THE

ALL INDIA REPORTER

1938

MADRAS SECTION

WITH PARALLEL REFERENCES TO

(1) I. L. R. (1938) MADRAS (2) (1938) 1 & 2 MADRAS LAW JOURNAL

(3) 47 & 48 MADRAS LAW WEEKLY (4) 1938 MADRAS WEEKLY NOTES

(5) 1938 MADRAS CRIMINAL CASES (6) 39 CRIMINAL LAW JOURNAL

(7) 173 TO 178 INDIAN CASES

CITATION : A. I. R. 1938 MADRAS

PUBLISHED BY

D. V. CHITALEY, B. A., LL. B., VAKIL,

NAGPUR, C. P.

1938

(All rights reserved)

TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

[illegible] UNIVERSITY
[illegible]
Acc. No 177218
Dated 20.11.80

PRINTED BY D. G. RANADE

AT THE ALL INDIA REPORTER PRESS

NAGPUR,

MADRAS HIGH COURT

1938

Chief Justices :

The Hon'ble Sir Alfred Henry Lionel Leach, Kt., Bar-at-law.

" Mr. C. Madhavan Nair, Bar-at-law. (*Offg.*)

Puisne Judges :

The Hon'ble Sir M. Venkatasubba Rao, Kt., B.A., B.L.

" Mr. C. Madhavan Nair, Bar-at-law.

" Rao Bahadur S. Varadachariar, B.A., B.L.

" Mr. S. Burn, I.C.S.

" " Vere Mockett, Bar-at-law.

" " V. Pandrang Row, I.C.S.

" " A. J. King, I.C.S.

" " S. Wadsworth, I.C.S.

" Rao Bahadur P. Venkataramana Rao Naidu, B.A., B.L.

" Dewan Bahadur K. P. Lakshmana Rao, B.A., B.L.

" Mr. F. W. Gentle, Bar-at-law.

" " J. C. Stodart, I.C.S.

" Dr. Sir Abdur Rahman, Kt., Khan Bahadur.

" Mr. K. S. Krishnaswami Ayyangar, B.A., B.L.

" " L. C. Horwill, I.C.S. *(Offg.)*

Advocate-General :

Sir Alladi Krishnaswami Iyer, KT., B.A., B.L.

Government Pleaders :

Mr. K. S. Krishnaswamy Iyengar, B.A., B.L.

" B. Sitharama Rao, B.A., B.L.

EDITORIAL COMMITTEE

DR. SUDISH CHANDRA ROY, M.A., LL.B., PH.D., BAR-AT-LAW, Calcutta.
SIR M. V. JOSHI, Kt., K.C.I.E., Ex-Law Member, C. P. Government, Nagpur.
MR. E. VINAYAKA RAO, B.A., B.L., Advocate, Madras.
MR. V. V. CHITALEY, B.A., LL.B., Senior Advocate, Federal Court of India, Nagpur.

EDITORIAL STAFF

MR. R. K. MANOHAR, B.A., LL.B., Advocate, Bombay (O.S.) and Nagpur.
MR. S. G. GADGIL, B.A., LL.B., Advocate, Bombay and Nagpur.
MR. D. D. DATAR, B.Sc., LL.B., Advocate, Nagpur.
MR. R. D. DATAR, High Court Vakil (Bom.), Nagpur.

REPORTERS

Privy Council

DR. A. Majid, M.A., LL.D., BAR-AT-LAW, London.

Federal Court of India

Mr. Rang Behari Lall, B.A., LL.B., Senior Advocate, Federal Court of India, Delhi.

Allahabad

Mr. Saila Nath Mukerji, B.A., LL.B., Advocate, Allahabad.

Bombay

Mr. S. C. Joshi, M.A., LL.B., M. L. C., Advocate (O. S.), Bombay.
Mr. B. D. Mehta, B.A., LL.B., Advocate, Bombay.

Calcutta

Mr. Praphulla Chandra Ghose, B.A., B.L., Advocate, Calcutta.
Mr. Monindra Nath Mukerji, B. L., Advocate, Calcutta.
Mr. Surajit Chandra Lahiri, M.A., B.L., Advocate, Calcutta.
Mr. Baidyanath Banerji, M.A., B.L., Advocate, Calcutta.
Mr. A. K. Bhattacharjee, BAR-AT-LAW, Calcutta.

Lahore

Mr. Amolak Ram Kapur, B.A. (HONS.) LL.B., Advocate, Lahore.
Mr. Anant Ram Khosla, B.A. (HONS.) LL.B., Advocate, Lahore.
Mr. Kedar Nath Chopra, B.Sc., LL.B., Advocate, Lahore.

Madras

Mr. P. R. Srinivasa Iyengar, M.A., B.L., Advocate, Madras.
Mr. N. Srinivasa Iyengar, M.A., B.L., Advocate, Madras.
Mr. C. R. Krishna Rao, B.A., B.L., Advocate, Madras.

Nagpur

Mr. E. M. Joshi, M.A., BAR-AT-LAW, Junior Advocate, Federal Court, Nagpur.
Mr. R. K. Manohar, B.A., LL.B., Advocate, Bombay (O. S.) and Nagpur.

Oudh

Mr. Surendra Nath Roy, M.A., LL.B., Advocate, Lucknow.
Mr. G. C. Roy, B.A. (HONS.) LL.B., Vakil, Lucknow.

Patna

Mr. Subal Chandra Muzumdar, M.A., B.L., Advocate, Patna.
Mr. Laxmidhar Mahanty, B.A., B.L., M. L. C., Vakil, Circuit Court, Cuttack.
Mr. Jagat Bandhu Kar, B.A., B.L., Pleader, Circuit Court, Cuttack.

Peshawar

Pandit Raghunath, B.A., LL.B., Vakil, Peshawar.

Rangoon

Mr. Sydney Loo-Nee, BAR-AT-LAW, M. H. R., Rangoon.
Mr. K. C. Sanyal, M.A., B.L., Advocate, Rangoon.

Sind

Mr. Hakumatrai M. Eidnani, B.A., LL.B., Advocate, Karachi.
Mr. P. K. Vaswani, M.A., LL.B., BAR-AT-LAW, Karachi.

NOMINAL INDEX

Abdul Hafiz v. Abdul Sukkur 27
Abdul Rahiman Rowther v. M. J. Jamalluddin Sahib and Co. 799
Abdurahiman v. Beeran Koya 402
Abhirami Ammal v. N. Chellammal 287
Abubacker Labbai v. Chinnathambi (FB) 262
Adam Haji Peer Muhammad Issac v. Pattakkarantavita Kunkan 242
Adiraju Mallikarjana Rao v. Somavaram Co-operative Society 69
Adiraju Somanna, *In re* 634
Ahammu v. Kunhu Muhammad Haji 836
Ahamed Maraikayar v. Thangiah Nadar 590
Alagar Raja v. Narayana Raja 757
Alamelu Ammal v. Parthasarathi Naidu 326
Alam Khan Sahib v. Karuppannaswami Nadan 415
Allah Baksh, *In re* 567
*Ambalathilakath Kuttoossa v. Kunhamma Amma 380
Ambu Nair v. Utha Amma 202
Ananthachari v. Krishnaswami 102
Ananthachari G., *In re* 996
Anantha Pattar v. Padmanabha Panikkar 468
**Angamuthu v. Sinnapennammal 364
Annaji Chinnappa Reddi v. Dasari Venkobayya 489
Annamalai Chettiar v. Chellammai Achi 174
*Annamalai Chettiar v. Srinivasaraghava 293
*Annapurnamma v. Makku Venkamma 323
Annum Kesanna Chetty, *In re* 29
*Appayya v. Lanka Narasimhalu 338
Appu Goundan v. Emperor 784
Arikatla Nagireddi, *In re* 112
Arulayi v. Rakka Kudumban 501
Arumugam v. Emperor 858
Arumugha v. Rangaswami 511
Arumugham Chettiar v. Mariappan 255
Arunachalam Chetty v. Seshiah Chetty 994
*Atchayya Patrudu v. Jalaluddin Sahib 454
Athiramankutti v. Uppari 570
Audiappa v. Taluk Board of Devakottah 941
Ayinan Chettiar v. Ramaswami Ayyar 945
Ayya Pattar v. Krishnan 835
**Bademian Saheb v. Jankan Saheb (FB) 438
Badsha Sahib S. H. & Co. v. Lakshmi Kutti Kovilamma 171
Bakthavatsalu Naidu v. Salem Municipality 252
Balagurumurthy Chettiar v. Kalingan Ambalagaran 957
**Balammal v. Palandi Naidu 164
Balasubramania Chettiar v. Manickam 429
Balian, *In re* 795
Baluswami v. Official Receiver, Madura 752
*Bapayya v. Ramakrishnayya 568
Bapayya Naidu v. Peta Bapayya 975
Basawanjanayulu v. Ramalingayya 115
*Batliwala S. S., *In re* 758
*Bharma Lingappa v. Nilakantappayya 533
Bivi Ammal v. Union Bank Ltd., 771
Bojji Reddi, *In re* 686
Bonagiri Sreeramulu v. Venkatanarasimham 1004
Bontanathila Naranappayya, *In re* 550
*Boppana Prakasam v. Nagabhushanam 938
*Borai Goudar v. Commissioner, Ootacamund Municipality 832
*Bulteel M. v. R. C. Bulteel 721
Canteen Contractors Syndicate Ltd. v. Corporation of Madras 70
Chada Mangiah v. Secretary of State 619
Chakrapani Naidu v. Venkataraju 958
Champion Automobiles Ltd. Madras v. Travancore National Bank Ltd. 77
*Chavali Velayya v. Board of Commissioners, Hindu Religious Endowments, Madras 631
Cheedalla Polamma v. Official Receiver, Nellore 718
Chidambaram Chettiar v. Rangaswami 232
*Chidambaram Chettiar v. Shanmugham 129
Chinnaswami Iyengar v. Kannia Naidu 132
*Chockalingam Chettiar v. Muthiah 884
*Chockalingam Chettiar v. Muthukaruppan 849
Chockalingam Chettiar v. Palaniappa 947
Collector of Kistna v. Sivarama Prasad 33
*Commissioner of Income-tax, Madras v. Andhra Insurance Co. Ltd. (SB) 145
*——— v. Aryan Chettiar (SB) 59
*——— v. Manickam Chettiar, Karaikudi (SB) 52
*——— v. S. L. Mathias (SB) 352
——— v. Tanjore Permanent Fund Ltd. (SB) 57
Dasi Viraya, *In re* 490
*Davood Rowther v. Ramanathan Chettiar 43
Dawood Rowther Sheik v. Abdul Kadar 976
Dawood Sahib v. Sheik Mohideen Sahib 5
Devaraja Mudaliar, *In re* 998
*Devendra Ayyar v. Muthu Chettiar 329
Dhanapala Chetty v. Goverchand Sowcar 959
**Dhanukodi Nayakkar, *In re* (FB) 435
*Dimala Narasu v. Ingili Baitharu 13
District Board, Kistna v. Lakshmayya 227
District Magistrate, Kurnool v. Chandra Tirumal Reddy 909
Donald Dixon, *In re* 900
*Doraiswami Iyengar v. Radhakrishna 669
Doss D. v. C. P. Connell 124
Durairangam Pillai v. Govindarajulu 560
Durga Madhava v. Radhamohana Rajendra 522
Ebrahim Sait H. M. v. South India Industrials Ltd. 962
Ellappa Chettiar v. Sesha Aiyer 897
Emperor v. Kuzikkal Krishnan 743
———v. Panchaksharam 723
———v. Picha Kone 726
*G. a Pleader, Mannargudi, *In re* (FB) 264
Ganti Veera Reddi, *In re* 615
**Girdharilal Son & Co. v. E. Kappini Gowder 688
Gomati Doss Bhavaji v. Hindu Religious Endowments Board, Madras 614
*Gopalakrishnan, *In re* 392
*Gopalaratna Iyengar v. Rajaratna Mudaliar 246
Govinda Krishna v. Secretary of State 734
Govindan Karnavan v. J. S. De'Silva 581
*Govindraj, *In re* 396
Gurunaidu v. Venkatraju 85
Gutta Venkayya v. Venkata Rattama 253
Hanumayamma v. Lakshmidevamma 950
Harichandra Reddy, *In re* 742
Hilton Brown, *In re* 462
Hindustan Commercial Bank (India) Ltd., Madras, *In the matter of* 651
Ibrahim Sahib & Brother v. Gurulinga 185
Irulandi Servai v. Veerappa Chettiar 738

*Janaki Ammal v. Perumalswami Nadar 953
*Kaliaperumal Pillai v. Visalakshmi Achi 32
*Kalliappa Goundan v. Kandaswami 498
Kalli Koravan, *In re* 464
Kallugudi Rachappa, *In re* 645
*Kamakshi Ammal v. Krishnammal 340
Kamalammal, *In re* 667
Kammaran Nambiar v. Valia Ramunni 257
Kammaran Nambiyar v. Koman 562
Kandan Padayachi, *In re* 878
Kandaswami Goundan v. Rangaswami 370
Kandaswami Mudaliar v. Thevammal 601
*Kannayalal v. Subbaraya Chetty 413
Kannayya v. Lakshmidevi 708
Kannegati Chowdarayya, *In re* 656
Kappini Gowder, *In re* 67
*Karuppasami Goundan v. Kondama Naicker 940
Karuthan Chettiar v. Chidambaram Chettiar 725
Kasim Ali v. Ratna Manikka Mudaliar 677
*Kayambu Pillai v. Lakshmi Ammani Ammal 491
*Kesavan Nambudri v. Theva Amma 41
Kista Pillai v. Amirthammal 833
*Koganti Appayya, *In re* 893
Kondal Rao Naidu v. Dhanakoti Ammal 81
Konddappa Naidu v. Marri Mahalakshamma 339
*Kondava Nayakar v. Ramaswami Naickar 317
Koti Veerayya v. Board of Commissioners for Hindu Religious Endowments, Madras 810
Kotta Venkatraju v. Surya Rao Bahadur Garu (FB) 342
*Krishnan Chettiar v. Velayee Ammal (FB) 604
Krishnan Nambiar v. Municipal Prosecutor, Calicut 709
Krishnan Nayar v. Pallikkal Moideen 263
Krishnan V. P. v. Narayanan Nayar 555
*Krishnaswami Ayyar v. Sabarathnam Chetti 394
*Krishnaveni Ammal v. Subramanyam Chetty 547
*Krishna Yachendra Bahadur v. Rama 248
Krishniah v. Lodd Govinda Doss 47
Krishniah Chetty v. Narayanappa 497
Kulandaivelu Chettiar, *In re* 705
**Kulasekara Chetty v. Tholasingam (FB) 349
Kullappa Reddiar v. Veerappa Chettiar 285
*Kumarappa Chettiar v. Chidambaram 898
Kumarappa Chettiar, *In re* 213
Kumaraswamy Goundan v. Palanisamy 668
*Kumaraswamy Reddiar, *In re* 530
*Kuppammal v. M. & S. M. Ry. Co. Ltd. and Corporation of Madras 117
Kuppuswami Ayyar v. Subba Ayyar 827
L, a Pleader, Rajam, M. Narayanamurti, *In the matter of* (SB) 276
Ladooram Sowcar v. Durgaprasadarayudu 463
*Lakhshmayya Naidu v. Purushothama 457
Lakshmanan Chettiar v. Ramasamy Chettiar 641
Lakshmana Reddiar v. Subramania Swami 576
*Lakshmi Ambalam v. Andiammal 66
Laldas Lakshmi Das v. J. D. Italia 918
Lingamurthi v. Peda Mallayya 599
Madana Palo v. Hindu Religious Endowments Board, Madras 98
M. & S. M. Railway Co., Ltd. v. Garimella Satyanarayana & Sons 206
Madras Automobiles v. Modern Bank Ltd., Colmbatore 545
*Mahalakshmi Amma v. Krishna Holla 320
*Mahomed Hasan Khaleeli v. Varadarajulu 96
*Mahomed Mohideen Nachiar v. Mahomed Naina Maracair 205
Mahomed Rowther v. Aiyesha Bivi 107
Mahomed Rowther v. Swaminatha Mudaliar 573
*Mahomed Rowther v. Tinnevelly Municipal Council 746
Mahomed Yoonus v. Abdur Sattar Ismail 616
Makkam Amma v. Kunhi Kalappa Kurup 289
Malayalam Plantations Ltd. v. Nagasuri Veeraraghaviah 304
*Mallikarjuna Rao v. Official Receiver, Kistna 449
*Mallikarjuna Vara Prasada Rao v. Venkataratnam 739
Mana, *In re* 448
Manavedan v. Karnavan Manavedan 474
**Manickam Chettiar v. Income-tax Officer, Madura (FB) 360
Manubolu Rangareddi v. Dasaradharami Reddi (FB) 441
Mariyappa Nadar v. Ramanuja Naick 465
**Maruthamuthu Naicker v. Kadir Badsha Rowther (FB) 377
Mask & Co. v. Secretary of State 608
Mathias, L. v. Kilachari Agricultural Co-operative Bank 272
Mathukumalli v. Uppalapati Lakshmayya 598
Meenakshi Mills Co. Ltd. v. Assistant Registrar Joint Stock Companies, Madura 640
*Meenakshisundaram Iyer v. Swaminatha 456
*Meera Sahib & Bros. v. Abdul Azeez Sahib 1
*Mookan Servai v. Muthayya Servai 146
Morsan, *In re* 393
Municipal Council, Dharapuram v. Muhommad Ismail 90
Municipal Council Rajahmundry v. Tripurari Mallayya 923
Murugappa Mudali v. Kuppuswami Mudali 819
Murugesa Mudali v. Angamuthu Mudali 190
Mustafa Sahib, *In re* 910
Muthammal, *In re* 503
Muthurama Aiyar v. Krishna Aiyar 829
Muthu Rama Reddi v. Motilal Daga 113
Nachiappa Chetty v. Nachiappa Chettiar 192
Nagappa Chettiar v. O.R.M.O.M.S.P. Firm 999
*Nagar Damodar Shanbhogue v. Gange 698
Nagayya Naidu v. Duraiswami Naidu 111
*Nageswara Rao v. Narayanamurthi 75
*Nama Nagayya v. Kalle Narasayya 853
*Nambi Chetty, *In re* 143
*Naraparedi Seshareddi, *In re* 595
Narasayya Garu v. Kristnam Raju Garu 925
*Narayana Iyer v. Moorthi Kendan 643
*Narayanan Chetti v. Periappan (FB) 887
Narayanan Nambudripad v. Board of Commissioners, Hindu Religious Endowments, Madras 209
*Narayana Rao v. Purushothama Rao 390
Narayana Singh v. Batcha Saheb 741
Narayanaswami Mudaliar v. Ratnasabapathy Mudali 136
Narayanaswami Pillai v. Secretary of State 400
*Narayanaswamy v. Gopalaswamy 6
Natesa Nattar v. Manicka Nattar 398
*National Live Stock Registration Bank Ltd. v. Velu Mudaliar 154
*Nedungadi Bank Ltd., Ottapalam v. Collector of Malabar 710
*Nemichand Parakh, *In re* 551
Nondi, *In re* 653
Noor Mohammad v. Mohammad Kareem 502
Nuserwanji Cursedji Bhesania and Co. v. Mahamayi Ammal 585
*Official Assignee, Madras v. P. Suryakanthammal 927
*———v. Suryakanthammal 175
———v. Vedanarayana Naicker 221
*Oonamalai Ammal v. Narasimha Rao 161

*Paboodan Goolabchand v. M. J. V. Miller 966
Padmanabha Ayyar v. Coimbatore Municipality 282
Padmanabha Iyer v. Visalakshmi Achi 283
Padmanabhuni Narasimhadas v. Dist. Board of Kistna 239
*Palaniappa Chettiar v. Chidambaram 53
*Palani Gramani v. Manickammal 486
Panchayat Board, Samalkot v. Narava Ramasami 23
Pandarathil Abdulla v. Komalath Thanga 855
*Pandian A. S., *In re* 821
*Pangudaya Pillai v. Uthandiya Pillai 774
Pappu Reddi v. Appaji Nayakkar 224
*Pappu Reddiar v. Pichu Ayyar 493
*Parasurama Iyer v. Subburamachari 151
Parthasarathi Ayyangar v. Ekambara 579
*Pattabhiramayya v. Krishna Rao 683
Peer Masthan Rowther, *In re* 659
Periaswami Goundan, *In re* 524
Perne Malla Rai, *In re* 591
Perumal Ayyar v. Ramasubramanian 265
**Perumal Chettiar v. Kamakshi Ammal (FB) 785
*Petheperumal Chettyar v. Ramaswami 919
Pichai Pillai Udayan v. Subbaraya Pillai 531
*Pollachi Transport Ltd. Coimbatore v. Arumuga Kounder 485
Ponnambala Mudali, *In re* 905
Ponnari Rao v. Lakshmi Narasamma 322
Ponnuswami Servai, *In re* 315
Ponnuswamy Iyer, *In re* 535
*Pothukutchi Appa Rao v. Secretary of State 193
Public Prosecutor, *In re* 613
———————v. Abdul Rajak 536
———————v. Chikka Rangan 949
———————v. Krishnamurthi Ayyar 712
*———————v. Marimuthu Gounden 460
———————v. Raju Naicken 806
*———————v. R. Rajagopalan 233
———————v. Sabapathy Chetty 847
———————v. Soosai Pillai 715
———————v. Srinivasa Rao 541
Putti Ramachar v. Venkata Row 661
*Raghudu v. Erraiya 881
Ragunatha Doraisingam v. Karuthan Ambalam 525
Raghunatha Doraisingam v. Muthaya 280
*Ragunathan v. Ravuthakanni 765
Rahiman Bibi v. Mahboob Bi Bi 141
*Rahiman Khan Sahib, *In re* 403
Raja of Vizianagaram v. Annapuranamma 219
Rajulu G. M. v. Govindan Nair 745
Ramachandra Madhavadoss Co. v. Moidunkutti Birankutti & Bros. 707
*Ramachandran v. Balasubramania Aiyar (FB) 347
Ramachandra Naidu v. Vengama Naidu (SB) 357
Ramakkal, *In re* 172
Ramakrishna Ayyar v. Parameswara Iyer 424
Ramakrishna Reddy v. Official Receiver, Bellary 461
Ramalingam Sabhudhi v. Zamindar of Parlakimedi 381
Ramalinga Reddy v. Ramalingam Setty 929
Ramamuni Reddi, *In re* 724
Ramamurthy v. Bhimasankara Rao 433
Ramanatha Gurukkal v. Arunachalam 972
Ramanathan Chettiar v. Alagappa Chettiar 711
*Ramanathan Chettiar v. Dowlat Singjee 865
Ramanathan Chettiar v. R. Duraiswami 256
*Ramanuja Mudaliar v. Sundaravaradachariar 176
Rama Rao v. Pottiswami 299
Ramasubbayya, *In re* 529
Ramaswami, *In re* 336
Ramaswami Iyenger v. Panduranga 173
Ramaswami Iyer v. Subramanian Chettiar 267
Ramaswami Mestriar v. Velayuthan Pillai 496
Ramaswamy Chettiar v. Manickam Chettiar 236
Ramaswamy Goundan, *In re* 675
Ramayya v. Lakshmayya 513
Ramayya v. Lakshmayya (FB) 796
Rami Reddy v. Narasi Reddy 924
*Ramseshayya v. Venkatarathnam 823
Ranga Razu v. Sreenivasa Jagannatha Rao 654
Ranga Reddy v. Official Receiver, Anantapur 177
Rangaswami Chetty v. Narayana Iyengar 215
Rangaswami Iyengar v. Marudanayagam Pillai 720
Rangaswami Reddiar v. Venkataperumal Reddiar 241
Rangiah Chetty v. Syed Hassumiah 305
Rarichan v. Anantanarayana Aiyar 313
Rathinam Pillai, *In re* 35
Rathnaswami v. R. C. Nagaraja 100
Rathnavelu Chettiar v. Subramaniam Chetty 767
*Ratnaswami Nadar v. Prince of Arcot's Endowments, Trichinopoly 755
Renga Aiyangar v. Ramanuja Jeer Swamigal 270
Ryots of Garabandha v. Zamindar of Parlakimidi 722
*Sabhanadri Sastrulu v. Dorbala Nagaya Sastry (FB) 420
Sakkarai Chettiar v. Chellappa Chettiar 374
*Samarapuri Chetty v. Thangavelu Chetty 87
Samayya Naicker v. Madras Hindu Religious Endowments Board 321
Sambasiva Ayyar v. Natesa Ayyar 389
*Sambayya v. Pedda Subbayya 19
Sangayya v. Venkatalakshmi Narayana 384
Sankaralingam Pillai v. Arumugam Pillai 814
Sankara Mining Syndicate Ltd., Nellore v. Secretary of State 749
*Sankaramurthi v. Subbamma 914
Sankaranarayana Reddiar v. Taluk Board of Aruppukottai 211
Santhappa Rai v. Santhiraja 426
Sanyasi Naidu v. Rajah of Vizianagaram 1006
Saravana Mudaliar v. Singaravelu Mudaliar 730
*Satyanandam v. Paramkusam Nammayya 307
Satyanarayana v. Krishnamraju 459
*Satyanarayanamurthy v. Sundara Rao 603
*Satyanarayanamurthy Pantulu Garu, *In re* (SB) 965
Secretary of State v. Mary Ponnammal 838
———————v. Muniappan Chetty 509
———————v. Rangaswami Naidu 583
*———————v. Subramanian Chettiar 278
———————v. Surya Rao Bahadur Garu 470
*———————v. Vinjamuri Kistnamacharyulu 218
*———————v. Zamindar of Saptur 180
Seetharamayya Garu v. Panthan Sathiah 716
Seshagiri Rao v. Venkataramayya Appa Rao Bahadur Zamindar Garu 295
Sevugan Chettiar v. Raghunatha Doraisingam 612
*Shahabuddin Sahib v. Tota Venkatachalam Chettiar 911
Shanmuga Pandaram v. Ponnuswami Iyer 714

Shanmugham Asari, *In re* 482
Shanmughan Chettiar v. Official Receiver, West Tanjore 532
Shanmukham Chetty v. Govinda Chetty 92
Sheth M. J. & Co v. Ramiza Bi 646
Singam Iyengar v. Kasturiranga Iyengar 260
Sinnammal v. Sattiya Goundan 578
Sitamma v. Sitapatirao 8
*Sitharamayya v. Ivaturi Ramayya 316
Sitharamiah v. Ramaswamy 73
Sivanagalingam Pillai v. Ambalavana Pillai 479
Sivanmalai Goundan v. Arunachala Goundan 822
Sivarama Aiyar v. Ahilambal Ammal 153
*Sivasankara Mudaliar v. Amaravathi Ammal 157
Society for Propagation of Gospel in Foreign Parts v. R. Sama Rao Naidu 977
Sodemma v. Krishnamurthy 824
Somasundaram Chettiar v. Venkata Subbayya 602
Sooramma v. Venkayya 589
Srinivasa Ayyangar v. Jagannatha Ayyangar 903
Srinivasam Pillai v. Alagappa Chettiar 372
Srinivasa Naicker, *In re* 508
Srinivasulu Naidu v. Damodaraswami Naidu 779
Subba Rao v. Venkatachalapathi Aiyer 904
Subbarayaloo v. Ranganatha Mudaliar 571
Subba Reddi v. Chengalraya Reddi 314
*Subbiah Thevar v. Samiappa Mudaliar (FB) 353
*Subramania Chettiar v. Srinivasaraghava Ayyangar 687
*Subramania Iyer v. Kannappa Chetti 38
Subramaniam Chettiar v. Natesa Gurukkal 713
Subramanyam Chettiar v. Ethirajulu Chettiar 325
Subramanyan Tirumurupu v. Naraina Tirumurupu 553
*Sukkira Goundan v. Palani Goundan 666
Sultan Nachi v. Salamar Bibi 25
Sundaram Ayyangar v. Official Receiver Trichinopoly 594
*Sundaram Chettiar v. Chokalingam Chettiar 672
Sundararajulu Naidu v. Papiah Naidu 623
Sundaresa Iyer v. Sarvajana Sowkiabhi Virdhi Nidhi Ltd., Coimbatore 931
*Suppan Chettiar, v. Rangan Chetty 405
Suryaprakasa Rao v. Venkataratnam 523
Surya Rao Bahadur Garu v. Secretary of State 445
*Swaminatha Aiyar v. Kuppuswami Ayyar 955
Swaminathan Chettiar v. Somasundaram Chettiar 731
*Taluk Board, Chidambaram, v. Varadesesha Iyengar 226
Thathachariar v. Srinivasa Raghava Iyengar 334
Thavasikannu Thevar v. Sankaralingam Pillai 217
Thevar Servai, *In re* 477
Thiagaraja Iyer v. Narayanaswami Pillai 684
Thimmanna Bhatta v. Rama Bhatta 300
Thirumalappa v. Ramappa 133
Tirumalai Mudaliar, *In re* 128
*Trichinopoly Tennore Hindu Permanent Fund Ltd., v. Commissioner of Income-tax, Madras (SB) 148
*Unna Muhammad Sahib, *In re* 74
Vaiyapuri Chettiar v. Municipal Commissioner, Salem 916
Valia Munnadiar, *In re* 495
Valli Ammal v. Arunachala Moopanar 385
Varisaimuthu Chettiar v. Samimuthu Chettiar 55
*Vedakannu Nadar v. Gnanayya Nadar 864
*Vedakannu Nadar v. Nanguneri Taluk Singikulam Annadana Chatram 982
Veeran Chetti v. Veeran Chetti 727
Veeranna v. Mocharamma 505
*Veeraswami Padayachi, *In re* 399
Veerayya v. Narasimharao 142
*Veerayya v. Subbamma 178
*Vellappa Goundan v. Ramaswami Goundan 537
Vellayan Chettiar v. Mahalinga Pathan 30
*Venkadari Somappa v. Official Receiver, Bellary 801
Venkamma v. Kotla Sanyasayya 422
*Venkanna v. Atchutaramanna 542
Venkatachalam Chettiar v. Nagappa Chettiar 189
Venkatachala Mudaliar v. Coimbatore Municipality 880
*Venkatachalapathi Iyer, Lakshmana Iyer Sons v. City Cinema Co. Ltd. 225
Venkatadri Appa Rao v. Seetharamayya 816
*Venkatakrishnayya v. China Kanakayya (FB) 539
Venkatakrishniah v. Sheik Alli Sahib 921
Venkata Manikyarao v. Bhadrachalam 507
Venkataramanaswami Temple, Kanampalli v. Ramaswami 71
Venkata Ramanier, *In re* 815
**Venkataramasami v. Imperial Bank of India Rajahmundry (FB) 889
Venkatarama Sastri v. Venkatanarasimham 144
Venkataramayya v. Venkataramayya 78
**Venkataramiah, *In re* 130
*Venkata Rangacharyulu v. Jammi Turanga Rao 857
Venkataratnam v. Secretary of State 318
Venkataratnam v. Secretary of State 565
Venkataratnam Garu v. Maharajah of Pittapur 68
Venkata Sastri and Sons v. Shroff Balakrishna Rao 199
Venkata Sivayya v. Suryanarayana 906
Venkatasubbamma v. Narayana Reddi 922
Venkatasubba Pillai, *In re* 879
Venkata Subbayya v. Secretary of State 483
*Venkatasubramania Ayyar v. Sivagurunatha Chettiar 60
*Venkatasubramania Sarma v. United Planters' Association of South India 234
Venkatesulu Naidu v. Chittappa 820
Venkateswara Sastrigal v. Krishna Iyer 212
Venkatraya Krishna Rangarao v. Lanka Appayya 504
Venkayya v. Sambayya 808
Venkayya v. Venkata Rao 979
Venkitaraya Ayyar v. Sankaran Embrandiri 649
Venugopalaswamy v. Hindu Religious Endowments Board, Madras 214
Villupuram Urban Co-operative Bank v. Balasubramania Mudali 809
Vythianatha Iyer v. Varadaraja Iyer 841
Zamindar of Biridi Estate v. Kunjo Kumari Devi 769

SUBJECT INDEX

Acknowledgment—Mortgage deed reciting debt due—Admission before Registrar of its execution—Acknowledgment of liability is sufficient to save limitation 429*b*

Adverse Possession—Guardian — Hindu dying leaving widow—Her mother-in-law taking possession—Widow if minor at the time of her husband's death, mother-in-law's possession must be presumed to be on behalf of her daughter-in-law 513*a*

*——Essential ingredients explained — Test is, acts of person in possession should be irreconcilable with rights of true owner —Conducting school in temporary sheds and giving lectures on vacant land would not create adverse possession 454*a*

——Character of, explained—Mode of proof for showing that title is not lost will be different in different cases 454*b*

——Co-sharers—Co-sharer not asserting exclusive title in himself but claiming title only to his own share—No ouster of other co-sharer 133*b*

——Trustee of choultry alienating choultry property as his own and not as manager —Alienation is void ab initio — Alienee's possession becomes adverse from date of alienation 60*c*

*——Dates from which adverse possession of alienee starts in cases of void and voidable transfers stated 60*a*

Agency—Termination—Power of attorney executed by several principals—One of them having distinct interest in subject-matter dying—Power of attorney terminates 542*b*

Agency Rules, *Rule 55* — Order refusing amendment of plaint can be revised: 708*a*

Alluvion and Diluvion—Right to emerged land — Plaintiff claiming declaration of title to lanka situated in river, establishing identification of part of lanka with site of land which formerly belonged to him—Such identification is sufficient to support title by re-formation—Claim based on re-formation prevails upon claim based on lateral accretion—Title founded on original ownership and identification of site is to be confined to re-formation of that site only 470*a*

——Right to emerged land—In case of river frequently throwing up and washing away lankas, period of 70 years' submersion is not sufficient to amount to abandonment of right to land claimed on ground of re-formation—Presumption is the other way 470*b*

——Accretion — Land claimed as alluvial accretion—It is not necessary that its re-formation must be proved to have been gradual 470*c*

Appeal—New plea — Point not raised in pleadings by parties but raised by Court itself—Parties to appeal should be given opportunity of meeting it **(SB)** 357*a*

Arbitration—Parties agreeing that dispute between them would be referred to arbitration — Subsequently one party accusing other of fraud—Party charged with fraud can ask Court to decide matters affecting his honesty in open Court—Court has discretion to stay arbitration proceedings 918

Attachment—Attaching creditor is not secured creditor **(FB)** 360*b*

Attestation—Person signing as witness cannot be looked upon as signing in any other capacity 90*b*

Banker and Customer—Trust funds—Application of trust funds with banker towards customer's debts, in breach of trust and for benefit of banker — Knowledge or suspicion on banker's part—Banker would render himself liable 999*b*

——Secretary of bank having authority to receive deposits receiving them at depositor's house — Deposits ratified by bank—Certain deposit misappropriated by secretary—Bank is liable to depositor 272

——Bank rule providing closure of depositor's account without reference—Rule held legal and valid 77

Benami—Benamidar—A benamidar is entitled to enforce his rights, whatever rights he possesses under his deed 757*b*

——Wife having separate income of her own though its amount uncertain — Purchase of properties in her name—Mere impossibility to connect any of sale deeds with particular item of her asset is no inference that purchase is by husband with family fund—Even if money has been contributed by husband, it is no conclusive proof of benami character of purchase: 8*a*

——Onus—Onus lies upon person who pleads that certain transaction executed and registered in name of a person is benami 8*b*

Cattle Trespass Act *(1 of 1871), Sec. 22* —Even forest officer responsible for illegal detention can be ordered to pay compensation—In compensation, fees paid by complainant to pleader for prosecution of case cannot be included 820

*Charge—Charge is saleable property 457*b*

Civil Procedure Code *(5 of 1908), S. 9, Explanation* — Right to first honours on occasion of festival is not right of civil nature unless it is attached to office—Suit for declaration of such right is incompetent 334

——*S. 10*—Court in which previous suit is pending must be competent to grant relief claimed in subsequent suit 602

——*Ss. 11 and 80*—Insolvency of *J*—Official Assignee executing deed of release in *V's* favour in respect of *J's* half-share in property in consideration of Rs. 738—Prior to deed of release, *J's* half-share sold in execution of *D's* mortgage decree—Suit by *V* against Official Assignee for recovery of Rs. 738 on ground that release deed was void — Suit dismissed— Subsequent suit by *V* against Official Assignee for recovery of Rs. 738 on ground of damages—Suit held not barred by res judicata—Notice under S. 80 held not necessary 221

——*S. 20*—Suit by landlord for realization of rent—Lease silent as to place where rent is to be paid — Question as to where it is payable is to be decided with reference to S. 49, Contract Act — Lease executed and registered at *S* in district *T* —Agreement to give lease entered into at *M* where lessor lived — Suit by lessor for recovery of rent instituted at *M*—Circumstances of case showing that it was intention of parties that payment was to be made at *M*—Court at *M* held to have jurisdiction to try the suit 977

——*S. 20 (b)*—Scope—There is no reason to read Clause (b) of S. 20 as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India—It makes no difference whether defendants are residents of British India though outside the local limits of the Court's jurisdiction or they are persons residing outside British India 731*d*

——*S. 24*—Transfer of suits — Same parties filing suits against each other in different Courts on same cause of action—Suits should be tried by the same Court 745*a*

Civil P. C.

——*S. 24*—Delay in applying for transfer —Delay of 12 days in applying for transfer is not sufficient to warrant refusing a remedy which should ultimately be convenient to both parties 745*d*

——*S. 34 (2)* — Person obtaining decree for maintenance from date of plaint and future maintenance to date from certain date — Person filing frequent execution petitions and recovering maintenance after considerable delay — Suit to recover interest on maintenance amounts is barred by Sec. 34 (2) 522

——*S. 39 (1) (a), (b) and (c)* — Even in cases falling under Clause (a), (b) and (c), powers of transferee Court are not limited 27*b*

——*S. 42*—S. 42 does not empower transferee Court to order simultaneous execution or send the decree to another Court for execution 113*b*

——*S. 47*—Party to suit—Even a person who is sued as a representative is a party to the suit within the meaning of Sec. 47 when he is claiming that certain properties belonging to him in his personal right are not to be attached in execution of a decree obtained against him as legal representative 731*b*

——*S. 47*—Decree in partition suit not engrossed on proper non-judicial stamp—Decree-holder applying to executing Court for having decree engrossed on proper stamp—Order of executing Court is not one under S. 47 307*f*

*——*S. 55 (4)*—Certain persons executing surety bond undertaking to produce judgment-debtor on particular day—Mere fact that judgment-debtor is ill, does not absolve sureties from their liability, when his illness is not such as to render his appearance in Court physically impossible—Obligation under bond can be successfully avoided only by reasons akin to vis major 530

——*S. 60*—Grant by East India Company of village to make permanent provision for grantee and his heirs as compensation for loss sustained owing to resumption of emoluments attached to police services—Grantee entitled to rents and profits but prohibited from alienating village—Village held could not be attached and sold in execution —Only interest attachable and saleable held was right to enjoy rents and profits—*(Per Abdur Rahman and Venkataramana Rao JJ.)* 623*b*

Civil P. C.

*——*S. 65* — Execution sale — Lessee of judgment-debtor paying rent to judgment-debtor before confirmation of sale—Suit by auction-purchaser against judgment-debtor and lessee to recover such rent—Lessee held was protected 317

——*S. 80*—Suit concerning title between plaint charity and temple represented by ward—Ward represented by Collector—Case held did not fall under S. 80 612*b*

——*S. 80*—S. 80 is mandatory—Notice of claim not given—Trial Court through negligence omitting to frame issue on point of want of notice — Government Pleader also through negligence omitting to make application regarding it but all along resisting suit—Point regarding notice cannot be deemed to have been waived by Secretary of State 583*c*

——*S. 91*—Channel constructed through village site — Public nuisance — Special damages not proved — Suit must be with permission of Advocate-General 338*a*

*——*S. 91*—Permission of Advocate-General not taken—Objections not raised at early stage—Suit held maintainable: 338*b*

——*S. 92*—Scheme suit — Scheme decree is not executable 256

——*S. 92*—Suit by trustee against banker for trust money—S. 92 does not apply 999*d*

——*S. 92* — Applicability — Suit for accounts by trustee against co-trustee—S. 92 does not apply—Nature of relief prayed for is not conclusive and exclusive test in determining applicability of S. 92 92

——*S. 100*—Appellate Court, while reversing considered judgment of trial Judge, failing to refer to material piece of evidence militating against its own view — Finding of such Court cannot be accepted as final finding of fact 568*b*

——*S. 100*—Question of law on construction of document can be raised in appeal 405*c*

——*S. 109 (b)* — Permission to appeal—High Court refusing to issue writ of certiorari to the Board of Revenue against enhancement of rent under Ch. 11, Madras Estates Lands Act — High Court's order comes under Sec. 109 (b) and permission could be granted 722

——*S. 110*—Substantial question of law—Question whether property was gift to God or archaka service inam—Question turning upon construction of inam papers—Question is not substantial question of law 631*a*

Civil P. C.

——*S. 110*—View based on language of section and taken in several cases — No substantial question of law is involved 631*b*

*——*S. 110* — Decree of affirmance — 'Decree' and 'decision'—Distinction between — Several decisions in respect of several subject-matters — Decree embodying those decisions should not be regarded as one and entire 631*c*

——*S. 110*—Suit by reversioner to set aside alienations by last holders — Parties claiming under different alienations joined as defendants—Decree cannot be treated as single and inseparable for purposes of S. 110 when Appellate Court confirms that decree in respect of some parties and reverses it against others 598

——*S. 110*—Interpretation of Priviso 2 to S. 4 (2), Income-tax Act, is substantial question of law **(SB)** 352*a*

——*S. 110* — Application for leave to appeal to Privy Council from decision of High Court on effect of Proviso 2 to S. 4 (2), Income-tax Act—Assessee as planter carrying on large business in Mysore State—Actual amount of tax involved in appeal Rs. 3500 — Still leave held should be granted **(SB)** 352*c*

*——*S. 110, Cl. 2*—Suit for partition of property worth more than Rs. 10,000—Decree of High Court declaring plaintiff's share to be of value less than Rs. 10,000—Leave by defendant to appeal to Privy Council challenging decree — Case does not come under Clause 2 666

——*S. 115* — Order by District Judge declaring person tout under S. 36, Legal Practitioners Act can be revised by High Court under S. 115—S. 224 (2), Government of India Act, 1935, does not bar revision—S. 439, Criminal P. C., does not apply to such case 634*a*

——*Ss. 145 and 47*—Decree-holder seeking to make surety liable—Surety is entitled to raise objections to executability — Inquiry by Court into question raised between decree-holder and surety is one under S. 47 and is appealable—Provisions analogous to S. 145 apply in cases where S. 145 does not literally apply 215

——*S. 157* — Madras Civil Rules of Pratice (framed under 1882 Code) — Rules not re-enacted and published under Part 10 and inconsistent with rules of First Schedule are invalid : *37 Mad 17=A I R 1914 Mad 652=20 I C 775 (F B), OVERRULED* **(FB) 438

Civil P. C.

*——*O. 1, R. 3*—Suit by trustee on behalf of trust property — Co-trustees not joined either as plaintiffs or defendants for 17 years in spite of objection regarding the same — Exercise of discretion of joining them as defendants after 17 years held not proper 982*f*

*——*O. 1, R. 8*—Representative suit lies in respect of declaration and injunction but not in respect of actions of debt, money claims, or liabilities in contract or tort—Suit under O. 1, Rule 8 against defendants representing large number of villagers holding karaiyedu tenure—Decree for consolidated sum representing mesne profits cannot be passed—Decree for possession, declaration and injunction can be passed 755

*——*O. 2, R. 2, O. 23, R. 1*—Suit on equitable mortgage instituted in Bombay High Court—Mortgagee seeking to enforce his claim against property situate in Madras Presidency as well as other lands included in mortgage — Bombay High Court giving permission to institute fresh suit in respect of property situated in Madras Presidency in Court of local jurisdiction—Direction of Court included in final decree — Fresh suit on mortgage in respect of lands in Madras is not barred merely because no specific application was made by plaintiff in previous suit to withdraw claim and no specific order was passed 865*e*

——*O. 2, R. 2*—D* selling land to *P* without disclosing prior encumbrances on it—Land sold in execution of mortgage decree —*P* purchasing it through benamidar *K*—*P* suing *D* for damages falsely alleging that *K* had purchased land and dispossessed him—Suit dismissed on ground that cause of action alleged was false—*P* bringing another suit for damages for being compelled to pay money to mortgagee to prevent dispossession — Suit held not barred under O. 2, R. 2 255*a*

——*O. 2, R. 2 (3)*—Leave under—Application for leave when can be made explained—What the Court has to consider stated 979

——*O. 6, R. 17*—Suit against two defendants alleging them to be partners in business—Amendment of plaint on basis that defendant 1 is carrying on business as guardian of defendant 2—Amendment can be allowed if it is in accordance with facts set out in plaint 265*b*

Civil P. C.

——*O. 7, R. 11 and Ss. 148 and 149*—Time to make up deficiency must be given even if plaint insufficiently stamped is presented on last day of period of limitation or payment of insufficient fee was due to design—Once time is fixed, plaintiff cannot, as of right, claim extension which depends upon discretion of Court under Ss. 148 and 149—Court acting under these sections must be presumed to have really exercised discretion 542*a*

——*O. 7, R. 11 (c) and S. 149*—Plaint insufficiently stamped filed on last day of period of limitation — Court allowing certian time for payment of deficit court-fee — Proper court-fee paid within time allowed but beyond period of limitation for suit—Suit is not time-barred 560

——*O. 7, R. 11 (c)*—Provision in O. 7, R. 11 (c) does not apply to appeals 316*a*

——*O. 14, R. 1*—Duty of framing issues though lies on Court, parties should draw Court's attention to omission in framing issues — Person alleging that he is not necessary party but not pressing issue to that effect when issues were being framed —That issue must be held to have been waived by him 329*a*

——*O. 17, R. 1* — Costs occasioned by adjournment should be ordered to be paid and not costs of suit generally 711

——*O. 21, R. 16*—*P* assignee of promissory note obtaining decree against defendants 1 to 6, executants thereof, and defendant 7, payee and assignor — Defendant 7 dying and *P* and defendants 8 to 10 succeeding her as heirs—Held that O. 21, R. 16 did not in terms apply—That decree did not become inexecutable in entirety but only to extent of one-fourth 814

——*O. 21, R. 16 and S. 47* — Application for execution by transferee of decree—Opposition by judgment-debtor that transfer was sham—Court must decide validity of transfer before making order—Order of Court thereafter is decree under S. 47—Separate suit to declare transfer invalid is barred by S. 47 78

*——*O. 21, R. 19*— Decree in favour of one party for sale of property for recovery of arrears of rent — Same decree granting opposite party costs—O. 21, R. 19 applies—Person entitled to smaller amount cannot execute his decree 638*a*

——*O. 21, R. 41*—Power vested in Court by O. 21, R. 41 is discretionary and should be exercised with caution — Garnishee

Civil P. C.
totally denying the debt—Court should order his examinatin or direct him to produce his account books, only if it is satisfied that it would better enable decree-holder to proceed with execution and would prevent possible fraud or collusion 771
*——*O. 21, R. 63*—Suit under, to set aside claim order—Rights of parties as on date of attachment or on date of order are to be taken into consideration 857
——*O. 21, Rr. 66, 94*—Mortgaged property put to sale in execution of mortgage decree—House plots in mortgaged property known as jari manais not mentioned in sale proclamation either by description or by specific survey numbers but included in sale certificate—Plots held not put to sale and suit for eviction of persons in possession of plots did not lie 232
——*O. 21, R. 86*—Initial deposit only can be forfeited—Rule regarding payment of cost of stamp being new and party's attention not being drawn to new rule by clerk of Court, party failing to deposit cost of general stamp—Initial deposit held should not be forfeited. 905
——*O. 21, R. 90*—Fact that inadequate price was due to irregularity in sale need not be proved by direct evidence—Sale can be set aside if there are facts from which it can be reasonably inferred that low price was due to irregularity 174
——*O. 22, Rr. 3, 4*—Applicability to petitions under S. 115—High Court passing order in ignorance of death of petitioner more than ninety days back—Order held was a nullity 115
*——*O. 22, R. 9*—Ignorance of death of respondent in absence of negligence is sufficient cause to excuse delay in seeking to set aside abatement 218
——*O. 22, R. 10*—Term suit in O. 22, R. 10 includes appeal and second appeal following on decree 757*a*
——*O. 26, R. 5*—Bangalore is not within British India 646*a*
*——*O. 32, Rule 7 (1-A) (Madras amendment)*—Guardian of minor under Hindu law can transfer decree passed in favour of minor without sanction of Court : *41 M L J 75=A I R 1921 Mad 587=63 I C 285, OVERRULED* **(FB)** 539
*——*O. 33, Rr. 1, 8, S. 141*—Rules under O. 33 are applicable to application for grant of probate or letters of administration when such applications become suits in pursuance of Original Side Rules 486*a*

Civil P. C.
——*O. 33, Rr. 1 and 8*—Proper fees paid up to date of application to be admitted as pauper—No funds to continue suit—Plaintiff can be allowed to continue as pauper 486*d*
*——*O. 33, R. 5 (e)*—"Interest"—Meaning—Interest does not necessarily mean one amounting to such under combined effect of provisions of Transfer of Property Act and Registration Act 491*a*
——*O. 33, R. 9*—Provisions of O. 33 are the for benefit of bona fide litigants only—Pauper entering into agreement with another to repay money advanced and to be advanced—In default agreement to sell portion of property in suit—Such agreement held was covered by R. 9 and such person should be dispaupered 153
——*O. 33, R. 9 (c)*—Word "plaintiff" in both places means plaintiff or his representative 491*b*
*——*O. 34, R. 1*—Attaching creditor, so long as attachment subsists, is necessary party to suit on mortgage—But if he sells judgment-debtor's property in execution of his decree and purchases it himself he is no longer necessary party 293
*——*O. 34, Rr. 7, 10*—General account regarding amount payable to mortgagee is complete and final—Subsequent claim for mesne profits up to date of redemption decree is barred — But claim for mesne profits from date of such decree to date of recovering possession is maintainable: 405*d*
——*O. 38, R. 12*—'Agriculturist' — Interpretation—Person possessing large extents of land cultivated by tenants is not agriculturist 922
——*O. 39, R. 1 and S. 151*—Powers of Subordinate Courts to issue injunction and punish disobedience thereof are confined within O. 39—S. 151 cannot be invoked to add to powers conferred by O. 39—Mere act of taking possession in execution of decree after 'interim stay' order does not amount to breach of injunction punishable under O. 39 190
*——*O. 41, R. 1, S. 149*—Appeal presented on unstamped or insufficiently stamped paper — No order granting time passed under S. 149—Presentation of appeal is not valid presentation 316*b*
——*O. 41, R. 4*—Death of one appellant—Abatement of appeal — Court can yet vary decree 374*a*
*——*O. 41 R. 10*—Appeal raising issues not jeopardizing appellant's position—Appellant's suit of vexatious character—

Civil P. C.
Court will grant application for security for costs even if effect of that order is to stifle appeal—Appellant cannot rely on his poverty to resist application for security for costs : *168 I C 924=A I R 1937 Mad 285, REVERSED* 380
——*O. 41, R. 10*—Appellant minor and pauper but mere creature in hands of persons able to find security — Order for security for costs can be made 313
*——*O. 41. R. 22* — Cross-objections can be filed by respondent against person who, though party to suit, was not impleaded by appellant as party to appeal 329*b*
——*O. 41, R. 27* — Order admitting additional evidence in appeal passed before appeal is heard is without jurisdiction 957
——*O. 41, R. 27 (1) (b)*—Lacuna in case due to negligence of legal adviser conducting trial—Additional evidence cannot be admitted to fill it 583*b*
——*O. 41, R. 27 (1) (b)*—Word 'requires' —Meaning explained 372*a*
——*O. 41, R. 27 (2)* — Reason merely of "in the interests of justice" is not sufficient 372*b*
——*O. 41, R. 29* — Non-observance of R. 29 is material irregularity 372*c*
——*O. 41, R. 33* — Appellate Court can vary decree even to benefit of party who has not appealed 322*a*
——*O. 43, R. 1 and S. 115*—Order rejecting auction-purchaser's application for confirmation of sale 307*e*
——*O. 45, R. 7* — High Court has power under R. 9 of Privy Council Rules to extend time prescribed for security and deposit: *A I R 1924 Mad 44=74 I C 705=18 M L W 21 and 55 Mad 835=A I R 1932 Mad 484=138 I C 663, OVERRULED* (FB) 796
——*O. 47, R. 1* — Court executing decree not deciding point raised by judgment-debtor that decree is not executable for want of engrossment on non-judicial stamp — Omission amounts to "other sufficient cause or reason" — Order of executing Court is open to review 307*b*
*——*O. 47, R. 1* — Application for review made — Subsequent filing of appeal does not render it incompetent — Application granted during pendency of appeal — Appeal cannot be heard and must be dismissed 307*c*
——*O. 47, Rr. 4, 7, 8 and S. 152* — Mere correcting of error arising from accidental slip does not bring into existence fresh decree, particularly when Court correcting error purports to act under S. 152 — Three stages of review petition pointed out — Rejection of review petition in second stage does not bring into existence fresh decree superseding old decree 573
——*Sch. 2, Para. 18* — Provisions are mandatory — Petition for stay filed after three years from suit and at instance of Court — Provisions of Para. 18 are not complied with 205*a*
——*Sch. 2, Para. 18* — An agreement to arbitrate does not by itself operate as a stay of suit 205*b*
*——*Sch. 2, Para. 18*—Stay of suit—Stay should not be "sine die" — Court must exercise its control over arbitration proceedings — Court should see that delay is avoided 205*c*
Commissioner — Order refusing issue of commission is revisable 646*b*
Common Law — Applicability — Where Common law is uncertain, Indian High Court can apply law which is equitable 164*b*
Companies Act *(7 of 1913), S. 76*—S. 76 requires distinct meeting every year and not same meeting being held once in each year 640
——*Ss. 103 and 235* — Directors allowing company to start business in spite of their knowledge that permission to start business had been obtained owing to false declaration — Company suffering loss — Directors held guilty of wilful negligence and liable to make repayment 124*b*
——*S. 235* — Promoter — Person not taking any steps to bring company into being, but merely signing memorandum of association and subscribing for certain shares —Fact that money so subscribed had been utilized in paying part of expenses of formation does not make him promoter: 154*a*
*——*S. 235*—Share broker of company is not officer for purpose of S. 235 154*b*
Company — Directors — Powers of — Managing business of company includes institution of suits on its behalf 962*b*
——Directors—In law, a meeting of directors is not duly convened unless due notice has been given to all directors 962*c*
——Share-holder — Rights of — Set-off — A share-holder is not entitled to set off against a company what he might receive on a winding up against the moneys due by him 962*d*
——Person entering into contract with company — Contract beyond powers of

Court-fees Act
decreed—S. 11, Cl. (1) applies — Court-fee on future mesne profits must be paid before decree in respect thereof can be executed 727*b*
*——*S. 12* — Appeal in respect of part of subject-matter of suit—Deficit court-fee can be levied only in respect of that part 278*a*
——*S. 13* — Suit remanded in Letters Patent appeal—Appellant is entitled to certificate for refund only in respect of court-fees paid on memorandum of Letters Patent appeal and not in respect of court-fees paid in first or second appeals 479*b*
——*S. 17*—Cause of action based on deed of settlement—Two reliefs claimed in respect thereof, one on footing of validity and other on footing of invalidity of deed—Such reliefs are not distinct subjects 241
——*S. 19-I* — Mandatory language of S.19-I concerning fees for grant of letters of administration is subject to O. 33, R. 8, Civil P. C. 486*c*
*——*Sch. 1, Art. 1*—Rs. 100 paid as court-fees on memorandum of appeal—Appellate Court holding that correct fee payable was Rs. 412-7-0 and on failure by appellant to pay deficit court-fee, dismissing appeal—Appellant filing second appeal valuing it at Rs. 312-7-0 and paying court-fee on that valuation—High Court demanding Rupees 412-7-0 as court-fee and on non-payment dismissing second appeal — Case governed by Art. 1—Court-fee paid by appellant in second appeal proper 498*b*
——*Art. 17-A (i), (as amended by Madras Act 5 of 1922)*—Suit for partition with prayer that certain debts are not binding on joint family property—Such suit cannot be regarded as one in which no consequential relief is prayed for (*Obiter*) 474*b*

Criminal Misappropriation—Actual conversion or misappropriation is necessary—Mere intention or preparation is not sufficient 172*a*
——High standard of honesty of persons finding property should do, person coming to expected — What a explained (*Obiter*) 172*b*

Criminal Procedure Code (5 of 1898)
S. 107—Mere proof in past is not sufficient to justify order under S. 107 by persons 213
——*Ss. 110 and 117*—Evidence of police witness as regards general reputation of a person cannot be excluded as inadmissible as regards similarly

Criminal P. C.
evidence of general reputation may be given by a stranger 591*a*
——*S. 110*—Person proceeded against need not be ex-convict (*Obiter*) (Per *Burn J.*) 591*b*
——*S. 110* — S. 110 is not confined in its application to cases in which parties are strangers to locality in which offences are committed—Proof of previous convictions is not necessary if it can be proved otherwise that person concerned is habitual thief or house-breaker—Evidence of reputation, although admissible must be viewed with caution 482
——*S. 110*—Man owning land and house can be dangerous 448
——*S. 110*—Applicability—S. 110 cannot be used against merely undisciplined people as local bosses and faction leaders 35*b*
——*S. 110 (e)*—Attempt to commit rape involves breach of peace 615*a*
——*S. 110 (e) and (f)* — Finding that person proceeded against under S. 110 is habitual criminal cannot be based on criminal cases against such person in which he is discharged 591*c*
——*S. 117 (4)* — Conviction by public opinion should take the place of conviction by Court only in exceptional circumstances—Person never accused of any crime—No presumption that he is criminal 35*c*
——*S. 117 (5)*—Charge against two persons that they are desperate and dangerous—There can be no intimate connexion between two persons in regard to their character and so joint enquiry cannot be held 35*a*
——*S. 144* — Adi-Dravidas taking procession through locality of caste residents—Order under S. 144 when can be made stated 714
——*S. 145* — Words "actual possession" mean actual physical possession as distinguished from constructive possession—Possession through tenants is not actual possession within meaning of S. 145 : 654*a*
——*Ss. 145, 439* — Party to proceedings under S. 145 admitting that he is not in actual possession of land — Refusal by Magistrate to take further evidence adduced by party does not result in failure of justice so as to make order open to revision : 654*b*
*——*S. 147* — Dispute regarding right to worship as pujari in temple comes within provisions of S. 147 — Magistrate has jurisdiction to deal with such dispute 537*a*

——*S. 147*—Dispute relating to offerings does not come under S. 147 (*Obiter*) 537*b*

——*S. 162*—Statements oral or otherwise made to police officer during course of investigation of offence are inadmissible in evidence 893*a*

——*S. 188* — Several persons being tried under S. 401, Penal Code, for being members of gang—Proof of association outside British India to commit crimes is not barred under Sec. 188 read with S. 4 of Penal Code 858*c*

——*S. 190 (1) (c)*—Magistrate trying case as summons case subsequently finding it to be warrant case—He can proceed with trial but must apply warrant case procedure thenceforward. 815

——*S. 195* — Court declining to prosecute person for offence under Ss. 193 and 199, I. P. C. — Private complaint against such person cannot be allowed 173

——*S. 196.A*—Committal after full magisterial inquiry or conviction after full trial on charge of criminal conspiracy is proper even in absence of previous sanction if no prejudice is caused to accused (*Obiter*) 130*a*

——*Ss. 203, 436* — Complaint dismissed under S. 203—District Magistrate cannot order complaint to be restored to file 112

——*S. 215*—For committal of one accused prosecution not relying only on confession of other accused but also on other evidence —Commitment cannot be said to be liable to be quashed on question of law 675

*——*S. 253 (2) and S. 537* — Number of accused tried for one offence—Magistrate discharging some of them and postponing giving reasons for discharge till final order as regards rest of accused — Order is not illegal—At best it is only irregularity which can be cured by S. 537 396

——*S. 271* — Trial under S. 401, Penal Code — Number of charge sheets originally filed against accused—All accused charged with being members of gang — There is nothing objectionable if only one charge is framed in Sessions Court against all accused 858*b*

——*S. 307* — Case having some offences triable by aid of jury and others by aid of assessors — Before reference under S. 307 Sessions Judge must dispose of case with regard to latter offences 686

——*S. 342* — Persons making petition to Sub.Inspector making certain allegations, alleged to be false against a person, prosecuted under S. 500, Penal Code — No evidence adduced by prosecution showing that accused had signed petition—Gap in prosecution cannot be filled by examination of accused under S. 342 904*b*

——*S. 350* — Prior to framing of charge accused is not entitled to have de novo enquiry — Magistrate is not bound to examine witnesses afresh 742*b*

——*S. 350* — Resummoning witnesses is not tantamount to recommencing enquiry 742*c*

——*Ss. 350 and 530*—Demand for resummoning witnesses — Non-compliance does not vitiate trial 724

——*S. 397* — Direction that sentence of detention in Borstal School should commence after expiration of previous one is illegal 613

——*S. 403*—Persons acquitted or convicted cannot subsequently be retried at all for same offence 847*a*

——*S. 436* — Further enquiry means further consideration of evidence 742*a*

——*S. 438* — Criminal Rules of Practice and Orders of Madras High Court, Rule 263 —R. 263 cannot be read as saying that District Magistrate shall never refer acquittal to High Court (FB) 349*a*

——*Ss. 476, 439* — Petitioner alleged to have harvested crops attached in execution of decree — Court relying on order of attachment, and receiver's report holding case under S. 206, Penal Code, to be made out against petitioner and filing complaint under S. 476 against him — No directions issued by attaching Court under O. 21, R. 45, Civil P. C.—Crops appearing to have been harvested by petitioner to save them from being ruined — Order under S. 476 held not justified — Although High Court would not ordinarily interfere in revision, it was a fit case for such interference : 976

——*S. 488* — 'Living in adultery' means continued adulterous conduct — It is not necessary that living in adultery must be in house of adulterer 833*a*

——*S. 488*—Practice — Charge of "living in adultery" put forward against wife — Wife should be given opportunity of adducing rebutting evidence 833*b*

——*Ss. 488 and 439*—High Court is loath to interfere with finding of fact in cases under S. 488—But it must interfere where awarding of maintenance to woman is not justified by definite finding that woman was legal wife 66*a*

*——*S. 488 (1)* — Application for maintenance by wife for herself and for her

Criminal P. C.
child — Rs. 100 can be directed to be paid to each separately 721
*——*S. 488 (5)* — 'Living in adultery' means having de facto protector with whom wife lives and is being maintained by him as his wife — But man cannot desert his wife, thus tempt her to unchastity and then resist her claim to maintenance on that ground 66*b*
——*S. 503*—Witness in Burma — District Magistrate in India cannot issue commission 192
——*S. 528*—Costs — A Magistrate has no power to award costs in applications under S. 528 909

Criminal Trial—Accomplice — Person instigating another to commit crime with intention of catching him in the act of committing crime—Instigation by him amounts to abetment of offence — He is to be regarded as accomplice when offence has been committed as result of instigation—At any rate his evidence is to be viewed with caution 893*c*
——Accused acquitted under S. 304, I. P. C., but convicted under S. 335—Appeal against acquittal — Court satisfied that accused is not guilty even under S. 335, Penal Code—Court can suo motu acquit accused under S. 335 723*a*
*——Confession — Statements to police by each of several accused, during course of investigation, not amounting to confession of any crime — Statements taken together showing that accused were engaged in criminal conspiracy to commit offence and sought to be used to prove that fact—They amount to confessions 893*b*
—— Evidence — Prosecution witnesses likely to turn hostile — Public prosecutor's duty—Court however must arrive at truth by lawful means — Either party not prepared to call witnesses who can depose on relevant facts — Court must call such witnesses—If trial Court fails, Appellate Court must do it 900
——Evidence — Unsworn testimony of young child is admissible in evidence: 490*a*
*——Evidence — Statements of witnesses accused in counter-case are admissible as evidence 403
—— Evidence — Post-mortem certificate taken by itself is not substantive evidence — Isolated statement in it cannot without guidance of doctor be used drawing inferences 336*a*

Criminal Trial
*——High Court — Inherent powers — Moral wrongs are not necessarily criminal offences — To attempt to create new offences in order to compel men to conform to high standard of morality, is abuse of process—High Court can in such cases interfere and set right abuse of process 129*a*
——Issue of process — Record not showing sufficient grounds — Process not issued—Reason not given—Interference in revision is undesirable — But where serious allegations of tyranny are made, High Court and complainant should be satisfied whether there is case made out or not — If case is made out, process must issue 879
——Joint trial — Four charges of attempt to commit rape framed against *A*, *B* and *C* for which they were jointly responsible—Two other charges against *A* and another charge against *A* and *B* jointly—Joint trial of all is desirable 615*b*
——Jurisdiction—Statement by accused of his having committed offence not triable by Magistrate — Magistrate is not deprived of jurisdiction unless he feels that statement was true or unless prosecution accept it 784*a*
——Practice — Calendar cases triable by First Class Magistrate — He cannot transfer them to Second Class Magistrate with direction to treat them as preliminary register cases even if calendar cases are counter to preliminary register cases and even if facts are complicated 529
——Previous convictions—Proof of—Convictions sought to be proved by finger-prints taken in previous trials—There is no room for doubt where sets of finger-prints taken by persons accustomed to take them are compared and declared by competent witness to be identical 858*f*
——Previous convictions — Proof of — Convictions sought to be proved by finger-prints and calendar extracts — Sufficiency of evidence as to identity of accused is question of fact in each case — Sufficiency of evidence as to identity in particular circumstances discussed 858*h*
——Sanction to prosecute—Order of sanction containing merely a request to Deputy Inspector-General as head of C. I. D. to depute officer of Inspector's rank to file complaint — Complaint filed by Inspector deputed by Superintendent, Special Branch, C. I. D., is properly filed 758*a*
——Sentence — Sentences of detention in Borstal School should not be ordered to run consecutively 567

Criminal Trial
*——Transfer—Order of transfer operates from date on which it is passed — Court which continues to act after order is passed acts without jurisdiction even though order is not communicated to it—Order passed by such Court is however saved from being void by S. 531, Criminal P. C. 832
——Trial by jury — Number of important points—Judge may separate some of them from other items of charges 477*b*
——Trial by jury—Theft case — Evidence against accused being of woman who received stolen property from accused—Judge in his charge to jury not pointing out with sufficient force, unsafety of relying on her evidence — Omission amounts to misdirection 464
Crown Debts—Priority—Money decree against debtor—Property sold in execution — Arrears of income-tax due by debtor — Court can order payment of this Crown debt to Government on mere application by Income-tax officer without formal suit —S. 46, Income-tax Act, does not bar such application (FB) 360*a*
Custom — Validity of—Custom amongst scavenger community in Madras allowing their scavenging rights to be mortgaged, sold, etc., is an oppressive monopoly and cannot be sustained in Court of law, having regard to modern conditions 881*c*
Debtor and Creditor — Composition deed —Every creditor need not execute deed — He can signify his acquiescence by other means 199*b*
——Debtor making gift to creditor of amount equal to or greater than debt — Question whether such payment is towards satisfaction of debt due is question of fact —Rule of English law that it is to be taken in satisfaction of debt due does not apply to India 25*a*
Decree—Execution — Instalment decree— In case of default of two successive instalments whole decretal amount to be recovered — Decree not providing to whom money was to be paid — Default in first instalment — Judgment-debtor on date previous to fixed date obtaining chalan and fixed day being holiday paying second instalment in Bank on next day — Judgment-debtor held did not commit default in two successive instalments 523
——Setting aside—Order declaring party ex parte made and decree passed —Decree not appealed against within time —Application under S. 115 Civil P. C., for
Decree
setting aside order declaring him ex parte —Jurisdiction of High Court to interfere with order 217
Deed—Construction—Scheme for election of dharmakarthas of temple setting out qualification of persons entitled to vote—One qualification being that they should be 'Vaishnavas of Tengalai sect'—These words held included even untouchables 571
——Construction—Grant—Terms not clear — Inconsistency between different parts of document—Circumstances prior and subsequent to grant may be looked at to discover whether any portion of instrument amounts to *falsa demonstratio* 525
——Construction — Sale — Recital in sale deed that price is to be paid before Sub-Registrar—Implication explained 246*b*
——Construction—Words importing hereditary character not imported in deed — Evidence of long enjoyment and descent — Hereditary character presumed 98*b*
Defamation—Communication by client to pleader not in connexion with any judicial proceeding or step thereto is not absolutely privileged — Such communication, when false, intended to be published to certain party and actuated by malice will not be protected 164*a*
Easement — Right of drainage of water from higher level to lower lands—Owner of higher land cannot introduce water foreign to the land — Owner of lower land is not bound to submit to artificial discharge of water from higher land 649*a*
——Distinction between regular stream of water and one caused by melting of ice on hills 649*b*
——Right to cut trees — No right of easement can be acquired in respect of tree projecting over neighbour's land — Owner of tree has no right to prevent person in possession of land over which its branches are growing from cutting away so much of them as project over his land—Where right to project boughs is expressly conferred or transferred and right to lop off branches is not reserved, branches cannot be cut 511
——Riparian rights—Right of upper riparian owner to divert water to tank situate at long distance is in nature of easement and not riparian right 180*a*
Easements Act *(5 of 1882), S. 17* — It is doubtful whether prescriptive right in respect of silt accumulation can be acquired *(Quære)* 180*d*

UNIVERSITY
Dated ...20.11.80

Election—Doctrine of—Election is not confined to instruments—No person can approbate and reprobate 1004
——Election Commissioner having jurisdiction to decide election disputes coming to conclusion that Election Officer has illegally rejected large number of votes and declaring election as void on this ground — Mere absence of finding that this has materially affected election result does not make his order one without jurisdiction 507
——Minor — It is better that Court itself should hold enquiry as to what is beneficial to minor, following English practice 136*e*

Estoppel—Decree against inalienable jagir — Compromise between decree-holder and some of judgment-debtors including minors consenting execution to proceed against immovable property — Court when recording compromise not observing provisions of O. 32, R. 7, Civil P. C., regarding minor judgment-debtors — Other judgment-debtors remaining ex parte — Portion of property mortgaged to decree-holder by previous jagirdar — No evidence showing decree-holder's ignorance of terms of jagir —Plea of estoppel held could not prevail against minors and other judgment-debtors remaining ex parte (Per *Abdur Rahman J.*) 623*a*
——District Board issuing licenses to motor bus proprietors for period of two months only — Motor bus proprietors accepting licenses with knowledge that they were for two months—They are estopped from denying that District Board could issue licenses for two months — Ultra vires nature of order of issuing license does not affect question of estoppel 227*a*
——Mortgage of property—Mortgagee leasing it to third person—Property resurveyed while lessee in possession—Lessee attorning to zamindar and registered as pattadar without there being any reference by lessee of his derivative title from mortgagor — Lessee held estopped from denying mortgagor's title even after attorning to zamindar 85*b*

Evidence——Admission—Judge when considering weight of admission cannot ignore it merely on guess of his own 133*a*

***Evidence Act** *(1 of 1872), S. 25*—Excise Officer is not Police Officer within the meaning of S. 25 460
——*S. 70* — Execution means not merely signing but due execution according to law — Attestation means due attestation — Question of attestation put in issue — Attestation must be proved before S. 70 can be applied 43*b*
*——*S. 70* — Admissions for dispensing with proof and admissions for evidentiary purposes — Difference between, explained 43*c*
——*S. 74*—Fingerprint slip taken in pursuance of statutory duty cast upon police officers after convict enters jail is public document—So also jail registers written up by jail authorities in ordinary course of their duties 858*g*
——*Ss. 91 and 92* — Applicability to wills —Ss. 91 and 92 apply only to contracts, grants and dispositions of property—A will is neither a contract nor a grant nor a disposition of property until the death of the testator makes it operative—Hence a registered will can be revoked by an unregistered document and S. 92 (4) is no bar 616*b*
*——*S. 92, Proviso 1* — S. 92 does not debar party to contract from adducing evidence for purpose of contradicting recitals of facts mentioned in document 320
——*S. 105* — Evidence for prosecution itself showing that act of accused falls under exception in Penal Code—Accused need not prove that it falls within any exception 656*b*
——*S. 110* — Case under Madras Land Encroachment Act — Presumption under S. 110 does not operate — But long possession can be relied on as evidence of grant by original owner 193*d*

Execution — Death of judgment-debtor — Decree-holder in application for execution stating certain person as heir of judgment-debtor—Court issuing notice on that person and adding him to be legal representative though in fact not heir of judgment-debtor —Person remaining ex parte throughout—Sale of property in execution — Sale held not without jurisdiction 945
——Decree binding — Court cannot go behind—Exception — Decree not showing minor as not properly served — Decree must be executed 809*a*
——Usufructuary mortgage by legal representative — Part consideration being to discharge debt of deceased — Mortgagee knowing that debts of deceased not fully discharged and consideration for mortgage not applied towards discharge of such debts —Subsequent decree by creditor of deceased —Property mortgaged attached in execution — Executing Court held could not attach property on purely equitable grounds

Execution
— Property could be attached only subject to mortgagee's rights 684
—— O. 9, Civil P. C., not applicable to execution proceedings — Yet application under O. 21, R. 90 can be dismissed for default—Power of dismissing for default is inherent 495
*——Mortgage suit — Unregistered agreement by decree-holder after preliminary decree but before final decree agreeing not to execute decree against certain items of hypotheca can be pleaded in bar of execution of final decree 456
——Validity — Decree in partition suit, in substance, a final order effecting partition —Decree not engrossed on proper non-judicial stamp is not valid — Sale in execution of such decree is nullity and passes no title to auction-purchaser 307*d*
——Transfer of decree to another Court for execution — Report under S. 41, Civil P. C., not sent to original Court—Application made to transferee Court for arrest of judgment-debtor is one presented to 'proper Court' 27*a*

Execution Sale — Setting aside — Upset prices shown in sale proclamation grossly low—Price realised far below market value —Such sale can be set aside 720

Executor—Suit by one executor is incompetent in absence of joinder of executors *(Obiter)* 982*h*

Family Settlement — Consideration— A bona fide settlement of a family dispute does not require any specific consideration to support it 236*a*

Government of India Act *(1919, 9 & 10 Geo. V, Ch. 101), Ss. 30 (2), 45* — Local Government granting mining leases to *A* and *R* reserving portion of land (referred to as margin) between lands allotted to each to prevent disputes — Each lessee anxious to obtain lease of margin — *A* obtaining order from Local Government granting lease in his favour — *R* appealing to Government of India and obtaining a lease in his favour — Suit instituted by *A* against Secretary of State and *R*, claiming declaration that order granting lease to *R* was illegal and decree for specific performance of contract alleged to have been entered into between him and Local Government — Order of Government of India setting aside order granting lease to *R* held intra vires under S. 45—As no formal lease was signed and executed by Collector, there was no contract which could be specifically enforced against Secretary of State 749*a*

——*(1935, 25 & 26 Geo. V, Ch. 42), S. 49 (1)*—Governor not required to consult his Ministers before performing executive acts —Governor exercising his individual judgment though not required to do so — Still his act cannot be questioned 758*b*

——*S 50 (3)* — Prohibition contained in S. 50 (3) is general 758*c*

Governor — Powers of — Self-governing dominion — Governor needs extraordinary powers to interfere in case of grave crisis though such powers are rarely exercised 758*d*

Grant — Construction — Right to take minerals—Grant to pious Mahomedans by way of shrotriem—Jodi reserved—Grantee to enjoy income of land — Grant held did not include right to take minerals 734
——Inam — Suit for ejectment by inamdar alleging himself to be owner of both warams — Onus is on him to prove that defendant was let in under terminable tenancy 576
——Property belonging to villagers in common cannot be presumed to have been included in grant 565*a*
——Fact that certain tank is not taken into account in fixing assessment payable by zamindar does not indicate that tank is excluded from grant 565*b*
——Communal property — Description of tank as village tank—Inference—It would be far fetched to hold that because a tank is called a village tank, the villagers necessarily own it 565*d*
——Village service inams granted before permanent settlement are resumable by Government and not by zamindar — Goldsmith and Kundanam service inams are village service inams and hence resumable by Government 445*a*
——Lost grant — Person permitted by Public Works Department to repair certain channel at his own cost and to irrigate his land from that channel — Lost grant of right to irrigate his lands from that channel cannot be presumed 400*a*
——Free grant of valuable land by Revenue Officer is devoid of authority — Collector, in his revisional jurisdiction can cancel such grant and his order cannot be questioned by Civil Courts 318
——No presumption that inam grant comprises both melvaram and kudivaram: 253*a*

Grant
——Extent of — Original grant by pre-British Government produced—Inam title deed in British rule not curtailing rights conferred by terms of original grant—Original grant is best evidence of what has been granted by Crown 193*a*
——Grant of village—Irrigation tanks are not communal porambokes and hence can be held to pass under grant—Tank within inam limits passed under grant 193*c*
——Tank-beds in agraharam openly cultivated by agraharamdar—Government collecting cesses but not assessment — Effect is admission of Agraharamdar's title by Government 193*e*

Guardian and Ward — Debts contracted by guardian — Testamentary guardian of minor incurring debt on behalf of minor in course of business started by father — Guardian is personally liable — Creditor is also entitled to have decree against assets of business on showing that guardian has right of indemnity in respect of such assets 265*a*

Guardians and Wards Act *(8 of 1890), Ss. 29 and 30* — Prohibition under S. 29 incorporated in order appointing guardian — Assignment of mortgage by guardian is still voidable and not void 822*a*
——*S. 35* — Security bond by guardian—Assignment to new guardian — Liability secured by charge of immovable property—Not only mere right to sue but charge is also assigned—Assignment is only as trustee of ward and hence assignee is bound to surrender bond to ward on attaining majority 829*a*
——*S. 41 (4)* — Guardian discharged — Court cannot hold inquiry into correctness of accounts **(FB)** 347*b*
*——*S. 41 (4)*—Court thinking that guardian acted properly throughout—It has full discretion to discharge him and order cannot be challenged in revision **(FB)** 347*a*

Highway — Religious festival — Right of performing it on public street is recognized by law—Such right is subject to direction of Magistrate and rights of public 819
——Right of community to use public street for procession with music — Order excepting music during hours of public congregational worship of Muslims is proper, if exception is confined to particular neighbourhood of mosque 305
——Owner of motor bus has no common law right to use highway subject to compliance with some formalities—Such right if at all existed, is taken away by Local Boards Act — Owner of motor bus not having authority to use road causing damage to road—Suit by District Board for damages is maintainable 227*c*

Hindu Law — Alienation — Mortgage by manager for family business is binding on family 547*b*
——Alienation — Widow — Alienation by widow consented to by presumptive reversioners—Consent merely raises presumption of necessity—Actual reversioners, although descendants of presumptive reversioners giving consent, are not estopped from disputing alienations 433
——Alienation—Widow — Consent by reversioner is presumptive proof of necessity 300*a*
——Alienation—Widow—Suit to set aside alienation made long ago — Recitals in document are sufficient proof in its support —No recitals — Still necessity can be presumed 300*b*
——Alienation—Father—Alienation without consent of existing coparcener—Alienation is voidable at their instance — Right to challenge alienation is confined to coparceners alive on the date of alienation 224
** ——Antecedent debt — Mortgage — Money advanced to father on understanding that he will execute mortgage whenever required—Debt not being part of same transaction constitutes antecedent debt — Mortgage executed to secure such debt is binding on sons **(FB)** 889*a*
——Charitable endowment — Constitution explained 999*a*
—— Debt—Liability of son for surety debt created by father is restricted to cases where money has been lent for goods supplied to principal debtor 829*b*
——Debts — Son's liability — Ancestral property—Mortgage or charge over antecedent debt or necessity must be proved: 829*c*
——Debts—Co-parcener — Person acquiring separate property by incurring debts—Property thrown into hotchpot and divided — Other members are not liable for debts 774*a*
——Debts — Loan to manager — Partition —Creditor must sue in time—Or else must obtain acknowledgments of all members who were not parties to loan 774*b*
——Debts—Promissory note by mother on behalf of minor in renewal of promissory note of her deceased husband—In body of note mother described as guardian but note signed by her without any description

Hindu Law
as guardian—She is not personally liable on such pro-note—Minor is liable to extent of assets in his hands 716
——Family arrangement between widow and reversioners—Essentials of—Widow succeeding to her son's estate after his death—Suit by next presumptive reversioner *N* against widow on footing that widow inherited property as heir to her son and that *N* was next presumptive reversioner—Widow denying that she took property as heir to her son and setting up independent title as devisee under her husband's will whereby she was to enjoy property for life and after her death her step-daughters were to take it absolutely —Suit compromised—Half of the property going to *N* and half to be retained by widow for her life and thereafter to daughters—Compromise held bona fide family settlement 364c
*——Gift — Gift by Hindu father to daughter on marriage—Daughter dying issueless and husband claiming estate—Considerations to be borne in mind in construing such gift—It is not illegal to make gift carrying absolute estate in one contingency but cutting it down to life estate in other contingencies 6
——Guardian de facto—His action may entail liabilities on minors if alienation by him is for benefit of minors *(Obiter)* 982d
——Joint family business—Manager of trading family entering into partnership with stranger for carrying on same kind of business—Members of family are liable to extent of their interest in family property for debts binding on manager 849b
——Joint family—Family property—Mere existence of nucleus of ancestral property will not raise presumption that subsequent acquisitions of property by member are joint family property—To raise this presumption nucleus must be such as could have led to subsequent acquisitions—There is no presumption in favour of blending 841
——Joint family—Debts—Suit on promissory note executed by father and son instituted after partition between them and decree obtained against father alone—Decree-holder is not entitled to proceed against property in hands of son unless he obtains decree against him 578
——Joint family—Self acquisition—Self acquired property may become joint family property if thrown in common stock—Onus lies upon person pleading that separate property ceased to be so to prove it—Mere circumstance that there is no evidence to show how separate and joint family income were dealt with by member is no ground to hold that property is not separate 136a
——Joint family — Self acquisition — Blending of—There is no presumption in favour of 'blending'—Presumption if any can only be one of fact drawn from surrounding circumstances 136b
——Joint family — Self acquisition — Blending of—Trustee mixing his own funds with the funds of the cestui que trust and 'doctrine of blending' distinguished 136c
*——Maintenance—Daughter-in-law—No right in father-in-law's self-acquired property bequeathed by will 914
*——Maintenance—Widow—Will by deceased husband granting some property to widow and rest to other donees—Property gifted to widow insufficient for her maintenance—Widow can retain that property and also claim maintenance from other donees 340
——Manager—Pronote executed by manager—Remedies open to creditor explained 774d
*——Manager of joint family entering into money lending transaction—Suit to recover money can be filed by him in his own name 739
——Marriage—Form — Marriages among Hindus in Madras Presidency are presumed to be in Brahma form unless shown otherwise—Party alleging marriage to be in Asura form must prove payment of bride price by bridegroom — Mere customary presents do not amount to bride price—Incurring whole of expenditure by bridegroom and celebrating marriage at bridegroom's place according to usage do not convert marriage in Brahma form into one in Asura form—Custom regarding expenses of marriage has no force of law 479a
*——Mother—Right of residence — No absolute right to reside in family house—On partition, Court can compel her to vacate it but must give her another suitable residence 953
*——Partition—Consent decree in partition suit does not put an end to joint status when terms of decree are not carried into effect and members continue to live together 849a
——Partition—Accounts—Interest in certain cases may be allowed on mesne profits

Hindu Law
—Interest on mesne profits held was correctly awarded in the circumstances of the case 424
*——Partition—Severance of joint status takes place from date on which communication of intention to become divided is sent and not from date on which communication is received by co-parceners 390
——Partition—Setting aside — *S* and *G* constituting joint Hindu family—*S* out of self-acquired income paying all family debts—Partition between *S* and *G*—*G* in consideration of services rendered by *S*, conveying moiety of his share to *S* in addition to *S's* legal share—Transaction so far as it affected *G's* share held could not be challenged by *G's* son 102
——Religious endowment—Mutt—Nature of, how should be determined explained (Per *Madhavan Nair J.*) 810*b*
——Religious endowment—Gift to temple—Properties conveyed to person described by donor as trustee—No other persons in management as general trustees—Object of gift connected with ordinary worship in temple—Such trustee is not special trustee 314
——Religious endowment—Private trust—Mere fact of admission of the public to temple does not affect private trust 214*b*
——Religious endowment — Dedication—Dedication whether public or private trust must be determined independently of factum of dedication 214*c*
——Religious endowment — Practice of archaka taking hundi collections for his own maintenance and for expenses of pooja—Legal origin of practice not known but practice long in existence and no evidence to contrary—Legal origin to practice held could be presumed 71
——Reversioner — Hindu dying leaving widow—Her mother-in-law taking possession not immediately but only in pursuance of arrangement between her and her daughter-in-law—Cause of action in such case does not arise to widow as possession by mother-in-law in pursuance of agreement cannot amount to dispossession of widow—Reversioner's suit for possession brought after widow's death is not barred 513*b*
*——Reversioner—Suit by *A* as nearest reversioner for declaration that will left by deceased was not genuine—During pendency, Act 2 of 1929 coming into force and *A* becoming remoter reversioner—*A* held should be allowed to continue his suit after

Hindu Law
making nearest reversioner party defendant 178
——Succession—Half-sister was heritable bandhu before Act 2 of 1929 came into force 364*c*
——Widow — Surrender — Surrender by daughter-in-law in favour of her aged mother-in-law is against natural presumption and probability 513*c*
——Widow — Surrender — Arrangement between widow and her mother-in-law in nature of vibhaga—Mother-in-law taking larger share—Widow reserving to herself interest in remainder in certain items and also asserting her claim to certain share after arrangement—Arrangement cannot be treated as surrender by widow in favour of her mother-in-law 513*d*
——Widow—Accretion—Stranger coming into possession of portion of property by virtue of alienation by widow—His acquisitions out of income of such property cannot be treated as accretion 513*e*

****Hindu Law Inheritance Amendment Act** *(2 of 1929)*—Sister does not include half-sister 364*b*

Hindu Widow's Remarriage Act *(15 of 1856), S. 2*—Guardian of widow executing release deed reciting that in consideration of execution of promissory note in his favour by widow's husband's coparceners of fixed amount in lieu of maintenance payable to widow she releases her right to maintenance—Suit by guardian against coparceners for balance due on promissory note—Remarriage of widow—Coparceners held could not repudiate claim for balance due on promissory note 994

Inam—Suit by zamindar questioning Government's right to resume certain village service inams—Question whether Government was entitled to resume shroff inams given up by Government before trial began—Government held could not do so, as it would prejudice rights of person in possession of these inams 445*b*

***Income-tax**—Company formed to enable members to save money and to enable members to secure loans—Loans granted to nominal members—Nominal members not allowed to share in profits of company—Company held not mutual benefit society and its income held taxable **(SB)** 148*a*
——Res judicata—Doctrine of res judicata is inapplicable to assessment made by Income-tax Officer **(SB)** 148*c*

Income-tax
——Partnership—Partnership either not assessable or escaping assessment—Partners are liable—Allocation of shares is not essential (SB) 59
——'Fund' floated with capital subscribed by shares—Chief income, interest derived from loans to share-holders—Such income held not assessable because fund was Mutual Benefit Fund Society (SB) 57
*——Receipts in British India—Debts due to foreign business of assessee—Debtor assigning British Indian decree in British India in discharge of his debt—Decree assigned not realized—Held that there was receipt of money or money's worth in British India (SB) 52
Income-tax Act *(11 of 1922), S. 10 (2) (iii)*—Dividends paid by company to its members are not interest on borrowed capital (SB) 148*b*
*——*Ss. 22 and 59*—Rules under S. 59, R. 25—Expression 'last preceding valuation' means last preceding valuation at the time of return (SB) 145*a*
——*Ss. 34 and 59*—Rules under S. 59, R. 25—Income-tax Officer cannot depart from provisions of R. 25 and reopen assessment under S. 34 (SB) 145*b*
*——*S. 66-A* — In granting leave for appeal to Privy Council, High Court cannot impose condition that appellant shall bear respondent's costs (SB) 352*b*
Injunction—Grant of—Law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do—Scavengers claiming permanent injunction against other scavengers from doing work in certain houses—Claim held was in substance a right preventing a man from pursuing his legitimate calling and so no such injunction could be granted 881*b*
Insolvency—Insolvency Court can go behind decree and ascertain whether decree debt is true or not if it believes that decree was obtained by fraud, collusion or is unjust 947
*——Amendment of petition—Insolvency petition by creditor alleging that certain amount was due by insolvent to certain firm of which he claimed to be sole proprietor—On day of petition, creditor in fact not sole proprietor but declared to be so four days afterwards—Amendment of petition held should be allowed 884
——Transfers after insolvency petition are void 801*a*
Insolvency
——Existence of contract to mortgage entered into more than three months before insolvency petition—Official Receiver is not barred from selling property 801*b*
——Fraudulent purchase — Decree-holder suppressing knowledge of debtor's insolvency proceedings from Court and purchasing property to detriment of other creditors—Purchaser cannot get benefit of S. 51 (3), Insolvency Act—Such fraudulent sale can be set aside under S. 4, Insolvency Act 718
——Creditor need only prove his right to present petition to adjudicate debtor—He need not prove debtor's inability to pay debts 489
——Words "debtor" and "insolvent"—Difference between stated 449*b*
*——Vesting of estate — After-acquired property—Suit by insolvent's mother to recover certain property as sole heir of her father dismissed—Appeal by mother—On death of mother pending appeal, insolvent applying for leave to continue appeal in his own right and not as representative of his mother—Official Receiver previously applying for leave to continue appeal but withdrawing his application—Official Receiver having once intervened and withdrawn, application by insolvent held not maintainable (FB) 420
——Sale deed by Receiver of insolvent's family property—Insolvent father possessing power to sell son's share at the time of vesting of property in Receiver — Consideration for sale representing value of whole property—Sale held of entire property including son's share 299
*——Amendment of pleadings — Acts of insolvency — Petition by creditor — Acts alleged beyond three months of date of petition—Amendment seeking to substitute new acts of insolvency within three months—Amendment held introduced new cause and could not be allowed 53
Interpretation of Statutes — Ousting of jurisdiction of Civil Courts — General scheme of Act is to be considered 972*b*
——Retrospective effect—Portions of statute which are silent in this regard should be taken as indicating prospective intention 779*a*
*——Retrospective operation — Test is whether existing rights are affected 688*c*
——Procedure — Meaning of 'procedure' explained—Step to be taken even prior to commencing action in Court is procedure 688*e*

Interpretation of Statutes
——Law of procedure — Meaning of — What is remedial law—Retrospective operation of law of procedure 688*f*
——New Act using same language used by former one relating to same subject—Use of words must be assumed to have been in same sense which decisions have attached to them 638*b*
——Fiscal statutes—Two constructions of fiscal enactment equally possible and reasonable—Construction more favourable to subject must be enforced 498*a*
——Value of headings in interpreting Sections under them explained 449*c*
Irrigation—Raiyatwari lands—Raiyat is entitled to irrigate his registered wet lands by customary source until Government makes efficient alternative provision: 509*a*
——Raiyat irrigating his wet fields from accustomed source—Government altering source causing diminution in accustomed supply—Raiyat is entitled to damages: 509*b*
Jurisdiction — Non-resident foreigner — Cause of action arising in British India—British Indian Court has jurisdiction in personam 731*a*
——Money under rateable distribution withdrawn in British India by father as member of firm—Suit to reopen rateable distribution—Son who was non-resident foreigner but a partner in firm impleaded as defendant—British Indian Court held had jurisdiction to deal with him 731*c*
——Civil Court—Suit instituted on ground that goods imported ought not to have been taxed by customs authorities on particular basis and that authorities have acted on wrong interpretation of the Sea Customs Act is triable by Civil Court — Finality enacted by last clause of S. 188, Sea Customs Act, is restricted to the redress available before the executive authorities themselves 608*a*
——Person filing suit must show that Court has jurisdiction—Merely stating that cause of action accrued within its jurisdiction is not enough 497*d*
——Objection to—An objection to jurisdiction which a defendant is precluded from raising is not open to a party who was the plaintiff in the previous suit: 257*d*
Laccadive Islands and Minicoy Regulations *(1 of 1912), S. 24*—Transfer of case—High Court cannot transfer cases from file of Amin 855*b*
——*S. 26*—Collector exercising appellate jurisdiction is subject to revisional jurisdiction of High Court just as he is subject to appellate jurisdiction of High Court while exercising original jurisdiction 855*a*
Land Acquisition—Melawaram Interest—Method of assessing capital value explained—Gross income minus peshkush and costs of realizing revenue at 10 per cent. is nett income—This nett income multiplied by number of years' purchase according to prevalent rate of interest plus addition of 15 per cent. gives value for compulsory acquisition 33
***Land Acquisition Act** *(1 of 1894), S. 31*—Question of title between rival claimants to money deposited in Court — Question must be decided under terms of Act and cannot be made subject of separate suit—Decision of such question operates as res judicata 955
Land Customs Act *(19 of 1924), S. 7 (2)*—Sub-Inspector of Customs is competent to file complaint 712
Land Improvement Loans Act *(19 of 1883), S. 7 (1) (c)*—Priority—The mortgage under the Lands Improvement Loans Act cannot be given priority in respect of lands other than those for whose benefit the loan was granted 583*a*
***Landlord and Tenant** — Lease — Construction — Tenant agreeing to deliver to landlord stipulated amount of paddy—No covenant that rents would be paid out of crops—No charge held on crops for rent 940
——Permanent tenant right—Acquisition of — Persons claiming permanent tenant right unequivocally putting forward their right in suit for rent filed in 1906 to which landlord was party and continuing to be in possession of holding openly till 1928—Suit for ejectment by landlord held barred by limitation 570
Land Tenure — Inam grants — Three classes enumerated 1006*a*
——Inam grants—Post-settlement grants—Presumption in favour of resumability—Basis explained 1006*b*
Legal Practitioner—Rights of—Lawyer cited as witness by prosecution is not disqualified from appearing as counsel for accused 878
Legal Practitioners Act *(18 of 1879), Ss. 3, 36*—Before a person can be declared a tout, it must be found as a fact that he has acted in a manner which would bring him within the definition laid down in S. 3: 634*b*

Legal Practitioners Act

*——*S. 13* — Mere negligence does not found petition for professional misconduct —There is nothing unprofessional in pleader employing unregistered clerk: **(SB)** 965

——*S. 13* — Misconduct — *A* obtaining decree against *B* for account—*B* obtaining decree against *A* for maintenance—*C* pleader acting for *B* in maintenance suit — Later on *C* appearing for *A* in execution of *A's* decree against *B*—*C* held not guilty of misconduct **(SB)** 276*a*

——*S. 13*—Misconduct—Purchasing and fraudulently executing decree of client for larger sum amounts to misconduct **(SB)** 276*b*

*——*S. 13*—Misconduct—Suggesting bribe to be offered to officials is grave misconduct—Fact that proceedings were instituted as result of grudge makes no difference in gravity of offence **(FB)** 264

***Letters Patent (Madras)**, *Cl. 15* — Order of High Court Judge refusing review from his judgment passed in second appeal —Appeal from such order is incompetent without leave 399

Limitation—Fresh promise—Record made on promissory note by payee held did not amount to fresh promise 683*c*

——Acknowledgment — Admission of liability coupled with declaration as regards the arrangement proposed for its satisfaction is sufficient acknowledgment 496

——There must be party capable to sue before applying law of limitation **(FB)** 353*b*

*——Declaratory suit — Bare repudiation of person's title without overt act would not make incumbent on him to bring declaratory suit—Successive denials of title—Owner of title may ignore any particular denial and can base his cause of action on any fresh denial 193*f*

*——Trustee alienating property honestly believing it to be his own—Property on true construction of trust deed found to belong to cestui que trust—Time allowed by trustee to pass owing to this mistake cannot be excluded in computing limitation for suit against alienee 60*d*

——"Kavimera" cess — Person in possession of village liable to pay mera out of his collection of melwaram — Nature of liability, whether personal — Liability is in nature of charge on immovable property—Claim for arrears of mera is governed by Art. 131, Limitation Act 47*b*

***Limitation Act** *(9 of 1908), Preamble*—Retrospective effect—It is retrospective not because it is matter of procedure but because of its express intention to extinguish existing rights 688*b*

——*S. 10* — Pre-settlement mokhasa in certain zamindari attached in 1831 under Cl. 6 of S. 34, Madras Regulation 28 of 1802—Zamindari sold for arrears and came in possession of Government—Government resumed mokhasa in 1856, wrote off arrears and regranted it unconditionally to zamindar in 1860—Zamindar held it since then in his own right — Mokhasadar having knowledge of resumption, acquiescing in and abandoning his right in mokhasa — Suit for possession brought in 1927 — It was alleged that zamindar was trustee and no question of limitation arose—No trust held was created—Time held began to run from date of disclaimer and suit was time-barred 295*b*

*——*S. 12*—"The time requisite"—Meaning explained—Day on which copy is notified to be ready should be excluded 823

*——*S. 14 (2)*—Order of executing Court on claim under O. 21, R. 58, Civil P. C.—Appeals against, firstly in sub-Court and then to High Court as per law then prevailing — On High Court holding that claimant's remedy was by separate suit, claimant filing suit under O. 21, R. 63—Period covered by appeals held could be excluded in computing period of limitation 41

——*S. 17*—'Legal representative' includes heir-at-law 157*b*

——*S. 19* — Word 'prescribed' includes period which party is entitled to exclude under any law in force 19*c*

*——*Ss. 20, 21* — Joint Hindu family — Manager contracting debt — Partition — — Acknowledgment by one cannot keep debt alive against others 774*c*

——*S. 20*—Joint liability of Hindu undivided family for family debt is not debt within S. 20 774*e*

*——*S. 20*— Period of limitation for suit expiring on Sunday — Payment of interest made on next day does not give fresh start for limitation 683*a*

——*S. 20* — Payment of interest — It is not necessary that money should actually pass between parties — Any facts which would prove plea of payment of interest would be payment sufficient to bar statute 579

——*S. 20, Proviso* — Writing — Creditor can show by extrinsic evidence that pay-

Limitation Act
ment made was payment towards interest as such 601
——*S. 21 (2)*— *A* and *B* each purchasing half share in mortgaged property from original mortgagors— Mortgagee accepting payment by *B* in full satisfaction of amount due by him — Subsequent suit by mortgagee against *A* — S. 21 (2) held applied and payment by *B* could not be relied upon to save limitation against *A* 111
*——*S. 22* –Suit against benamidar within limitation— Real owner impleaded after limitation merely as matter of caution — Suit as against real owner will not be barred by operation of S. 22 687
——*S. 23* — "Continuing wrong" — Obstruction to water by accumulation of silt due to construction of dam — Injury to lower riparian owner is continuous 180*c*
——*S. 31*—Prescribes special period *(Obiter)* 683*b*
** ——*Art. 23*— Person prosecuted either discharged or acquitted—Revision petition against discharge or acquittal dismissed — Suit for malicious prosecution— Time runs not from discharge or acquittal but from dismissal of revision petition : *23 Mad 24, OVERRULED* **(FB)** 349*b*
——*Art. 44*—Suit contemplated by Art. 44 is suit for possession— Suit should be filed against parties in possession including persons deriving title from alienee — Alienee disposing whole or portion of property before suit—Second alienee is not affected by result of minor's suit against his alienor— Suit against him should be brought within three years of attaining majority 677*c*
——*Art. 60*—Sum as deposit with banker in *A's* name— Subsequent agreement between *A* and *B* arranging portion of deposit to be transferred to *B* the rest going to benefit of *A* — Suit by *A* against banker for recovery of deposit— Art. 60 held applied 236*c*
——*Art. 62*—Assignment of decrees subsequently annulled on insolvency of assignor —Suit by Official Receiver against assignee for recovery of money received by assignee in execution of decrees assigned— Suit is governed by Art. 62 even in respect of money received by assignee between date of assignment and date of annulment 532
——*Arts. 64 and 97*—Agreement between creditor and manager of estate that balance due to creditor should be treated as advance for supply of tea from estate to creditor for certain period— Agreement subsequently repudiated— Suit by creditor

Limitation Act
for recovery of amount brought within three years of repudiation is in time: 966*c*
——*Arts. 89, 90*— Agent serving his principal under salary chit for period of three years — Agent given power of attorney to facilitate conduct of business — On expiry of term, another salary chit executed by which salary and percentage commission were only changed — Suit by principal for accounts on termination of agency alleging excess of authority in certain transactions — Suit held governed by Art. 89 and not by Art. 90 — Period of agency under two salary chits held single one 38*a*
——*Art. 96*— Suit for sale of property on basis of mortgage— Property alleged to be wrongly described — Plaintiff also praying for rectification of mistake — Art. 96 does not apply — Plaintiff's title may be established by oral evidence even though his right to secure rectification of mortgage deed is barred by limitation 589
——*Art. 106*— On dissolution partners settling accounts—Effect stated 133*c*
——*Art. 132*— Hypothecation bond making principal amount payable in annual instalments with defaulting clause—Mortgagee waiving his right on default— Limitation does not run under Art. 132 from date of default—Interest to mortgagee can be allowed only on each instalment due and not on principal amount 836
*——*Art. 134*— Word "transfer" in third column refers to transfer of possession and not merely to conveyance of title— Transfer by mortgagee—Possession not given on date of transfer—Suit by vendee of orginal mortgagor for possession — Art. 134 does not apply — Even if held to apply, limitation under Art. 134 cannot begin to run against original mortgagor or his alienee before cause of action for redemption accrues to them 394
——*Art. 139*—Suit by landlord to recover possession from tenant— Tenant proving determination of tenancy—Landlord alleging continuation of tenancy must prove it 73
——*Arts. 142, 144*— Suit for ejectment— Plaintiff setting up title of landlord against defendant — Title of plaintiff found to be false — Article applicable is Art. 142 and not Art. 144 415*d*
——*Arts. 142 and 144* —Certain property in possession of tenants — Attempts by rival claimants to property to get tenants to attorn to one side or other—Suit by one

Limitation Act
for possession— Art. 144 and not Art. 142 applies 8c
——*Art. 182* — Application for execution without copy of decree — Such application is 'in accordance with law' and saves limitation 144
——*Art. 182, Expl. 2*—Decree transferred for execution—Application to Court which passed decree to transfer it to another Court is application to proper Court and is step-in-aid 113a
——*Art. 182 (5)*—Application for issue of notice under O. 21, R. 22, Civil P. C., is step-in-aid 553b
*——*Art. 182 (5)* — Application for execution by nephew of deceased decree holder praying that decree should be executed for benefit of himself and widow of decree-holder jointly as representatives of decree-holder—Counter-statement by widow that nephew's application should be dismissed and requesting that decree should be executed for her benefit alone — Application for execution dismissed—Subsequent application by widow for execution within three years of dismissal of previous application held in time 323
——*Art. 182, Cl. (5)* — 'Final order' — Meaning — Application for transfer of decree to another Court for execution — Application being defective, Court ordering further time for remedying defects — Such order is not final order 113c

Madras Abkari Act (1 of 1886), *S. 65*— Possession of wash — Presumption under S. 64 operates — Accused presumed guilty 784b

Madras Borstal Schools Act (5 of 1926), *S. 8*— Sentence of detention in Borstal School must take effect at once and cannot be postponed to subsequent date— Sentence of detention for period lesser than two years is illegal 653

Madras City Civil Courts Act (7 of 1892), *S. 3*— S. 3 gives purpose for which Court is established — Suit transferred to it however can be tried by it 745b
——*S. 5 (1)* — Power of Court — Small Cause suit transferred to it can be tried by City Civil Court 745c

Madras City Municipalities Act (4 of 1919), *S. 110 and Sch 4, Part 2, R. 7*— Company with head office at Karachi—Warehouse in Madras under manager — Manager having no discretion in fixing prices and banking all moneys received — At times sales made to public and purchases made locally — Company held transacting business within city and it could be taxed only under Proviso to R. 7 70
——*S. 258*— S. 258 is not mandatory but permissive—Failure to give notice does not give any member of public right of complaint against Corporation 117b

Madras Co-operative Societies Act (6 of 1932), *S. 51* — Dispute between Society and ex-officer — Registrar has no jurisdiction to decide it — Submitting to jurisdiction without protest and acquiescing in decision for long time — Writ of certiorari cannot be obtained ex debito justitiae 69

Madras Court of Wards Act (1 of 1902), *S. 49*—'Property of ward' cannot comprise property of institution of which ward is only trustee 612a
——*S. 49*—Person giving notice assigning his interest— Assignee need not give fresh notice before filing suit 280

Madras Debt Conciliation Act (11 of 1936), *S. 25* — Application by creditor against person who had applied for insolvency— Leave of Insolvency Court not obtained — Application to stay insolvency proceedings cannot be granted 808

Madras District Municipalities Act (5 of 1920), *Ss. 3 (25) and 93*— Person absent from house without letting it and with intention of being at hill station for certain period—He does not cease to reside in such house 880
——*Ss. 68 and 69*— Lease not in conformity with Ss. 68 and 69 — Lease though invalid, Municipality is entitled to relief under S. 65, Contract Act, if lessee has secured benefit of lease 746e
——*Ss. 68 and 69* — Contract involving consideration of over Rs. 1000 signed by Vice-Chairman and two members merely as witnesses—Sanction of Municipal Council not obtained — Contract held invalid 90a
——*S. 69* — Contract should be signed by councillors either immediately or within reasonable time 746b
——*S. 69 (2)*—Contract not in conformity with S. 69 (2) — Contract is unenforceable not only against Municipality but also against other party to contract 746c
——*S. 83* — Property not choultry when tax accrues is liable to property tax even if it had been choultry in past 923
——*S. 93*—Profession tax—Test for liability of person holding appointment is not personal presence within Municipality: 709a

Madras District Municipalities Act
——*Ss. 177 and 339*—S. 177 applies only against person who entered into contract under S. 176—Person to whom notice had been sent under S. 177 parting with ownership — He will not be convicted if he has shown that he was prevented from complying with terms laid down by Municipality 916
——*S. 178* — To sustain conviction under S. 178, persons charged must be owners or occupiers of lands abutting on roads 910*a*
——*Ss. 178, 339*— Three persons charged under Ss. 178, 339 — Their cases should be tried separately — Accused however not suffering any prejudice by three cases being joined together — High Court will not interfere in revision 910*c*
——*S. 270-E* — Buses belonging to petitioner taken to shed after their return from journey for letting passengers to alight and new passengers to get in for return journey—Such shed is cart stand 535
——*S. 339* — To sustain conviction under S. 339, persons charged need not be owners of land abutting on roads—Failure to carry out agreement with Municipality is sufficient to make them liable 910*b*
——*Sch. 4, R. 13*—Chairman should direct party to pay amount fixed on revision — This is condition precedent to be satisfied before taking proceedings for non-payment 282
——*Sch. 4, Rr. 18 and 19* — Profession tax in case of Government servant is to be calculated on half yearly income irrespective of fact that he has received salary out of India for portion of the period 462

Madras Elementary Education Act (8 of 1920), *Ss. 34 and 36* — Education tax levied under head of profession tax—Assessee is liable to pay education tax even if he has paid profession tax to another Municipality not levying education tax 709*b*

Madras Estates Land Act (1 of 1908), *S. 3 (2) (b) (as amended by Act 18 of 1936)* — Words in S. 3 (2) (d) as amended in 1936 should be read as if they were present in Act of 1908 339
——*Ss. 24 and 30* — S. 24 should be read along with S. 30—Enhancement of rent—Water taken by tenant without landlord's permission—Rent charged by landlord for water — Suit for such rent is under S. 77 **(FB)** 342*a*
——*S. 24* — Enhancement — Parties not contemplating increase of rent — Tenant taking water without landlord's permission — Landlord can charge excess rent for water so used—Such rent does not amount to enhancement **(FB)** 342*b*
——*S. 26 (3)*—Land granted to *D* permanently by predecessor of *P*—No rent was payable for first seven faslis and subsequently Rs. 19.12.0 per annum for ever — *P* suing *D* claiming Rupees 959 7.0 for three years — Matter held governed by S. 26 (3) and question for decision was what was lawful rent at the time of grant — Document embodying terms of grant held admissible in evidence even though not registered 769
——*Ss. 30 (1) (b) and 168 (2)* — In settling fair and equitable rent under S. 168 revenue officer is not bound by limitations of S. 30 (1) (b) 381
——*S. 42*—Decree cannot be passed for back rent also 459
——*S. 74*—S. 74 was not intended to settle disputes regarding validity of adoption by landlord or claims of rival landlords *(Obiter)* 738
——*S. 189* — Permanent right of occupancy conferred upon tenant cannot be fettered by any contract — Fact that such contract is result of bona fide settlement of disputed claim makes no difference 504

Madras Gaming Act *(3 of 1930), S. 3* — Accepting rent for building used for gaming is making profit from gaming within S. 3 705*a*
——*S. 3* — Gaming house restricted to particular section of public is still common gaming house 705*d*
——*Ss. 5 and 6*—Presumption under S. 6—No need of evidence for prosecution that warrant under S. 5 was issued on proper information — Presumption may be raised under S. 114 (e), Evidence Act 705*c*
——*S. 5* — No form is prescribed for warrants under S. 5—All that S. 5 requires is that "Magistrate shall have reason to believe"—If he has, he can issue warrant under S. 5—No necessity to record reasons 550
——*Ss. 5 and 6* — Drafting is defective 29*a*
——*Ss. 5 and 6* — Reasons for issue of search warrant not before Court—Mere finding of instruments of gaming by itself is not sufficient evidence that place is common gaming house 29*b*
——*S. 6*—Mere finding of instrument of gaming in house searched on warrant under S. 5 is evidence that building is used for

Madras Gaming Act
gambling—That evidence alone is sufficient for conviction 705*b*
——*S. 12*—Gambling to be offence must be in public place—Such place means place regularly and necessarily used by people 74

Madras Hereditary Village Offices Act *(3 of 1895), Ss. 6, 13 and 21* — Direction in S. 6 is mandatory—Choosing of new office.bearer—Claims of old family possessing office should be considered—Right to office can be enforced by civil suit : *View of Napier J. in 9 M L W 90=A I R 1919 Mad 312=50 I C 185 ; 54 M L J 357=A I R 1928 Mad 497=109 I C 661 and 12 M L W 767=A I R 1920 Mad 556=54 I C 816, OVERRULED* **(FB)** 441*a*
——*S. 6 (3) (as amended in 1930)*—Sub. s. (3) is not retrospective **(FB)** 441*b*
——*S. 13*—Right of suit given by S. 13 is not inconsistent with continuance of power of control given to District Collector by S. 3 of Regulation 7 of 1828 903
——*Ss. 13 and 21*—Village blacksmith of ryotwari village alienating his service inam land dismissed and his widow appointed in his place—Suit by widow for recovery of possession against alienee held to be exclusively triable by Revenue Court and not by Civil Court 505
——*Ss. 13 and 21*—Claim to office — Revenue Courts alone competent to decide — Board of Revenue is final authority in second appeal—Order of Board is decree of final Court—Civil Courts cannot interfere with it 483*a*
——*S. 23*—Appeal before Board of Revenue can be decided without hearing parties 483*b*

Madras High Court—Criminal Rules of Practice, R. 85—Omission to comply with R. 85 does not vitiate confession provided provisions of S. 164, Criminal P. C., are complied with 490*b*
——Fees Rules (1933), O. 2, R. 2—provisions are in addition to and not in substitution for O. 33, Civil P. C. 486*b*

Madras High Court, Original Side Rules, *O. 7, R. 7 (2)*—Leave to defend unconditionally should generally be given where defendant has shown that he has fair case for defence—Defendant's case must be bona fide and should raise triable issue — Court should be satisfied that there is a fair issue to be tried by competent tribunal 962*a*
——Rules of practice, O. 41, R. 7 — Word 'ordinarily'—Interpretation stated 669*b*

Madras Hindu Religious Endowments Act *(2 of 1927), S. 9 (5)*—Court deciding under S. 9 (5) must advert to both the provisions contained in S. 9 (5) — Failure to do so would be ground for revision under S. 115, Civil P. C. 321*a*
—— *Ss. 9 (5) and 84* — Provisions of succession to trusteeship made by founder need not continue to be in force at the time of petition under S. 84 321*b*
——*S. 9 (5)*—Excepted temple—Trusteeship in one family for four generations—Temple should be regarded as 'excepted' and trusteeship hereditary 98*a*
——*S. 9 (7)* — Mutt should be public endowment—Property given for private use of head is not public endowment *(Per Leach C. J.)* 810*a*
——*S. 9 (12)*—Question of intention to dedicate place for public use or of user by public as of right is necessarily matter for inference—Inference that institution must have been dedicated for use by public when can be drawn stated 209
——*S. 43*—Orders under, are final—Jurisdiction of Civil Courts is barred 972*c*
——*S. 43 (3)*—Jurisdiction of Civil Courts—Order of dismissal validly communicated—Allegation that order was arbitrary does not give Civil Courts jurisdiction to scrutinize it 972*a*
——*Ss. 62, 63 and 73*—In case of temple governed by the Act, reliefs for framing scheme of management and for rendering of accounts by existing trustee cannot be claimed in ordinary suit for declaration of right to trusteeship—Court is not entitled to institute system of rotation entitling plaintiff to enjoy office along with existing trustees 661*c*
——*S. 63*—Scheme framed by Board—Clause in scheme providing that it would be in force for two years—Subsequent order substituting fresh period in old scheme—Subsequent order held amounted to framing of new scheme and suit under S. 63 brought within six months of that order was in time 614
——*S. 73 (3)*—Suit by worshippers of temple against Sukhavasis for declaration that latter are not entitled to receive fixed share in prasadams and for injunction restraining trustees from allowing such claim—Such suit does not come within purview of S. 73 (3) 250*b*
——*S. 84*—Appeal—Revision and not appeal lies from order under S. 84 (2); 214*a*

Madras Hindu Religious Endowments Act ——*S. 84 (2)*—Persons successfully opposing trustee's application under S. 84 are proper though not necessary parties to application under S. 84 (2) 384

Madras Impartible Estates Act *(2 of 1904), S. 4*—S. 4 does not prohibit grant of cowle at favourable rent or umbalam land rent free—Cowle granted long before Estates Land Act came into force — Presumption in favour of grant likely—Cowle is good encumbrance on estate 374*b*

Madras Irrigation Cess Act *(7 of 1865), S. 1*—Payment of cess by person under mistaken notion of liability—He is not estopped from denying his liability 838*b*

——*S. 1, Proviso* — Inamdar receiving water from Government channel — Old barrier replaced by new one with Government's permission—Channel not widened —More land brought under cultivation after erection of new barrier — Inamdar held not liable to pay cess for new cultivation — Right to take water was governed by S. 1, Proviso 838*a*

——*S. 1, Proviso 1*—Water irrigating land belonging to Inamdar admittedly coming from artificial channel belonging to Government—Inamdar claiming to be entitled to use water free from cess must prove engagement with Government within meaning of Proviso to S. 1—He must also prove that water which he has used comes from mamool source of supply — The fact that channel flows through an Agraharam and Inamdar abstracts water at point situated in Agraharam makes no difference—Question is not whether property has become third person's property but whether channel is one belonging to and constructed by Government 619

——*S. 1, Proviso 1*—Riparian land—Pre-settlement inam land situated on bank of stream—Channel from stream, origin of which was unknown, irrigating portion of land—Small portion only noted as wet in inam register — Land held riparian tenement—Riparian owner held entitled to irrigate whole land without liability to pay cess 68

——*S. 1, Proviso 2* — User of water with permission of Public Works Department—Penal water rate cannot be levied 400*b*

Madras Local Boards Act *(14 of 1920), S. 88*—Grant originating in ancient times —Payment to zamindari of kattubadi cess —No inference that grant was by zamindar and not by ruling power 219*a*

Madras Local Boards Act

——*S. 88*—Inam lands not included in assets of zamindari—Inamdar is directly connected with Government for payment of cess 219*b*

——*S. 93*—Receipt of money within Local Board area by person within area out of income of his foreign money-lending business from his foreign agent amounts to receipt of income from money lending 941*b*

——*S. 93*—Assessee must be assessed to half yearly tax within the half year to which tax relates 941*c*

——*Ss. 159 (1) and 207*—Prosecution for failure to obey notice to remove encroachment—Acquittal does not bar prosecution for failure to obey fresh notice : *58 Mad 513 = 67 M L J 873 = A I R 1935 Mad 56 = 153 I C 322, OVERRULED* 847*b*

——*S. 199 (c), R. 35 (2)* — Government can stay proceedings at any time before result is declared—Election Commissioner can enquire only after declaration of results 189

——*S. 214 (2)* — Warrant to attach property for arrears of tax — Facsimile stamp of President's signature is sufficient 659*a*

——*S. 223* — Prosecution sanctioned by President—Complaint filed by section officer — Subsequent application by section officer to withdraw prosecution — Section officer held competent to apply for withdrawal 524

——*S. 225*—Test for applicability of S. 225 — Suit for balance of amount due under contract made with District Board to construct culvert on road within its area is not governed by S. 225 239

——*S. 228, Sch. 4, Rr. 11 and 28* — Professional tax—President, Panchayat Board, rejecting assessee's returns and making assessments arbitrarily — Assessee making payment and appealing against assessment —Board rejecting appeal—Suit by assessee for refund of tax illegally collected — Suit held was maintainable as R. 11 of Sch. 4 was neglected — Tax held was paid under R. 28 and as such was not voluntary : 23

——*Sch. 4, Rr. 11 and 11-A (5) (as amended by Act 11 of 1930)* — President calling on profession tax assessee by notice to produce accounts and assessing profession tax on arbitrary basis — Levy of tax held illegal 211

Madras Marumakkathayam Act *(22 of 1933), S. 38* — Share of junior member in tarwad can be attached in execution of

Madras Marumkkathayam Act
decree against him for his personal debts 553a
——*Ss. 43 and 46* — Attachment of judgment-debtor's share in tarwad property — Pending attachment, registration of tarwad as impartible — Court's order refusing to proceed further with execution is revisable 555a
——*S. 43* — Attachment by creditor of judgment-debtor's share in tarwad property — Attachment does not terminate by subsequent registration of tarwad as impartible 555b

Madras Mining Rules, *R. 46*—Words 'right of applicant' in R. 46 cannot be read as recognition of vested right—Effect of R. 46 stated 749b

Madras Prevention of Adulteration Act *(3 of 1918), S. 5 (1) (d) and Rr. 24, 28 and 29 framed under S. 20 (2)* — Supply of sample to Sanitary Inspector under S. 14 is not sale 541

Madras Regulation *(28 of 1802), S. 34, Cl. 6* — Legal relationship and nature of rights and obligations between zamindar and tenant whose tenure is attached under Cl. 6 explained 295a

Madras Revenue Recovery Act *(2 of 1864), S. 38 (5)*—Collector cannot go into question of benami—Once sale is confirmed purchaser's name must be registered: 283c
——*S. 40* — Revenue sale directed against jenmi for arrears of revenue — Sale certificate granted to purchaser—Application by purchaser under Sec. 40 for possession — Tenants under kanamdar claiming value of improvements — Purchaser is entitled only to symbolical possession 835a
——*S. 40* — Position of purchaser at revenue sale is similar to decree-holder — Purchaser is entitled to remedies available in execution proceedings 283a
——*S. 40* — Benami — Revenue purchase can be benami —Bar of S. 66, Civil P. C., also does not apply to benami purchaser—Process can be issued after necessary enquiry 283b
——*S. 42*—Tenants under kanamdar claiming value of improvements are not holders of encumbrance 835b
—— *S. 58* — Apportionment of liability — Power of Civil Court — Apportionment should be proportionate 925

Madras Suppression of Immoral Traffic Act *(5 of 1930), S. 6 (2)*—Search of house made by Inspector under warrant not under S. 6 (1) but under Ss. 13 and 14 issued by Commissioner who was not satisfied that there were girls in house under 18 years of age—Search resulting in finding of girls — Order of Magistrate under S. 6 (2) —Order held could not be deemed to be under S. 6 (2) 667

Madras Town Nuisance Act *(3 of 1889), S. 3 (12)*— Offence under — Binding over under Sec. 106, Criminal P. C., whether desirable discussed—S. 106, Criminal P. C., should be sparingly used when offence is a petty one 795

Madras Village Courts Act *(1 of 1889), S. 15* — What suits can be entertained by village Courts explained 497a
——*S. 15* — Jurisdiction — Courts being special tribunals their own laws must decide their jurisdiction — Provisions of Civil P. C. should not be applied 497c
——*S. 25* — Carrying on business — Mere purchase of sarees at a particular place would not mean carrying on business there 497b

Mahomedan Law—Applicability—A Cutchi Memon is governed by the Mahomedan law so far as the execution and revocation of his will is concerned—The will need not be in any particular form and it can be revoked by any definite expression of a present intention to revoke it 616a
——Dower—Madras Presidency — Dower not postponed by agreement—Presumption is that entire dower is prompt and payable on demand 107
——Dower—Liability of heirs of deceased is not personal but only with respect to assets of deceased 25b
——Gift—Gift to brothers jointly—Donees take as tenants-in-common and not as joint tenants 677b
——Legitimacy — Marriage with living wife's sister — Children of such marriage are legitimate 141

Malabar Compensation for Tenants Improvements Act *(1 of 1900)* — Benefit conferred by Act does not extend to lessees of buildings or houses or shops 171
——*S. 5* — S. 5 abrogates Art. 139, Limitation Act 581a

Malabar Law—Kanom — Redemption — Deed distinctly providing that amount borrowed thereunder should be paid at the time of redemption of prior kanom — Prior mortgage cannot be redeemed unless mortgagor offers to redeem both 562a

Malabar Law
——Kanom—Mortgage of undivided share —Suit for redemption without partition is maintainable 562c
——Karnavan—Acts of—Karnavan entering into kuri chit transaction on behalf of tarwad — Transaction found on the whole to be prudent — Stake holder acting bona fide in admitting karnavan in the kuri chit —Transaction is binding on tarwad 468a
——Karnavan — Acts of—Mortgage executed by karnavan as representing tarwad — Court has power to investigate into necessity for imposing onerous terms and to reduce them reasonably 468b
——Karnavan—Powers of—He can make maintenance grant in favour of junior member or group of members constituting tavazhi — Such arrangements are binding on succeeding karnavan — When arrangements can be altered — Maintenance grant in favour of persons to be born included in tavazhi as one entity is valid—Such grant is capable of revision or enhancement — Such arrangements cannot be assailed by succeeding karnavan 289a
——Karnavan—Assignment of right to redeem by way of Melcharth— When can be attacked—Assignment to member in lieu of maintenance with right to redeem is however valid in law 289b
——Nambudries — Rule of Hindu law regarding pious obligation does not apply to Nambudries 643a
——Tarwad — Incidents of, explained — Comparison with Mitakshara law 242a
——Tarwad — Conversion — Effect of — Status as member and incidents of Tarwad are severed—Words "tenancy-in-common" are hence not properly applicable 242b
——Tarwad — Gift — Presumption that donees take property with incidents of tarwad — Gift to members some of whom are converts—Property is taken as tenants-in-common and each donee can claim separate share 242c
——Tavazhi—Tavazhi consisting of female and descendants in female line as subdivision of tarwad is legal entity and can hold property as distinct unit 202a

Malabar Tenancy Act *(14 of 1930), S. 33* —Tenant—Power of purchasing landlord's rights—Tenant being mortgagor with lease back—Tenant can redeem portion of mortgaged property — No distinction made between ordinary tenant and tenant being mortgagor with lease back 263

Married Women's Property Act *(3 of 1874)*—Value of English decisions—As the Married Women's Property Act of 1874 followed similar legislation in England, English decisions are directly applicable **(FB)** 604c
*——*S. 6*—'Policy' — Policy stating that proposal and declaration were made part of contract — Statements in proposal must be read as being incorporated in policy **(FB)** 604a
——*S. 6*—Policy expressed in proposal, which was part of policy, to be for benefit of 'self or wife'—Words held created trust in favour of wife **(FB)** 604b
*——*S. 6*—Word used in policy of assignment leading to conclusion that policy is for benefit of wife—Policy will be deemed to be trust for benefit of wife according to S. 6 — Creditor of assured cannot treat policy as being property of assured and claim assignment of it 413
*——*S. 6* — Expression " policy of insurance" does not mean proposal or prospectus — For a policy to come under S. 6, it must appear on face of policy that it is effected for benefit of wife or children 234b

***Master and Servant** — Contract of service for definite period—Before completion of period, employer terminating employment and employing another servant at cheap salary — Discharged servant is entitled to salary for full period unless employer shows that he had opportunity of other employment which he refused 672a
*——Contract of service for definite period —During employment servant remaining absent from place for certain period but performing master's duties—Employer not electing to dismiss him but continuing his services—Servant is entitled even to salary for period during which he was absent 672b

Minor—Discharge by de facto guardian — Validity — De facto guardian validly in charge of minor's affairs can give good discharge in respect of debt due to minor 950a
——De facto guardian—Powers of—Ordinarily first act of intermeddling with estate of minor would not be act of de facto guardian, if he has not already become one before hand—Nor subsequent management of estate makes the first act as one of de facto guardian — Position of de facto guardian recognized by those interested in minor before any act of intermeddling has been accomplished—Courts might recognize the

Minor
first act of such person as binding on minor 950*b*
*——Guardian de facto—Acknowledgment by — Limitation under S. 21, Limitation Act is not saved : *24 M L J 428=19 I C 362, OVERRULED* 853
——Minor on attaining majority can repudiate transfer by guardian without filing suit under Art. 44, Limitation Act 822*b*
*——Covenant by guardian to sell immovable property—Covenant cannot be enforced against minor — Minor is not liable to return earnest money paid to guardian under covenant 765
——Alienations by guardian—Necessity—Sales by minor's guardian to discharge debt—Alienations to different persons and for amounts undoubtedly due—No suggestion that alienees acted together — Fact that guardian does not make best use of sale proceeds of one alienation does not make the rest any the less binding on minor's estate—Alienee deliberately not making enquiries and paying larger consideration than really due—Fact that vendor is respectable does not make alienation binding 677*a*
——Debts incurred by guardian—Creditor's right of subrogation to guardian's rights against minor's estate—In absence of finding that guardian has right of recourse against minor's estate, creditor of guardian is not entitled to right of subrogation 398
——Alienation by guardian to pay binding debts of minor—Actual pressure on estate is not necessary 322*b*
*——Decree against—Grounds for setting aside such decree stated — Compromise decree against minor can also be set aside even if it is sanctioned by Court—Grounds for setting aside such compromise decree stated 13
Mortgage—Suit on—Minor alleging that he was minor on date of execution of mortgage—Burden is on him to prove that 959*b*
——Agreement to mortgage does not create charge **(FB)** 889*b*
—— Subrogation — Partial subrogation is permissible even under law prevailing prior to amendment of T. P. Act in 1929 779*c*
——Subrogation—Accrual of right—It is not necessary that payment must be made in addition and not out of purchase money 779*d*
——Subrogation—Person discharging prior mortgage personally liable to pay it—He is not entitled to subrogation—In other cases question is one of intention 779*e*
—— Suit for partition by *G* branch of family against *S* branch — Pending suit *S* mortgaging family properties as manager of joint family—Mortgagee obtaining decree for substituted security in shape of whatever might be allotted to *S's* branch—Partition suit ripened into decree—Mortgaged properties allotted to *G's* branch and in addition certain cash sum as owelty to be realized out of share allotted to *S's* branch—*G's* branch held entitled to charge over properties allotted to *S's* branch—Proper security to which mortgagee was entitled stated 767
——Suit on—Mortgagor becoming insolvent and his assignee, Official Receiver, impleaded as defendant—Mortgagee appointed receiver in presence of and after objection by Official Receiver—Mortgagee applying for particulars regarding certain leases granted by Official Receiver—Application allowed—Held that Official Receiver was bound by the order and could not take exception to it 594
——Redemption — Mortgage sought to be redeemed specified, but property misdescribed—Suit should not be dismissed: 562*b*
*——Equitable— Deposit of title deeds as collateral security for loan—Terms of loan already agreed upon some days before—Deposit of title deeds followed by memorandum evidencing deposit and not itself being complete record of mortgage transaction—Memorandum does not require registration 547*a*
——Substituted securities — Priority — After partition rights in substituted security of two rival claimants should be proportionate to value of original security standing on date of partition—S. 48, T. P. Act, has no application to such case 547*c*
——Marshalling—For marshalling there must be two sets of properties, one subject to both mortgages and other only to earlier mortgage—Where only one and not two items are liable to be sold, doctrine does not apply—Right to contribution is not however lost 503*a*
——Mortgage of four items by *A* for himself and his sons to *C* and *D*—Purchase by *A* of remaining six items—To raise money for purchase *A* mortgaging all ten items to *P*—Suit by *C* and *D* on their mortgage without impleading *P*—Sale proceeds being insufficient, *C* and *D* obtaining personal decree for remainder and attaching remain-

Mortgage
ing six items — During attachment sale of six items to *P*—Suit by *P* on his mortgage —*P* held not precluded from bringing mortgage suit against six items by reason of purchase during attachment—Shares of sons in items 1 to 4 held liable 465
——Construction—Plaintiff though possessing executable money decree, entering into mortgage with judgment-debtor for lesser amount in full satisfaction of decretal amount—Mortgage amount made payable 'on demand'—Mortgage held only a security and amount payable only on demand 429*a*
*——Redemption — Clog — Right of redemption to accrue after certain period—If right not exercised on such date, mortgagor subsequently to have right to redeem in any succeeding year only on a particular day of the year—Latter clause held clog 405*b*
*——Redemption — Puisne mortgagee in redeeming prior mortgage, becoming entitled to mesne profits — He cannot tack on such mesne profits to sum due under his mortgage in redemption by subsequent mortgagee merely because prior mortgagee's rights had vested in subsequent mortgagee —Liability of original mortgagor if any for such mesne profits held only equity available against him personally but not covenant running with land 405*e*
——Appointment of Receiver — Receiver can eject mortgagor 325*a*
*——Suit on — Costs — Court can pass personal decree against non-mortgagor: 226
——Costs—Mortgage suit against mortgagor, puisne mortgagees and purchaser of equity of redemption—Mortgagor denying liability and remaining ex parte — Other defendants contesting suit—Decree for personal liability for costs held could be passed against mortgagor as well as other defendants 212
*——Subrogation—Priority—*A* advancing money to *B* to pay off mortgage decree against *B* on understanding that *B* would execute mortgage deed in favour of *A* to secure repayment—Deed not executed—Subsequently *B* executing deed of settlement in favour of *Z*—*C* advancing money to *Z* in ignorance of *A*'s rights—Title deed lying in Court and not with *A*—*A* held entitled to equitable subrogation but his claim should be postponed to that of *C*: 161
——Person borrowing amount less than Rs. 100 and executing document thereby intending to mortgage property from ensuing year—Before beginning of that year, document is agreement to mortgage and delivery at the time of execution of document is not necessary 85*a*

Motor Vehicles Act *(8 of 1914)*, Rules under—Madras Motor Vehicles Rules, R. 30 (a)—"Let for hire"—Lorry without "G" permit engaged for journey from Calicut to Pollachi for hire—Offence is committed in District of Malabar as well as in District of Coimbatore if lorry gets out of limits of District of Malabar 743*a*
——*S. 16*—Madras Rules, R. 15.A—Onus of proof of overloading is on prosecution—Knowledge to accused, how can be imputed stated 998
——*S. 16*—Madras Motor Vehicles Rules, R. 30 (a)—Trial for violating R. 30 (a)—Several offences committed on different dates by several owners and drivers—Joint trial is objectionable 743*b*
*——*S. 16*—Madras Motor Vehicles Rules, R. 30 (a)—Owner of private motor lorry carrying goods for reward on one occasion without license—Offence under R. 30 (1) is committed 233
——*S. 16*—Motorist from outside British India not evading license fee but actually paying it on spot—Prosecution thereafter is illegal 128

Murder — Evidence—Accused alleged to have murdered child—Sole fact proved against him that he was seen in company of child not far from where corpse was found and some time before murder—Accused commonly seen with child previously—Accused held was not responsible for murder 336*b*

Negotiable Instruments Act *(26 of 1881)*, *S. 9*—To determine whether assignee is holder in due course, promissory note payable on demand cannot be considered to have matured on date of its execution—Promissory note payable on demand assigned—Time between its execution and assignment very short—Promissory note cannot be considered to have matured on date on which it is assigned and assignee is holder in due course 911*a*
——*Ss. 9 and 82*—Payee of promissory note executed by *A* and *B* relinquishing his claim against *B* — Assignee of note taking it with knowledge of this arrangement is not entitled to decree against *B* also 599
——*S. 50* — Endorsement — Ordinarily only property in instrument and not debt

Negotiable Instruments Act
is transferred — For assignment of debt, endorsement must comply with provisions of stamp duty (Per *Leach C. J.*) **(FB)** 377*c*

Oaths Act *(10 of 1873), S. 12*—Challenger should not be permitted to resile, except on good grounds, after his offer is accepted by other party—Court should administer oath in spite of revocation of his offer by challenger 385*a*

——*S. 12*—Challenger to perform some act in proceedings for administration of oath as condition precedent to his offer to be bound by oath — Challenger refusing to perform the act as agreed — Condition should be deemed to have been waived by him 385*b*

——*S. 12*—S. 12 does not apply to refusal of challenger to do certain act in compliance with form of oath stated in agreement 385*c*

Pardanashin Lady—Execution of deed—Not only execution, but understanding of contents and free and independent will must be proved 43*a*

Partnership—Lease obtained by partnership for definite period—*B* becoming partner—Parties intending that partnership should last as long as duration of lease—No provision in lease for renewal—One partner *A* shortly before termination of old lease obtaining fresh lease of same land openly in competition with others—*B* held could not claim interest in new lease or claim it to be treated as asset of old partnership 929*a*

*——Accounts—Joint family, partner in firm—Partnership dissolved—Member of joint family can recover his share in the family assets after taking account, if necessary—Suit would not lie if there has been no dissolution—But Court cannot dismiss suit as framed without deciding question whether or not there was dissolution before suit 388*a*

*——*A* becoming partner — Number of partners increasing beyond 20 without *A's* knowledge—Partnership subsequently converted into joint stock company, *A* being given no share—Suit by *A* for dissolution and for share of his profits in partnership —*A* held entitled to share but suit without impleading all partners held not maintainable 151

Partnership Act *(9 of 1932), Ss. 13 and 17*—Agreement between two partners of firm as to share of profits and losses—Death of one partner and substitution of

Partnership Act
son in his place—No new agreement between them as to share in profits and losses—Son held entitled to share on same basis as his father under S. 17—S. 13 held inapplicable 5

——*S. 53*—Partnership consisting of *A* and *B* carrying on mining business — Shortly before termination of lease and partnership *A* taking new lease of same land and sending notice to settle accounts of partnership which was terminating—*B* refusing to do so and obstructing *A* in working mine by using boiler which they were previously using—*B* held could not take advantage of S. 53 and *A* held entitled to damages 929*b*

——*Ss. 69 and 74*—Right of action accruing before passing of Act — Suit instituted after passing of Act — S. 69 does not affect right but alters procedure which must be followed 185*b*

——*S. 69* — Suit instituted contrary to provisions of S. 69 cannot be validated by subsequent compliance 185*c*

**——*S. 69 (2)*—Retrospective nature—Section cannot be treated retrospectively —Retrospective nature particularly saved by 74 (b) (Per *Pandrang Row and Varadachariar JJ.*; *Venkataramana Rao J.* contra) 688*a*

——*S. 69 (2)*—Registration—Subsequent registration will not validate original institution 688*d*

——*S. 74*—Retrospective effect—Operation of S. 74 is not confined only to suits and proceedings which were pending at commencement of the Partnership Act 185*a*

——*S. 74 (b)*—Cause of action accruing before 1st October 1932 is saved from the bar of S. 69 (2) 688*g*

Part Performance — Widow obtaining decree for maintenance against her step-sons—Maintenance made charge on family property—One step-son selling his share to other persons — Agreement between widow and alienees providing that in case alienees pay balance of maintenance, widow would execute formal release of her charge on property—Balance not paid—Assignee of widow's decree selling property in execution and bringing suit for possession of share—Doctrine of part performance held did not apply **(SB)** 357*b*

Penal Code *(45 of 1860), Ss. 109 and 405* —*A*, employee in corporation of Madras, issuing cheques for payment at Corpora-

Penal Code
tion treasury — Cheques presented for encashment at Corporation treasury and money obtained even when person drawing cheque had no funds to meet them and many of the cheques so encashed were dishonoured subsequently — Money so obtained used by *A* for his private business — *A* and his fellow employee *C* charged with offence of abetment of criminal breach of trust — No evidence to show that *C* had done anything which facilitated cashing of cheques — *C* held not guilty of offence of abetment of criminal breach of trust — *A* held guilty, as abetting by him was one by instigation ; his case was covered by Section 109 996*a*

——*S. 109*—Omission by public servant to bring to notice of higher authorities offence committed by fellow servant does not amount to abetment of offence 996*b*

——*S. 109* — Abetment by instigation—Instigation need not be in any particular form 996*c*

**——*Ss. 120-A, 120-B* — Actual offence committed—S. 120.A or S. 120.B is not applicable — Person committing offence should be tried for substantive offence—Persons in conspiracy to do that offence should be tried for abetment 130*b*

——*S. 124-A* — Report of short-hand writer—Short-hand writer neither missing nor misunderstanding very much, but committing a few mistakes in recording and transcribing—Report is reliable though undue importance to particular sentence is not safe 758*e*

——*S. 124-A*—A man may make ninety-nine non-seditious speeches, yet his hundredth speech might be full of sedition 758*f*

*——*S. 124-A*—Essentials of—Speech is to be adjudged not by the views of accused or his political party—Advocacy of principles is not sedition but adoption of methods and modes intended to cause disaffection towards Government is — It is possible to express dissatisfaction with Government without exciting disaffection 758*g*

——*Ss. 148 and 120-B*—Accused found in temple at middle of night with house breaking implements, aruvals and gun — Held that they were guilty under S. 143, but not under S. 120.B 726

*——*S. 147*—Seven persons charged with offence of rioting—Four of them acquitted —Rest also should be acquitted 392

Penal Code
——*Ss. 159 and 160* — Word "affray" interpreted—One party beating another—Latter remaining passive — Offence of "affray" held cannot be established : 924

——*Ss. 186 and 353*—Warrant need not be legal 659*b*

——*S. 218*—What is essential is making of entries with intention to cause loss or injury and not whether accused will be able to accomplish that object 595*a*

*——*Ss. 219 and 218*—Village Munsif making entries in register of suits that certain suit was filed when in fact it was not so filed and also that judgment was pronounced when in fact it was not so pronounced—He cannot be convicted under S. 219 but under S. 218 595*b*

——*S. 225-B*—District Munsif in pursuance of High Court's order issuing order that warrants of arrest should thereafter be signed by head clerk — Escape from arrest is offence under S. 225-B even in absence of authorization by succeeding District Munsif to head clerk to sign warrant of arrest 536

——*S. 235* — Conviction — Mere physical possession of instruments or material of counterfeiting are not sufficient—Prosecution must prove intention of using same 393

——*S. 294-A*—Government issuing order declaring chit funds illegal but adding that prosecution would be withheld provided chit funds were wound up within certain time and subscriptions were repaid — Accused not repaying subscription within time and therefore prosecuted under Section 294.A — Withholding of prosecution held not tantamount to authorization of chit fund and accused if proved to have conducted chit fund held liable under S. 294-A 715

——*S. 302*—Accused charged with murder of woman, making voluntary confession of having committed it and also producing jewels worn by woman at the time of her death—Confession sufficiently corroborated by other evidence — Accused acquitted by Sessions Judge by reason of certain discrepancies in evidence—Acquittal held to be miscarriage of justice 806

——*Ss. 302 and 304* — Murder — Injury necessarily resulting in death — Intention or knowledge determines nature of offence 723*b*

——*Ss. 361 and 363*—Accused convicted under S. 363 for having deceitfully enticed away his own child from custody of his

Penal Code
mother, who was deserted by him and in whose custody child was since its birth for more than three years—No proof of purpose for which child was taken away—Conviction held not proper 656*a*
——*S. 397* — Robbers exhibiting dangerous weapons in such manner as to intimidate persons robbed and to facilitate robbery — They can be punished under Sec. 397 even if blows were not actually inflicted 477*a*
——*S. 401*—Several persons tried under S. 401 of being members of gang—Evidence that big gang was committing acts of depredation all over India and that some of the accused were found associated together in crime characteristic of gang is sufficient to justify Judge on very little proof of association in leaving it to the jury whether particular accused was member of gang 858*a*
——*S. 401*—Evidence of association before period of charge is admissible to corroborate other evidence of association during that period 858*d*
——*S. 401*—Two Sessions cases started against accused tried under Sec. 401 — Accused members of one gang—Two cases can be combined together 858*e*
——*S. 401*—Several persons tried under S. 401—Previous convictions of accused not properly proved — Prosecution case weakened — Ordinary course would be retrial—Retrial should not however be ordered where it would involve another elaborate trial at great cost to Crown and accused and where accused have been in jail for several months 858*i*
*——*S. 405* — Sub-pledge by pledgee of goods pawned to him to the extent of his interest therein is not criminal breach of trust 551
——*S. 409* — Offence under, cannot be tried by Second Class Magistrate—Alteration of conviction to one under S. 409/109 is illegal 315
——*S. 411*—Lost currency note found by child — Possession traced to accused and recovery made—No offence under S. 411 held proved 172*c*
*——*S. 415*—Two ingredients—Dishonest inducement and deception—Either by itself is not cheating—Further damage or harm to body, mind, reputation or property must be established—Issuing post-dated cheque which was dishonoured held not cheating 129*b*

Penal Code
——*Ss. 500, 182 and 211*—Presentation of petition to Sub-Inspector of Police making certain allegations, alleged to be false, against a person and praying for protection amounts, if at all, to offence under S. 182 or S. 211 and not under S. 500—Accusation made in good faith—Case falls within Exception 8 to S. 500 904*a*

Pleadings — Amendment — Party cannot place inconsistent case—Amendment cannot be permitted when party wishes to change specific legal relation 669*c*
——Amendment of plaint should not be granted if it takes away right accrued to defendant by lapse of time 669*d*
——Amendment of—Defects in pleadings not affecting substantial rights—Amendment should not be refused 388*b*
——Amendment of plaint in second appeal — Objection to maintainability of suit taken in written statement — Defendant risking point being decided against him in lower Courts — Amendment of plaint in second appeal is unfair 331*b*

Possession — Presumption is of lawful origin in case of long and quiet enjoyment 415*c*

Practice — Amendment — Suit by mortgagee to enforce his half share in mortgage — Sub-mortgagees made defendants but subsequently transposed as co-plaintiffs—Application by them for amendment of plaint by including other half share held should be allowed 708*b*
——Amendment of pleadings — Power to direct amendments in plaint should not be exercised to impose additional burden — It is not Court's duty to advise plaintiff as to what relief he should ask for — If he asks for mere declaration, court-fee should be paid on relief he actually prays for—If prayer is found insufficient, he is himself to blame 645*b*
*——Costs—In proper case, unsuccessful defendant can be ordered to pay successful defendant's costs directly 117*c*
——Court should not depart from long established practice unless it is contrary to law **(FB)** 435*b*
——Judgment — Duty of Judge—Judges writing judgments should be dignified and restrained in expression of their opinion—They should avoid expressions giving rise to comment that they had made up their minds before case had started 634*c*
——Judgment — Contents of — It is not incumbent upon the Appellate Court to

Practice
repeat in extenso the arguments of the trial Judge which it accepts, but the party is entitled to a considered opinion of the appellate tribunal—It is not the first Court's view but that of the second Court that is final if the question is one of fact 253*b*
*——Order of Court setting aside ex parte decree and granting decree-holder costs—Decree-holder accepting costs without protest — He cannot subsequently attack Court's order setting aside ex parte decree 603*a*
——Relief — Pleadings defective — Court can grant relief not prayed for, if it is not inconsistent with facts of case, provided defendant is not placed at disadvantage 865*f*
——Witness — Credibility — Inconsistent answers by witness from hearsay—Adverse inference not correct 47*a*
* **Presidency Small Cause Courts Act** *(15 of 1882), S. 38* — Powers of Full Bench under S. 38—Nature explained—It has no power to order amendment of plaint nor has it jurisdiction to order re-trial after proposed amendment has been permitted by trial Court 669*a*
Presidency Towns Insolvency Act *(3 of 1909), S. 17* — Notice of application for leave granted to Official Assignee only — Leave granted cannot be so construed as to authorise suit against insolvent 643*b*
*——*S. 17*—No distinction can be drawn between suits relating to property and suits against person of insolvent—Leave is necessary even to enforce personal remedy 643*c*
*——*S. 49 (3)* — Proposal of Official Assignee to pay financing creditor 25 % of net realizations from litigation as purchase price and to treat such price as 'costs in administration' is neither against law nor impracticable 143
*——*S. 58 (5)* — Powers of Court for committing an agent for contempt are not limited by S. 58 (5) — It has power to commit for contempt person who deliberately obstructs lawful order of Court on insolvent's behalf : *A I R 1938 Mad 175 =175 I C 543, REVERSED* 927
*——*Ss. 58 (5) and 33 (4)*—Obstruction by insolvent's agent in realizing insolvent's property — Contempt proceedings against agent cannot be taken 175
Prevention of Cruelty to Animals Act *(11 of 1890), S. 3 (a)*—Scope — Question whether there was overloading or not is to be decided on facts by Magistrate 949
Principal and Agent—By unauthorized borrowing by agent, money of third person applied to benefit of principal—Principal is jointly and severally liable to restore money even if agent had other funds in his hands at the time of borrowing—This equitable principle regarding creditor's right against principal is not excluded by Contract Act 966*b*
——Independently of any agreement to that effect agent is not entitled to commission for collecting old outstandings of firm 725*a*
——Custom among Nattukottai Chettis—It is customary among Nattukottai Chettis to pay ten per cent. of the net profits to the foreign agent as samans 725*b*
*——Contract by elder brother to mortgage his sister's property—Contract signed by brother in his own name without any qualification—But in body of document, brother described as authorized agent of sister — This description held excluded personal liability of person signing contract 146
*——Suit for accounts—Agent entitled to share of profits—Interest on capital is not to be charged in taking accounts unless there is agreement to that effect 38*b*
*——Suit for accounts—Certain realizable assets at date of termination of agency not realized due to laches on part of principal or subsequent agent—Agent is entitled to have credit for such assets in calculation of profits between them 38*c*
Principal and Surety — Discharge of surety—Surety undertaking to pay any amount that may be decreed against two defendants in a suit—Compromise decree passed as against one defendant and suit as against other defendant dismissed—Surety is discharged 422
Promissory Note—Promissory note executed by *A* in favour of *B*—Agreement between parties that *A* should pay future instalments of chit fund which were originally to be paid by *B*'s brother and should get credit for the same towards promissory note—Suit on promissory note by endorsee who was not holder in due course—*A* held entitled to credit for amount paid by him 897
**——Suit on — Pronote being insufficiently stamped—Bar of S. 35, Stamp Act and Sec. 91, Evidence Act — Instrument given as collateral security or conditional payment or not embodying all terms of contract—Suit on original debt is maintainable—Money paid contemporaneously

Promissory Note
with execution of instrument—Possibility of conditional payment or collateral security is not excluded—Circumstances determine whether suit lies on original debt : *A I R 1926 Mad 1148=98 I C 75 and A I R 1935 Mad 206=156 I C 250=67 M L J 912, OVERRULED* **(FB)** 785
——Endorsement—Pronote executed by managing member of Hindu family—Ordinarily, endorsee has no remedy against non-executant coparceners — Endorsement transferring instrument as well as debt and complying with stamp laws — Suit against non-executants can be maintained : *32 M L J 354=A I R 1917 Mad 61=38 I C 339, OVERRULED* **(FB) 377*a*
——Assignment — Position of assignee of debt—Assignee governed by principles in Ch. 8, T. P Act—Privileges of endorsee under Negotiable Instruments Act however will not be available to him. *(Per Varadachariar, J.)* **(FB)** 377*b*

***Provident Fund**—Employee of company dying while still in service — His contributions to company's provident fund are not liable to attachment to defray his debts 234*a*

Provincial Insolvency Act *(5 of 1920)*—Preamble—Policy of Act—Distribution of insolvent's property should be proportionate amongst creditors—So also efforts of diligent execution creditors are not to be frustrated 906*a*
——*S. 9 (1) (c)*—Three months under, is not period of limitation but condition for adjudication—Period expiring when Court is closed—Petition for insolvency cannot be presented when Court reopens after vacation 898*a*
——*S. 25 (1)*—Dismissal of petition on statement by creditor that debt had been paid is one under S. 25 (1) 267*a*
——*S. 26*—Applicability—Whether petition was frivolous or vexatious need not be decided at the time of its dismissal under S. 25 (1) — Court can do so on separate application 267*b*
——*S. 26*—'Debtor' need not in reality be debtor — Application by creditor against him makes him debtor 267*c*
——*S. 26*—Debt by Hindu father binding on family—Demand by creditor—Alienation of large portion of family property by father together with sons after demand —Petition in insolvency by creditor against father and sons—Debt paid and petition dismissed under S. 25 (1)—Petition against sons held not frivolous and vexatious and no compensation could be recovered by them 267*d*
——*Ss. 28, 51* — Sale of property is not prohibited till date of adjudication—Creditor however is not entitled to benefit of sale—Bona fide auction-purchaser is saved under S. 51 (3) 906*b*
——*S. 28*—After adjudication of deceased father his creditor bringing suit without leave of Court against his son as legal representative to recover debts due by deceased father — Son's share in family property attached—Suit being against provisions of S. 28 attachment is invalid and son's share vests in Official Receiver: 752*b*
*——*Ss. 28 and 51 (3)*—S. 51 (3) does not operate in cases of sales held after adjudication—Sale therefore by executing Court of debtor's property after adjudication is inoperative 449*a*
*——*S. 28 (7)* — S. 28 (7) enunciates English doctrine of relation back—Only difference is as to time when insolvency commences 19*a*
*——*S. 35* — Judge in insolvency can revise order of adjudication, if it was passed without jurisdiction—Court has no discretion in the matter 898*b*
——*S. 37*—Vesting order can be passed subsequent to order of annulment 752*a*
——*S. 42 (1) (a)* — Burden of proving existence of circumstances laid down in S. 42 (1) (a) is on debtor and not on creditors or on Official Receiver 590
——*S. 51 (3)*—Sale of property—Decreeholder knowing insolvency proceedings can proceed with sale and purchase property—Notice of insolvency does not impute want of good faith — Sale price however cannot be set off against decree 906*d*
——*S. 52* — Executing Court is to deliver property only on application 906*c*
——*S. 53*—Suit to set aside sale—All facts should be relatively considered and weighed as a whole 370*b*
——*S. 53*—Transfer not bona fide—Subsequent transfers also fall 370*c*
——*S. 53*—Applications under—Joint trial with consent of parties — Each alienation must be dealt with separately and evidence relating to each considered separately 285*a*
——*S. 53*—Good faith—Proof of—Absence of good faith on part of transferee must be proved—Such burden is not discharged by vague allegations of fraud — Absence of valuable consideration and circumstances

Provincial Insolvency Act
reasonably leading to inference of bad faith on part of alienee must be shown 285*b*
*——*S. 54* — For purpose of S. 54 date of transfer is date of its registration—Deed of transfer executed more than but registered within three months before filing of insolvency petition — Such transfer can be impeached under S. 54 801*d*
——*S. 54*—Fraudulent preference—Test is dominant motive of debtor — Person appointed guardian of son-in-law misappropriating ward's funds — In order to relieve from this obligation guardian selling his immovable property to ward — Subsequent insolvency of guardian — Sale held did not amount to fraudulent preference 177
——*S. 75 (3)*—Application by creditor on behalf of other creditors to District Judge to modify his predecessor's order of annulment by vesting insolvent's estate in Official Receiver till debts due to unpaid creditors were paid — Order of District Judge rejecting application is appealable 461
——*S. 75 (3)* — Creditor aggrieved by order of District Court may appeal to High Court without first applying to Official Receiver to appeal and getting refusal from him 370*a*
——*S. 78* — 'Proved debt' — Inclusion of debt by insolvent in his petition of insolvency does not make it proved 142
——*S. 78 (2)*—Suit on annulment of insolvency on pro-note executed before petition for insolvency — Plaintiff can deduct only period from order of adjudication to order of annulment and not from date of petition for insolvency 19*b*

Provincial Small Cause Courts Act *(9 of 1887), S. 25* — No decree or order passed by trial Court—Only one issue decided by it — High Court cannot take action under Section 25 252
*——*Sch. 2, Art. 28*—Art. 28 contemplates suit between rival claimants to property of intestate — Husband claiming property of his wife removed by her brother—Brother admitting husband's right of succession —Suit held triable by Small Cause Court: *49 M L J 554=A I R 1926 Mad 37=91 I C 561 and A I R 1933 Mad 346=142 I C 613, OVERRULED* 864
——*Sch. 2, Art. 31* — Suit for accounts—Essence of action—Where relief cannot be granted without taking account, suit is one for accounts 799
——*Sch. 2, Art. 31*—Suit by agent against principal for specific sum alleged to be due from principal is not suit for account 707

Provincial Small Cause Courts Act
Railways Act *(9 of 1890), S. 72*—Burden of proof — Risk note form B — Liability of railway — Non-delivery of entire goods — Railway must account for dealing with goods during all period while under its control—Evidence adduced should be such as would avoid all adverse inference 206
Receiver—Suit for partition—On considering facts, order appointing receiver to harvest existing crops held justified 730
Registration — Unregistered document of transfer is not of itself sufficient to support suit for specific performance of agreement to transfer 801*c*
*——Partition lists recording result of already completed partition transaction do not require registration 568*a*
——Dissolution of partnership and division of immovable properties — Document evidencing it is not transfer from partnership to individual partners and does not require registration — Where however such document vests immovable properties in proportions different from interests held by partners during subsistence of partnership, it may require registration 133*d*

Registration Act *(16 of 1908), S. 17*—Award declaring rights of parties to certain property—Award should be registered — Unregistered award is inadmissible in evidence 55*b*
*——*Ss. 17 (1) and 49*—Receipts purporting to put an end to mortgage rights are compulsorily registrable — Mortgagor cannot rely on these receipts as evidence of payment of mortgage debts 533
——*S. 17 (1)*—"Declare" implies declaration of will and not mere statement of fact —Deed of partition causing change of legal relation is declaration but not letter containing admission of partition 55*a*
——*S. 17 (2) (vi) (as amended in 1929)* — Magistrate passing order in inquiry under Sec. 145, Criminal P. C. as result of compromise between parties and contained in their statements that one party had created mortgage of certain property in favour of other — Order passed prior to amendment of S. 17 (2) (vi) in 1929—Suit instituted on basis of mortgage—Suit held maintainable — Order of Magistrate along with statements of parties, being exempt from registration prior to 1929 held admissible in evidence 531*a*

Registration Act
——*S. 17 (2) (vi)*—Unregistered compromise decree under old provisions referring to conveyance of property is admissible in evidence to prove completed conveyance 202*b*
——*S. 49* — Mortgage suit — Mortgagors while executing another mortgage in respect of suit properties addressing letter to proposed mortgagee containing statement that suit properties are under mortgage with plaintiff — Letter although not registered is admissible as evidence of collateral fact, namely acknowledgment of mortgage in favour of plaintiff 865*d*
Religious Endowments — Transfer of office of trustee in return for present payment of certain amount and annual contribution of certain sum is opposed to public policy 713
——Right of alienation of trust property — Power of trustee is same as that of manager of infant heir 415*a*
——Alienation by trustee — Adverse possession when starts stated 415*b*
——Property dedicated for use of whole Brahmin community as such — Suit by representatives of Brahmin Vadagalai Sri Vaishnavite community claiming exclusive title—Denial of title as claimed in plaint held could not preclude Court from granting relief which they were entitled to get as members of Vadagalai community 270
Religious Trust—Appointment of trustees —Religious trust created by will—Testator appointing his son as trustee without further directions—He must be deemed to have prescribed line of succession in that son and his heirs 661*b*
Res Judicata—Applicability—Applicability of doctrine to co-defendants—Requisite conditions specified 959*a*
——Lease by jenmi to tenant — During tenant's occupation, jenmi granting melcharath — After previously terminating lease jenmi and melcharathdar bringing suit in ejectment against tenant — Jenmi claiming no relief in his favour but stating in plaint that melcharathdar to be entitled to property and liable to pay value of improvements — Decree passed but not executed—Subsequent suit by successor of jenmi for ejectment is not barred by res judicata 581*b*
——Suit by *A* against *B* and *C* claiming certain plot of land—*C* claiming as vendee from *B*—Decree of trial Court in favour of *A* and negativing *B's* title and consequently *C's*—Appeal by *C* alone—*B* not made party—Finding of trial Court negativing *B's* title does not operate as res judicata against *C* : *A I R 1937 Mad 228 =169 I C 318, REVERSED* 501
——Mortgagee applying for removal of mortgagor—Court rejecting application—Another application by mortgagee at another stage of removal of mortgagor held not barred by constructive res judicata 325*b*
——*A* obtaining decree for partition against her sister *B* and brother—Decree remaining unexecuted owing to agreement—Parties continuing in joint possession—Subsequent suit by *A* under S. 9, Specific Relief Act decreed — Subsequent suit by *B* for partition and possession of her share held not barred by res judicata by previous two suits 287
——Bar of—Suit by person filling dual position of karnavan of tarwad and uralan of dewaswom against another shrine claiming homage including certain payments from defendant shrine—Same relief claimed in previous suit—But in previous suit uralan figuring as plaintiff suing through dewaswom, while in latter suit, dewaswom figuring as plaintiff suing through the uralan—Both suits identically same — Parties to both suits cannot be regarded as different parties—Subsequent suit is barred by res judicata 257*a*
——Constructive—S. 11, Suits Valuation Act, and S. 21, Civil P. C., embody principle of res judicata — Suit instituted in Court having no pecuniary jurisdiction to try it—No objection raised by either party as regards jurisdiction of Court to try suit —Parties are precluded in subsequent suit between them, based on same cause of action, and involving same relief from contending that subsequent suit is not barred as former suit was tried by Court having no pecuniary jurisdiction to try it 257*b*
——Applicability — Principle cannot be evaded by literal and narrow application of special Section 257*e*
* ——Applicability — Consent decree — When prevents application of doctrine stated—Consent decree deciding disputes finally—It operates as res judicata 225
——Suit by inam holder for declaration that he was owner of whole village excluding communal porambokes—Decree in terms asked for granted but tank-beds whether communal porambokes not decided—

Res Judicata
Decree does not make title to tank-beds res judicata 193*b*
Revision — Powers of High Court — Expunging of objectionable remarks — Language used by Magistrate making reference to one of the parties, although objectionable not harsh or uncalled for — High Court will not interfere in revision and direct remarks to be expunged 654*c*
——Finding of fact essential for jurisdiction found to be erroneous by higher Court — Lower Court cannot be said to have acted without jurisdiction 603*b*
Riparian Owners — Riparian rights — Nature of riparian rights explained — Rights of riparian owners enunciated 816
Riparian Rights — Obstruction — Acquisition of prescriptive right to maintain dam — Party does not obtain immunity in respect of all other obstructions naturally arising owing to existence of dam — Obstruction by accumulation of silt amounts to nuisance — Remedy of person injured thereby stated 180*b*
*——Upper proprietor's rights — Acquisition of prescriptive right to maintain dam — Owner can still use such water only as he was accustomed to — He cannot enlarge dimensions of channel 180*e*
Sale — Vendor and vendee — Charge on property for purchase money — Vendor asking vendee to withhold payment of one of vendor's creditors — Vendor does not lose charge of property 457*a*
Sea Customs Act *(8 of 1878), S. 188* — Opening words of S. 188 cannot be limited to cases falling under S. 182 and succeeding Sections 608*b*
Second Appeal — Suit to recover tax levied under Madras Local Boards Act and for injunction restraining Board from levying it in future is not of small cause nature 941*a*
Specific Relief Act *(1 of 1877), S. 42* — Mortgage attached in execution of decree — Assignee of mortgage, whose application for removal of attachment is dismissed, applying under O. 21, R. 63, Civil P. C. for declaration that assignment is valid — Suit is not barred by Sec. 42 although consequential relief is not claimed 741
——*S. 42* — *S* entrusted with plaintiff's jewels, pledging them with defendant — *S* convicted for breach of trust and jewels ordered to be returned to plaintiff — High Court in revision holding that jewels should be returned to defendant — Plaintiff obtaining possession of jewels before High Court's order and returning them to Magistrate after 10 months of such order — Suit by plaintiff for declaration that he was entitled to possession of jewels — Magistrate held jewels not as plaintiff's but defendant's agent — Suit for mere declaration without claiming possession was not sufficient 331*a*
***Stamp Act** *(2 of 1899), Ss. 2 (15), 35, 36 and 37* — Decree in suit for partition of joint family directing payment of specific sums to individual members — Payment to be made from joint family fund or out of proceeds of sale of joint property — Decree amounts to final order effecting partition and falls within S. 2 (15) — It cannot be executed by Civil Court unless engrossed on proper non-judicial stamp paper — Fact that decree does not finally divide whole of joint family property is immaterial — Mere fact that decree has been acted upon for over two years does not preclude objection to its executability on ground of want of proper stamp — Decree and proceeding thereunder cannot become validated with retrospective effect on production of proper stamp — Case is governed by S. 35 — Ss. 36 and 37 do not apply 307*a*
*—— *S. 35* — Improperly stamped pronote — Inadmissible to prove acknowledgment of prior instruments : *A I R 1930 Mad 485=124 I C 53 and A I R 1933 Mad 251=141 I C 169, OVERRULED* 75
*——*S. 36* — "Admitted in evidence" — Endorsement by Judge that promissory note is insufficiently stamped and is allowed to go in — Endorsement bearing rubber stamp with initials of Judge — Document is admitted within meaning of S. 36 and its admissibility cannot be subsequently called in question 938
——*Sch. 1, Art. 40* — Security bond executed under Sec. 21 (1), Provincial Insolvency Act, should be stamped under Art. 40 and not under Art. 57 **(FB)** 262
Succession Act *(39 of 1925), S. 295* — Where there is contention, proceeding must take form of regular suit 502
Suits Valuation Act *(7 of 1887), S. 11* — S. 11, Suits Valuation Act, and S. 21, Civil P. C., are exceptions to fundamental rule of law that judgment of Court without jurisdiction is nullity and that want of jurisdiction cannot be waived 257*c*
Surety — Discharge — By agreement between *A* and *B*, *A* to hand over partnership assets to *B* immediately in consideration

Surety
of *B's* paying certain sum to *A*— *C* standing surety for *B* — Subsequent agreement between *A* and *B* excusing immediate delivery of assets and granting more time— *C* is discharged 585
*__Telegraph Act__ *(13 of 1885), S. 20*—Use of wireless receiving set without license is not offence under S. 20 821*a*
Tort—Damages—Suit for—No action lies against anyone for damages resulting from erroneous decision of Court, merely because he has set the Court in motion, unless malice is established 958
*——Negligence—Public latrine erected by Corporation against compound wall of Railway Company—Knowledge to company that if wall not kept in proper repairs it would cause danger to those using latrine —Duty of company to repair wall — Wall falling and killing two persons using latrine —Latrine wall in reasonably good condition—Company and not Corporation held liable for damages 117*a*
*__Trade Mark__—Infringement— Relief—In a passing off action, relief can only be granted on ground of defendant's doing something calculated to deceive—Essentials to be shown in such action stated 1*a*
*——Infringement — Right of action — Merchant is entitled to protection for trade mark if it is associated in market with goods he sells — It is immaterial whether goods are made for him in his country or abroad—Supplier's acquiring reputation in other country does not affect such merchant—It is not necessary that purchaser must know actual name of owner of goods 1*b*
Transfer of Property Act *(4 of 1882), S. 6 (a)* - Under English law property of every description is assignable for value — Under Indian law mortgage of property non-existing but to come into existence in future can be mortgaged—But mere possibility or expectancy is expressly prohibited —Mortgage of future income to be derived from scavenging is expectancy and so invalid 881*a*
——*S. 51* — Alienation by guardian set aside as unwarranted—Alienee may be entitled to benefit of S. 51 677*d*
*——*S. 53-A* — S. 53-A is generally only available to defendant 716*d*
—— *S. 58 (f)*— Moneys advanced in pursuance of oral agreement between parties —Title deeds deposited subsequently, creating equitable mortgage on certain properties—Later on, formal document purporting

Transfer of Property Act
to be memorandum of completed transaction of mortgage executed —Such document does not require registration — Oral evidence is admissible to prove deposit of title deeds 865*a*
*——*S. 58 (f)*—Sub-mortgage by deposit of title deeds in case where original mortgage is by deposit of title deeds, is valid 865*b*
*——*S. 58 (f)* — Deposit of only some of the title deeds relating to property is sufficient to create valid equitable mortgage over entire property 865*c*
——*Ss. 59, 3*—Mere endorsement by Sub-Registrar of admission of execution and signature of witnesses present at the time are not sufficient to satisfy requirements of S. 59, in absence of evidence showing that signature of witnesses to admission were affixed in presence of admitting executant or any endorsement to that effect 959*c*
——*S. 68*—Claim by mortgagee to money decree only on personal covenant — Court has no power to insist upon his filing mortgage suit 132
*——*S. 78*—Gross neglect — Meaning — Prior mortgagee failing to secure title deeds and delaying registration to enable mortgagor to secure necessary funds for payment of amount due to him — Subsequent mortgagee taking mortgage after satisfying himself that there was no prior mortgage —Prior mortgagee held guilty of gross neglect 87
——*S. 81*—Property subject to two mortgages — Right of first mortgagee to release any part of security is not lost or made subject to right of marshalling 503*b*
*——*Ss. 83, 103* — Mortgagee minor— Deposit is effective only from date when he is properly represented by guardian 405*a*
*——*S. 84 (before amendment of 1929)* —Mortgage with possession—Deposit made under S. 83 withdrawn and mortgagor not able to produce amount even at the time of redemption — He is entitled to mesne profits only for period when deposit was in Court 405*f*
——*S. 92 (as amended by Act 20 of 1929)* —S. 92 is not retrospective 779*b*
——*S. 107*—Lease of right to collect fees of slaughter houses and fish bazaars—Lease at the time of registration not executed by lessor—Lease is invalid 746*a*
——*S. 107 (before amendment of 1929)*— Lease of reversion upon existing term can be created—Such lease operates as assign-

Transfer of Property Act
ment of reversion and entitles lessee to recover rent due under prior lease—Distinction between assignment of rents and profits and lease of reversion stated 100
——*S. 130* — Assignment of actionable claim—Particular form or consideration is not essential—Intention to transfer should be clear from language 236*b*
Treasure Trove Act *(6 of 1878), S. 4*—Certain persons finding treasure but deciding not to report it to Collector—*A* and *B*, though taking share in treasure, not present at finding and had no connexion with finder's non-reporting to Collector—*A* and *B* held not guilty of abetment of offence under S. 4 508
*——*S. 20* — Finding of bangle — Finder selling it and depositing money so obtained in bank—Crown cannot claim refund: 710
Trespass — Action against trespasser — Relief is possession and not damages 463
Trusts—Suit by trustee to recover trust funds applied in breach of trust—Art. 120, Lim. Act, applies — Trustee ignorant of breach—Right to sue accrues when trustee becomes aware of it 999*c*
——Charitable endowment — Transfer of right to conduct charity by trustee to co-trustee for consideration is against public policy 982*b*
*——De facto trustee has no locus standi to maintain suit on behalf of trust—Position of de facto trustee explained 982*c*
*——One trustee cannot maintain suit on behalf of trust property if remaining trustees are not joined as plaintiffs or defendants 982*e*
——Misconduct of trustee—Misconduct on the part of the trustee does not ipso facto result in his removal 982*g*
——Creation of — Security deposit of employee in employer bank placed upon fixed deposit in his name—Payment of interest—Bank holds such deposit in trust — Insolvency of bank — Employee has right to follow assets of bank 651
——Creation of — Funds held in trust for particular purpose — Purpose failing or coming to end — Resulting trust of such funds as remain arises in favour of contributors or their personal representatives—Suit for recovery of their shares by subscribers is governed by Art. 120, Lim. Act—Time runs from date on which there is failure of purpose 641
*——Suit against trustee—Loss occasioned to trust—Suit to make it good—Art. 120 and not Art. 36, Limitation Act, applies (FB) 353*a*
*——Suit against trustee—Loss occasioned to trust—Suit to make it good — Starting point of limitation — Commencement of time depends on circumstances of each case (FB) 353*c*
——Breach of — Debtor and creditor — Composition — Debtor executing composition deed in favour of one creditor who agreed to composition — Such creditor receiving amount for distribution becomes trustee—Payment by such trustee to such creditors only who accept composition when funds are not sufficient to satisfy all creditors does not amount to breach of trust—Trustee commits breach by paying to himself whole balance when he knows that one creditor is willing to accept composition 199*a*
Trusts Act *(2 of 1882), S. 59* — Chit transaction — Stake-holder in position of trustee while taking mortgages from successful bidder — Stake-holder adjudged insolvent and his property sold by Official Receiver—Suit under S. 59 is maintainable by beneficiaries 668
***Vendor and Purchaser** — Agreement to purchase property—Mere fact that deposit is demanded by vendor implies that it should be forfeited if contract is broken 246*a*
——Vendee fully conversant with boundaries and extent of land, purchasing it—Sale deed describing land accurately by boundaries and stating it to be 'about 99 grounds'—Land measuring only 85 grounds after sale—Suit for compensation for deficiency—Principle of Sec. 15, Specific Relief Act held applied — Question of exact area held was immaterial and vendee could not succeed 81*b*
Will — Construction — Will as it stands creating lawful and well recognized mode of devolution — It is not open to Court to draw inferences 661*a*
——Revocation — Mahomedan testator after making registered will communicating with his solicitors and getting properly drafted but incomplete codicil — Testator subsequently sending telegram and letter suggesting certain alterations — Telegram and letter not signed by testator—Telegram and letter held were not codicil nor were revocation of former will 616*c*
——Execution — Proof of — Copy of will containing copy of signature of testator produced — Words "signed before us" at

Will
foot but no attestation by witnesses — Neither attestation nor existence of original will at the time of testator's death proved— Valid execution held not proved 326
*——Executors appointed under will declining to accept office — Heir-at-law of testator can maintain action to recover possession of estate left by testator 157*a*
——Validity — Presumption—Every reasonable presumption must be made in favour of validating the will as far as possible rather than in favour of invalidating it 136*d*
——Executor—Position of—Held trustee 60*b*
***Wireless Telegraphy Act** *(17 of 1933), Ss. 3 and 6*—Possession of wireless receiving set without license — Postmaster by subsequently issuing license to take effect from date previous to possession cannot convert offence into non-offence 821*b*
Words and Phrases — "Lodge" — The word "lodge" when used in regard to Courts is usually meant to convey a deposit of a formal document of information or complaint, etc. 531*b*
——"Poramboke"—Word "poramboke" is used in several senses — Granting that poramboke includes communal property it cannot be seriously maintained that it connotes no other kind of property 565*c*
——'Sukhavasi'—Word "Sukhavasi" means "one who lives in comfort without any particular employment" 250*a*
***Workmen's Compensation Act** *(8 of 1923), S. 2 (1) (n) and Sch. 2, Cl. (i)*— Conductor of motor omnibus is workman 485*b*
——*S. 8* — Allotment or distribution of compensation made to dependant—Dependant dying—Compensation will not revert to employer but will devolve on descendants of dependant 402
——*S. 10 (1), Proviso (3)* — "Sufficient cause"—Man's illness is sufficient cause 485*a*

COMPARATIVE TABLES

A. I. R. 1938 Madras = Other Journals

AIR	Other Journals
1	1937 M W N 1020
	46 M L W 635
	174 I C 262
	ILR 1938 M 466
	1938-2 M L J 651
5	46 M L W 520
	1937 M W N 1063
	1937-2 M L J 760
	175 I C 766
6	46 M L W 258
	175 I C 760
8	1937-2 M L J 606
	46 M L W 651
	ILR 1938 M 220
	176 I C 535
13	46 M L W 620
	176 I C 477
19	1937 M W N 929
	46 M L W 559
	1937-2 M L J 703
	ILR 1938 M 439
	176 I C 321
23	46 M L W 433
	1937 M W N 1075
	176 I C 1006
25	46 M L W 617
	1937 M W N 1166
	176 I C 747
27	46 M L W 565
	1937-2 M L J 602
	1937 M W N 1086
	176 I C 827
29	1937 M W N 1068
	1937 M Cr C 295
	1937-2 M L J 741
	46 M L W 855
	172 I C 909
	39 Cr L J 236
30	1937 M W N 1040
	1938-1 M L J 171
	173 I C 781
32	1937 M W N 1042
	175 I C 843
33	1937 M W N 1018
	1937-2 M L J 744
	46 M L W 877
	ILR 1938 M 431
	175 I C 735
35	1937 M W N 1065
	1937 M Cr C 298
	1937-2 M L J 749
	46 M L W 858
	172 I C 866
	39 Cr L J 230
38	...
41	1937 M W N 141
	175 I C 767
43	46 M L W 610
	ILR 1938 M 523
	176 I C 309
	1938 M W N 1203
47	46 M L W 358
	1937 M W N 899
	176 I C 247
52	9 I T C 407
SB	5 I T R 534
	46 M L W 908
	1938-1 M L J 14

AIR	Other Journals
52	1938 M W N 85
SB	173 I C 31
53	1937 M W N 1190
	1937-2 M L J 737
	46 M L W 815
	176 I C 750
55	1937 M W N 1183
	176 I C 646
57	5 I T R 160
SB	9 I T C 51
	47 M L W 28
	176 I C 374
59	9 I T C 386
SB	5 I T R 600
	1937-2 M L J 928
	46 M L W 901
	173 I C 143
60	...
66	1937 M Cr C 317
	1937 M W N 1131
	46 M L W 766
	1937-2 M L J 885
	172 I C 811
	39 Cr L J 228
67	1937 M W N 1157
	46 M L W 757
	1937-2 M L J 788
	174 I C 991
68	1937 M W N 974
	46 M L W 512
	175 I C 889
69	1937 M W N 1017
	1937-2 M L J 858
	46 M L W 929
	175 I C 913
70	1937 M W N 1146
	1937-2 M L J 809
	46 M L W 953
	173 I C 313
71	1937 M W N 1170
	46 M L W 758
	1937-2 M L J 893
	177 I C 185
73	46 M L W 848
	176 I C 84
74	46 M L W 641
	1937 M W N 1126
	1937 M Cr C 310
	ILR 1938 M 347
	39 Cr L J 277
	173 I C 223
75	1937 M W N 1050
	46 M L W 692
	1937-2 M L J 805
	ILR 1938 M 210
	175 I C 24
77	1937 M W N 1052
	46 M L W 733
	1937-2 M L J 817
	174 I C 928
78	1937 M W N 1043
	176 I C 628
81	1937 M W N 1027
	46 M L W 797
	176 I C 173
85	46 M L W 742
	1937 M W N 1221

AIR	Other Journals
85	176 I C 564
87	1937 M W N 1024
	46 M L W 778
	176 I C 757
90	1937 M W N 1104
	46 M L W 892
	176 I C 584
92	1937 M W N 849
	46 M L W 426
	ILR 1938 M 39
	176 I C 26
96	1937 M W N 1106
	46 M L W 768
	1937-2 M L J 825
	ILR 1938 M 284
	175 I C 851
98	1937 M W N 1073
	46 M L W 787
	1937-2 M L J 830
	173 I C 42
100	46 M L W 730
	1937 M W N 1186
	1937-2 M L J 871
	176 I C 402
102	1937 M W N 853
	46 M L W 568
	174 I C 599
	ILR 1938 M 410
107	1937 M W N 1077
	46 M L W 712
	1937-2 M L J 779
	172 I C 708
	ILR 1938 M 609
111	1937 M W N 194
	46 M L W 688
	175 I C 426
112	46 M L W 642
	1937 M W N 1242
	1937 M Cr C 384
	39 Cr L J 281
	173 I C 213
113	1937 M W N 943
	46 M L W 540
	ILR 1938 M 326
	176 I C 753
115	1937 M W N 787
	176 I C 344
117	1937 M W N 921
	46 M L W 452
	ILR 1938 M 233
	174 I C 270
124	1937 M W N 1099
	1937-2 M L J 848
	46 M L W 869
	ILR 1938 M 292
	176 I C 592
128	46 M L W 729
	1937 M W N 1195
	1937 M Cr C 391
	173 I C 145
	39 Cr L J 264
129	1937 M W N 999
	46 M L W 629
	1937 M Cr C 278
	1937-2 M L J 878
	173 I C 14
	39 Cr L J 261
130	1937 M W N 996

AIR	Other Journals
130	46 M L W 709
	1937 M Cr C 337
	1937-2 M L J 862
	173 I C 26
	39 Cr L J 266
132	46 M L W 728
	1937 M W N 1215
	1937-2 M L J 920
	175 I C 593
133	1937-2 M L J 511
	1937 M W N 1285
	46 M L W 910
	176 I C 639
136	1937 M W N 835
	46 M L W 576
	1937-2 M L J 906
	176 I C 542
141	1937 M W N 1084
	46 M L W 706
	1937-2 M L J 753
	ILR 1938 M 278
	176 I C 300
142	1937-2 M L J 883
	174 I C 480
143	1937 M W N 1053
	46 M L W 690
	1937-2 M L J 812
	ILR 1938 M 87
	175 I C 799
144	46 M L W 700
	1937 M W N 1192
	1937-2 M L J 881
	175 I C 827
145	5 I T R 697
SB	1938-1 M L J 11
	47 M L W 21
	1938 M W N 81
	174 I C 17
	ILR 1938 M 270
146	1937 M W N 1118
	46 M L W 851
	1938-1 M L J 63
	174 I C 799
148	5 I T R 703
SB	47 M L W 24
	1938-1 M L J 130
	1938 M W N 171
	ILR 1938 M 183
	173 I C 998
151	1937 M W N 1189
	175 I C 290
153	46 M L W 649
	1937-2 M L J 789
	1937 M W N 1305
	175 I C 704
154	1937-2 M L J 820
	46 M L W 887
	1937 M W N 1337
	ILR 1938 M 192
	176 I C 635
157	1937 M W N 1153
	46 M L W 880
	1938-1 M L J 146
	174 I C 638
	ILR 1938 M 533
161	1937 M W N 1262
	47 M L W 40
	176 I C 976

AIR	Other Journals
164	1937 M W N 1108
	46 M L W 932
	176 I C 574
	1938-2 M L J 340
171	1937 M W N 1185
	1937-2 M L J 814
	46 M L W 846
	174 I C 325
	ILR 1938 M 763
172	1937-2 M L J 734
	46 M L W 812
	1937 M Cr C 332
	1937 M W N 1321
	173 I C 317
	39 Cr L J 312
173	1937 M W N 1070
	1937 M Cr C 289
	46 M L W 704
	1937-2 M L J 757
	171 I C 943
	39 Cr L J 1
174	1937 M W N 1201
	1937-2 M L J 936
	47 M L W 434
	175 I C 493
175	1937 M W N 1251
	46 M L W 900
	175 I C 543
176	46 M L W 925
	1937-2 M L J 926
	1938 M W N 24
	175 I C 22
177	1937 M W N 1219
	1937-2 M L J 868
	46 M L W 895
	176 I C 652
178	1937 M W N 1175
	175 I C 575
180	1936 M W N 948
	46 M L W 862
	174 I C 229
185	1937 M W N 1056
	1937-2 M L J 717
	175 I C 811
189	1937-2 M L J 700
	1937 M W N 1231
	46 M L W 794
	175 I C 474
190	1937 M W N 1229
	1937-2 M L J 888
	46 M L W 956
	176 I C 688
192	1937 M Cr C 318
	1937 M W N 1132
	46 M L W 703
	171 I C 931
	1937-2 M L J 902
	ILR 1938 M 455
	39 Cr L J 27
193	47 M L W 438
	1938 M W N 244
	1938-2 M L J 434
199	1937 M W N 1081
	47 M L W 36
	176 I C 611
202	1937 M W N 1254
	176 I C 733
205	1938-1 M L J 38
	177 I C 440
	1938 M W N 1124
206	46 M L W 790
	1937-2 M L J 798

AIR	Other Journals
206	1937 M W N 1309
	176 I C 738
209	1937 M W N 1171
	175 I C 738
211	1937-2 M L J 903
	175 I C 154
212	1937 M W N 1173
	1937-2 M L J 896
	175 I C 441
213	1937 M W N 1072
	1937 M Cr C 314
	47 M L W 322
	1938 M W N 212
	174 I C 218
	39 Cr L J 416
214	46 M L W 740
	1937 M W N 1269
	1937-2 M L J 876
	175 I C 309
215	1937 M W N 1259
	176 I C 964
217	1938 M W N 17
	176 I C 825
218	46 M L W 899
	1938 M W N 14
	1938-1 M L J 54
	174 I C 951
	ILR 1938 M 275
	179 I C 62
219	1938 M W N 10
221	47 M L W 46
	1938-1 M L J 92
	177 I C 579
224	1937 M W N 1261
	174 I C 838
225	1937 M W N 1281
	176 I C 649
226	1937 M W N 1280
	174 I C 784
227	1937 M W N 1223
	1938-1 M L J 391
	177 I C 126
232	1937 M W N 1267
	175 I C 208
233	46 M L W 959
	1937 M Cr C 395
	1938 M W N 30
	174 I C 127
	39 Cr L J 447
234	46 M L W 904
	1938 M W N 55
	ILR 1938 M 335
	176 I C 713
236	1937 M W N 1249
	1938-1 M L J 56
	47 M L W 118
	176 I C 617
239	1937 M W N 513
	175 I C 763
241	1937 M W N 1252
	47 M L W 64
	1938-1 M L J 139
	174 I C 983
242	1937 M W N 1204
	46 M L W 772
	174 I C 250
246	1937 M W N 1288
	173 I C 955
248	1937 M W N 1193
	1937 M Cr C 392
	173 I C 455
	39 Cr L J 828

AIR	Other Journals
248	ILR 1938 M 545
	1938-2 M L J 81
	48 M L W 444
250	1937-2 M L J 931
	1938 M W N 58
	47 M L W 94
	177 I C 561
252	46 M L W 924
	1937 M W N 1343
	1938-1 M L J 61
	174 I C 960
253	1937-2 M L J 916
	47 M L W 66
	174 I C 669
255	1937 M W N 1256
	1938-1 M L J 184
	176 I C 809
256	1937 M W N 1159
	46 M L W 701
	1937-2 M L J 887
	174 I C 934
257	1937 M W N 1292
	1938-1 M L J 193
	177 I C 91
	48 M L W 679
262	47 M L W 154
FB	1938-1 M L J 159
	1938 M W N 190
	174 I C 587
	ILR 1938 M 460
263	1937 M W N 1268
	175 I C 220
264	47 M L W 156
FB	1938-1 M L J 410
	1938 M W N 219
	173 I C 1008
	39 Or L J 398
	ILR 1938 M 457
	1938 M Cr C 218
265	...
267	1938-2 M L J 179
270	...
272	1938 M W N 3
	47 M L W 88
	1938-1 M L J 241
276	47 M L W 192
SB	1938 M W N 220
	174 I C 44
	ILR 1938 M 399
	1938 M Cr C 231
278	1938-1 M L J 29
	47 M L W 70
	1938 M W N 169
	ILR 1938 M 309
	177 I C 901
280	1938 M W N 53
	47 M L W 278
	176 I C 872
	ILR 1938 M 873
	1938-2 M L J 1016
282	1938-1 M L J 99
	47 M L W 700
	1938 M W N 633
	177 J C 512
283	1937 M W N 1307
	176 I C 632
285	...
287	...
289	...
293	1938 M W N 73
	178 I C 595
295	...

AIR	Other Journals
299	...
300	179 I C 173
304	...
305	1938 M W N 119
	47 M L W 683
	1938-2 M L J 165
	1938 M Cr C 250
307	47 M L W 51
	1938 M W N 656
313	1938 M W N 72
	47 M L W 158
	1938-1 M L J 235
	174 I C 276
314	...
315	1938 M W N 223
	174 I C 776
	39 Cr L J 465
	1938 M Cr C 137
316	1938 M W N 71
	1938-1 M L J 514
	47 M L W 211
	177 I C 453
317	1937 M W N 1009
	178 I C 647
318	1938 M W N 65
	1938-1 M L J 187
	177 I C 629
320	1938-1 M L J 236
	174 I C 309
	1938 M W N 1142
321	174 I C 841
	47 M L W 647
	1938 M W N 616
322	1938 M W N 67
	1938-1 M L J 154
	47 M L W 751
	177 I C 693
323	1938-1 M L J 135
	1938 M W N 191
	47 M L W 693
	178 I C 749
325	1938-1 M L J 249
	1938 M W N 1140
326	47 M L W 81
	1938 M W N 149
	1938-2 M L J 95
	178 I C 947
329	1938 M W N 75
	47 M L W 760
	178 I C 191
331	1938 M W N 274
334	1938 M W N 18
	1938-1 M L J 174
	47 M L W 459
	173 I C 986
336	1938 M W N 36
	1938 M Cr C 8
	47 M L W 272
338	1938 M W N 262
	177 I C 633
339	1938 M W N 102
	1938-1 M L J 206
	177 I C 652
340	1938 M W N 64
	47 M L W 146
	1938-1 M L J 252
	177 I C 688
342	47 M L W 245
FB	1938 M W N 180
	1938-1 M L J 256
	ILR 1938 M 381
	174 I C 434

AIR	Other Journals
347	1938 M W N 188
FB	47 M L W 268
	1938-1 M L J 285
	174 I C 376
	ILR 1938 M 667
349	1938 M W N 209
FB	47 M L W 314
	1938-1 M L J 344
	174 I C 428
	ILR 1938 M 675
	1938 M Cr C 299
352	1938 I T R 8
SB	47 M L W 350
	1938 M W N 465
	174 I C 491
353	1938 M W N 229
FB	1938-1 M L J 334
	47 M L W 344
	174 I C 459
	ILR 1938 M 586
357	1938 M W N 269
SB	174 I C 493
	48 M L W 76
	ILR 1938 M 829
360	1938 M W N 197
FB	1938-1 M L J 351
	47 M L W 368
	1938 I T R 160
	174 I C 423
	ILR 1938 M 744
364	1938 M W N 44
	47 M L W 286
370	...
372	1938-1 M L J 50
	1938 M W N 1147
	48 M L W 797
374	179 I C 125
377	47 M L W 309
FB	1938 M W N 288
	1938-1 M L J 378
	174 I C 577
	ILR 1938 M 568
380	1938 M W N 87
	47 M L W 133
	1938-1 M L J 142
	178 I C 899
381	1938-1 M L J 68
	47 M L W 181
	1938 M W N 496
	ILR 1938 M 858
	178 I C 416
384	178 I C 970
	1938-1 M L J 685
	47 M L W 738
	1938 M W N 636
385	1938 M W N 110
	1938-1 M L J 368
	47 M L W 458
388	1938 M W N 22
	1938-1 M L J 106
	176 I C 821
390	1938-1 M L J 45
	47 M L W 104
	ILR 1938 M 815
	1938 M W N 568
	178 I C 781
392	1938 M Cr C 6
	1938 M W N 224
	47 M L W 328
	176 I C 40
	39 Cr L J 687
393	39 Cr L J 344

AIR	Other Journals
393	1938 M W N 89
	47 M L W 173
	1938 M Cr C 37
	173 I C 394
	1938-1 M L J 482
394	1938-1 M L J 101
	1938 M W N 117
396	39 Cr L J 335
	1938 M W N 38
	1938-1 M L J 110
	47 M L W 128
	1938 M Cr C 42
	173 I C 417
398	1938 M W N 103
	47 M L W 175
	1938-1 M L J 181
	177 I C 756
399	47 M L W 178
	1938 M W N 312
	1938-1 M L J 402
	ILR 1938 M 633
	177 I C 762
400	1938 M W N 97
	47 M L W 199
402	47 M L W 159
	1938 M W N 124
	173 I C 424
	1938-1 M L J 571
	ILR 1938 M 716
403	1938 M Cr C 70
	47 M L W 149
	1938 M W N 31
405	1938 M W N 356
413	1938 M W N 49
	47 M L W 130
	1938-1 M L J 281
	ILR 1938 M 867
415	1938 M W N 105
	1938-1 M L J 118
	47 M L W 165
420	47 M L W 363
FB	1938 M W N 272
	1938-1 M L J 413
	175 I C 898
	ILR 1938 M 578
422	1938 M W N 68
	47 M L W 84
424	1938 M W N 457
	1938-1 M L J 489
	47 M L W 702
426	1938 M W N 99
	47 M L W 714
	1938-1 M L J 676
	178 I C 563
429	1938 M W N 118
433	1938 M W N 166
	1938-1 M L J 296
	47 M L W 295
	ILR 1938 M 688
	178 I C 784
435	47 M L W 488
FB	1938 M W N 373
	1938-1 M L J 628
	175 I C 470
	ILR 1938 M 598
438	47 M L W 448
FB	1938 M W N 366
	1938-1 M L J 495
	175 I C 484
	ILR 1938 M 784
441	1938-1 M L J 552
FB	47 M L W 498

AIR	Other Journals
441	1938 M W N 369
FB	175 I C 401
	ILR 1938 M 841
445	...
448	47 M L W 139
	1938 M W N 213
	1938 M Cr C 132
	175 I C 491
	39 Cr L J 595
449	1938 M W N 201
	1938-1 M L J 471
	47 M L W 705
	178 I C 135
	ILR 1938 M 1063
454	47 M L W 202
	1938-1 M L J 190
	1938 M W N 185
	178 I C 301
456	1938 M W N 193
	ILR 1938 M 451
	174 I C 681
	1938-2 M L J 404
	48 M L W 448
457	1938-1 M L J 316
	47 M L W 527
	177 I C 648
	1938 M W N 233
459	47 M L W 179
	1938-1 M L J 204
	1938 M W N 174
	175 I C 818
	ILR 1938 M 630
460	1938 M W N 95
	1938 M Cr C 5
	47 M L W 275
	1938-1 M L J 238
	39 Cr L J 338
	173 I C 448
461	1938 M W N 18
	176 I C 48
462	1938 M W N 466
	47 M L W 254
	177 I C 605
463	1938 M W N 468
	47 M L W 255
	176 I C 877
464	1938 M W N 96
	47 M L W 159
	1938-1 M L J 234
	1938 M Cr C 78
	175 I C 416
	39 Cr L J 580
465	1938 M W N 60
468	1938 M W N 51
	1938-1 M L J 79
	47 M L W 679
470	1938 M W N 301
	48 M L W 163
474	1938 M W N 131
477	1938 M Cr C 1
	1938 M W N 215
	173 I C 450
	39 Cr L J 323
479	1938 M W N 161
	47 M L W 300
482	1938-M W N 93
	47 M L W 196
	1938-1 M L J 178
	1938 M Cr C 75
	175 I C 417
	39 Cr L J 588

AIR	Other Journals
483	1938-1 M L J 539
	1938 M W N 477
	178 I C 534
485	1938-1 M L J 864
	47 M L W 186
	1938 M W N 186
	ILR 1938 M 636
486	47 M L W 731
	1938 M W N 640
489	47 M L W 772
	1938 M W N 283
	177 I C 627
490	1938 M W N 90
	47 M L W 161
	1938-1 M L J 239
	1938 M Cr C 39
	175 I C 422
	39 Cr L J 585
491	1938 M W N 322
	47 M L W 405
	1938-2 M L J 137
	178 I C 514
493	1938-1 M L J 829
	47 M L W 188
	1938 M W N 164
495	1938-1 M L J 255
	47 M L W 258
	1938 M W N 416
	176 I C 320
496	1938 M W N 207
	47 M L W 351
	1938-1 M L J 450
	179 I C 236
497	1938-1 M L J 229
	47 M L W 259
	1938 M W N 242
	178 I C 824
498	47 M L W 356
	1938 M W N 264
	1938-1 M L J 662
	ILR 1938 M 931
501	47 M L W 467
	1938 M W N 450
	178 I C 717
502	1938-1 M L J 443
	47 M L W 485
	176 I C 895
	1938 M W N 1139
503	47 M L W 261
	1938-1 M L J 310
	1938 M W N 266
	177 I C 681
504	47 M L W 354
	1938 M W N 258
	1938-1 M L J 384
	177 I C 745
505	1938 M W N 284
	1938-1 M L J 406
	47 M L W 421
507	1938 M W N 196
	47 M L W 388
	1938-1 M L J 375
	178 I C 467
508	47 M L W 320
	1938 M Cr C 55
	1938 M W N 850
	175 I C 502
	39 Cr L J 600
509	1938 M W N 194
	48 M L W 115
	1938-2 M L J 355

AIR	Other Journals
509	178 I C 351
511	47 M L W 324
	1938 M W N 282
	1938-1 M L J 510
513	177 I C 225
	1938 M W N 1032
522	47 M L W 327
	1938 M W N 909
	1938-1 M L J 437
	178 I C 414
523	1938-1 M L J 342
	47 M L W 388
	1938 M W N 389
	178 I C 462
524	1938-1 M L J 854
	47 M L W 808
	1938 M W N 423
	1938 M Cr C 84
	176 I C 149
	39 Cr L J 707
525	1938 M W N 335
	1938-2 M L J 490
	178 I C 625
529	1938 M Cr C 56
	1938-1 M L J 409
	47 M L W 486
	1938 M W N 417
	176 I C 182
	39 Cr L J 715
530	47 M L W 408
	1938 M W N 321
	178 I C 511
531	47 M L W 495
	1938-1 M L J 536
	1938 M W N 394
	178 I C 667
532	1938 M W N 290
	47 M L W 557
	1938-1 M L J 682
	178 I C 448
533	1938 M W N 296
	1938-1 M L J 586
	178 I C 208
535	47 M L W 433
	1938-1 M L J 485
	1938 M Cr C 121
	1938 M W N 351
	176 I C 185
	39 Cr L J 719
536	1938 M W N 316
	47 M L W 536
	1938-1 M L J 667
	1938 M Cr C 106
	176 I C 138
	39 Cr L J 685
537	47 M L W 305
	1938 M Cr C 64
	1938 M W N 348
	1938-1 M L J 817
	176 I C 127
	39 Cr L J 705
539 FB	47 M L W 696
	1938-1 M L J 775
	1938 M W N 587
	175 I C 1002
	ILR 1938 M 819
541	1938 M Cr C 4
	1938 M W N 317
	47 M L W 535
	1938-1 M L J 669
	176 I C 272
	39 Cr L J 735

AIR	Other Journals
542	1938 M W N 253
	47 M L W 492
	1938-1 M L J 610
545	...
547	1938 M W N 235
	48 M L W 119
550	1938 M W N 319
	1938-1 M L J 509
	1938 M Cr C 96
	47 M L W 750
	176 I C 256
	39 Cr L J 719
551	1938 M W N 255
	47 M L W 359
	1938 M Cr C 128
	1938-2 M L J 161
	ILR 1938 M 639
	176 I C 391
	39 Cr L J 716
553	47 M L W 538
	1938 M W N 478
	1938-1 M L J 710
	178 I C 525
555	1938 M W N 330
	1938-1 M L J 715
	47 M L W 786
560	1938 M W N 257
	1938-2 M L J 135
	48 M L W 244
	178 I C 238
562	1938 M W N 78
	47 M L W 686
565	1938 M W N 305
	47 M L W 425
	1938-2 M L J 452
567	47 M L W 321
	1938 M W N 387
	1938 M Cr C 142
	176 I C 768
	39 Cr L J 839
568	47 M L W 477
	1938 M W N 354
	1938-1 M L J 582
	179 I C 265
570	1938-1 M L J 400
	47 M L W 386
	1938 M W N 324
571	47 M L W 480
	1938 M W N 376
	1938-1 M L J 590
573	1938 M W N 250
	47 M L W 474
	1938-1 M L J 796
576	47 M L W 559
	1938-1 M L J 634
	1938 M W N 650
	ILR 1938 M 838
	178 I C 903
578	1938 M W N 525
	1938-1 M L J 875
	178 I C 471
579	47 M L W 517
	1938 M W N 397
	1938-1 M L J 624
581	47 M L W 236
	1938 M W N 241
	1938-1 M L J 318
583	1938 M W N 280
585	1938 M W N 325
589	47 M L W 661
	1938 M W N 499
	1938-1 M L J 806

AIR	Other Journals
589	176 I C 875
590	47 M L W 653
	1938-1 M L J 760
	1938 M W N 528
	176 I C 973
591	1938 M W N 313
	47 M L W 428
	1938 M Cr C 133
	ILR 1938 M 720
	177 I C 586
	39 Cr L J 898
594	1938-1 M L J 543
	1938 M W N 1160
595	1938 M W N 845
	47 M L W 542
	1938 M Cr C 92
	1938-1 M L J 876
	177 I C 489
	39 Cr L J 875
598	1938-1 M L J 492
	47 M L W 514
	1938 M W N 439
	177 I C 248
599	47 M L W 663
	1938-1 M L J 757
	1938 M W N 526
	177 I C 428
601	47 M L W 520
	1938 M W N 395
	1938-1 M L J 620
	177 I C 743
	ILR 1938 M 1090
602	1938 M W N 353
	47 M L W 525
	1938-1 M L J 873
	177 I C 102
608	1938 M W N 383
604	1938 M W N 561
FB	1938-2 M L J 22
	48 M L W 25
	177 I C 119
	ILR 1938 M 909
608	1938 M W N 341
	47 M L W 505
	ILR 1938 M 1040
612	1938 M W N 435
	47 M L W 637
	1938-1 M L J 763
	178 I C 880
613	1938 M W N 352
	47 M L W 473
	1938 M Cr C 141
	176 I C 768
	39 Cr L J 795
614	1938-1 M L J 561
	1938 M W N 449
615	47 M L W 640
	1938 M Cr C 200
	176 I C 815
	1938 M W N 601
	39 Cr L J 816
616	1938-1 M L J 414
	47 M L W 719
	1938 M W N 699
619	47 M L W 263
	1938-1 M L J 519
	1938 M W N 673
623	1938 M W N 440
	1938-1 M L J 686
	ILR 1938 M 767
631	47 M L W 393
	1938 M W N 298

AIR	Other Journals
631	1938-1 M L J 487
634	47 M L W 578
	1938 M W N 426
	1938-2 M L J 100
	177 I C 456
	1938 M Cr C 310
	ILR 1938 M 988
638	1938 M W N 277
	47 M L W 382
	1938-1 M L J 417
	177 I C 464
640	47 M L W 635
	1938-1 M L J 856
	1938 M W N 608
	1938 M Cr C 219
	177 I C 600
	39 Cr L J 907
641	47 M L W 389
	1938 M W N 310
	1938-1 M L J 616
643	1938 M W N 364
	1938-1 M L J 467
	47 M L W 532
	ILR 1938 M 897
645	47 M L W 523
	1938 M W N 453
	176 I C 928
646	47 M L W 656
	1938-1 M L J 769
	1938 M W N 630
	178 I C 290
649	1938 M W N 414
	47 M L W 564
	1938-2 M L J 108
	177 I C 425
651	1938 M W N 7
	48 M L W 153
	178 I C 428
653	47 M L W 636
	1938-1 M L J 761
	1938 M W N 535
	1938 M Cr C 151
	177 I C 554
	39 Cr L J 906
654	1938 M W N 252
	47 M L W 340
	1938-1 M L J 463
	1938 M Cr C 122
	177 I C 584
	39 Cr L J 922
656	1938 M W N 385
	47 M L W 568
	1938-1 M L J 670
	1938 M Cr C 117
	ILR 1938 M 805
	178 I C 67
	39 Cr L J 993
659	1938 M W N 418
	1938 M Cr C 102
	47 M L W 673
	177 I C 448
	39 Cr L J 879
661	1938 M W N 175
	47 M L W 764
	1938-2 M L J 623
666	1938 M W N 433
	47 M L W 591
	1938-1 M L J 728
	ILR 1938 M 923
667	47 M L W 742
	1938-1 M L J 886
	1939 M W N 611

AIR	Other Journals
667	1938 M Cr C 186
	177 I C 390
	39 Cr L J 869
668	1938 M W N 523
	177 I C 461
669	1938 M W N 542
672	1938-1 M L J 857
	47 M L W 803
	1938 M W N 653
675	1938 M Cr C 67
	1938 M W N 577
	48 M L W 139
	177 I C 494
	39 Cr L J 894
677	1938 M W N 403
683	1938 M W N 513
	47 M L W 726
	177 I C 759
684	1938 M W N 618
	47 M L W 782
	1938-1 M L J 867
686	47 M L W 740
	1938 M W N 581
	1938-1 M L J 871
	1938 M Cr C 181
	177 I C 288
	39 Cr L J 864
687	47 M L W 665
	1938 M W N 500
	177 I C 381
688	1938-2 M L J 44
	48 M L W 81
	1938 M W N 682
	179 I C 16
705	1938 M W N 421
	1938 M Cr C 99
	47 M L W 643
	1938-2 M L J 266
	178 I C 123
	39 Cr L J 1003
707	47 M L W 654
	1938 M W N 618
	1938-2 M L J 112
	177 I C 631
708	47 M L W 692
	1938-1 M L J 818
	1938 M W N 575
709	1938 M Cr C 88
	1938 M W N 536
	47 M L W 771
	1938-2 M L J 81
	177 I C 560
	39 Cr L J 905
710	1938-1 M L J 767
	47 M L W 813
	1938 M W N 608
	1938 M Cr C 154
	177 I C 924
	39 Cr L J 958
711	1938 M W N 502
	1938-1 M L J 793
	47 M L W 760
	177 I C 431
712	47 M L W 576
	1938 M W N 511
	1938-1 M L J 815
	1938 M Cr C 140
	177 I C 885
	39 Cr L J 867
713	1938-1 M L J 517
	47 M L W 529
	1938 M W N 893
	177 I C 823
714	47 M L W 741
	1938 M W N 606
	1938-2 M L J 160
	1938 M Cr C 217
	177 I C 436
	39 Cr L J 886
715	47 M L W 573
	1938 M W N 431
	1938-1 M L J 724
	1938 M Cr C 143
	177 I C 640
	39 Cr L J 916
716	1938 M W N 677
718	47 M L W 676
	1938-1 M L J 781
	1938 M W N 540
720	1938 M W N 524
	47 M L W 773
	177 I C 717
721	1938 M W N 424
	47 M L W 594
	1938 M Cr C 97
	1938-1 M L J 821
	ILR 1938 M 729
	177 I C 334
	39 Cr L J 865
722	1938-2 M L J 154
	1938 M W N 706
	48 M L W 107
	ILR 1938 M 816
723	1938 M W N 605
	48 M L W 142
	1938 M Cr C 210
	1938-2 M L J 225
	177 I C 432
	39 Cr L J 871
724	1938-2 M L J 41
	1938 M Cr C 153
	1938 M W N 620
	48 M L W 248
	177 I C 593
	39 Cr L J 932
725	1938 M W N 576
	1938-2 M L J 79
	48 M L W 237
	179 I C 225
726	1938 M W N 593
	48 M L W 146
	1938 M Cr C 241
	177 I C 545
	39 Cr L J 901
727	1938-1 M L J 750
	47 M L W 808
	1938 M W N 286
	ILR 1938 M 1050
730	1938 M W N 515
	1938-1 M L J 863
	178 I C 519
731	47 M L W 552
	1938 M W N 558
	ILR 1938 M 1080
734	1938 M W N 409
	47 M L W 628
738	1938 M W N 452
	177 I C 810
739	1938-1 M L J 526
	47 M L W 511
	1938 M W N 487
	177 I C 411
741	1938 M W N 514
	1938-1 M L J 808
741	47 M L W 724
742	1938 M W N 587
	48 M L W 136
	1938 M Cr C 202
	1938-2 M L J 222
	176 I C 879
	39 Cr L J 828
743	1938-1 M L J 800
	47 M L W 774
	1938 M Cr C 188
	1938 M W N 822
	177 I C 314
	39 Cr L J 861
745	1938 M W N 555
	48 M L W 74
	1938-2 M L J 249
	178 I C 287
746	47 M L W 668
	1938 M W N 634
749	48 M L W 194
	1938 M W N 718
	1938-2 M L J 141
752	47 M L W 587
	1938 M W N 455
	1938-1 M L J 824
755	1938-2 M L J 148
	48 M L W 109
	1938 M W N 740
	ILR 1938 M 1094
757	1938 M W N 516
	47 M L W 728
	1938-1 M L J 882
	178 I C 205
758	1938 M W N 529
	48 M L W 170
	1938 M Cr C 191
	1938-2 M L J 416
	177 I C 747
	39 Cr L J 933
765	48 M L W 112
	1938 M W N 779
	1938-2 M L J 277
	ILR 1938 M 928
767	48 M L W 215
	1938 M W N 1099
769	...
771	1938 M W N 702
	48 M L W 157
	178 I C 212
774	1938-2 M L J 33
	1938 M W N 714
	48 M L W 251
	178 I C 243
	ILR 1938 M 968
779	1938 M W N 708
784	1938 M W N 592
	175 I C 896
	1938-2 M L J 43
	48 M L W 145
	1938 M Cr C 204
	39 Cr L J 659
785	1938 M W N 722
FB	1938-2 M L J 189
	48 M L W 220
	177 I C 236
	ILR 1938 M 933
795	1938 M W N 588
	1938 M Cr C 180
	48 M L W 138
	1938-2 M L J 152
	179 I C 169
796	48 M L W 35
FB	1938 M W N 678
	1938-2 M L J 128
	177 I C 188
	ILR 1938 M 1007
799	1938-2 M L J 76
	47 M L W 793
	1938 M W N 707
	176 I C 806
801	1938 M W N 291
	1938-2 M L J 362
	48 M L W 522
	179 I C 240
806	1938 M W N 609
	48 M L W 150
	1938 M Cr C 228
	178 I C 115
	39 Cr L J 1006
808	1938 M W N 667
	1938-2 M L J 93
	48 M L W 246
	179 I C 47
809	1938 M W N 567
	1938-2 M L J 186
	48 M L W 285
	178 I C 803
810	1938-2 M L J 85
	1938 M W N 744
	48 M L W 735
	179 I C 275
814	1938 M W N 572
	48 M L W 32
	1938-2 M L J 156
	177 I C 331
815	47 M L W 739
	1938 M W N 589
	1938 M Cr C 190
	1938-2 M L J 360
	ILR 1938 M 814
	177 I C 814
	39 Cr L J 958
816	47 M L W 744
	1938 M W N 736
	1938-2 M L J 270
819	1938 M W N 839
	48 M L W 267
	1938-2 M L J 875
	1938 M Cr C 278
820	48 M L W 214
	1938 M W N 831
	1938-2 M L J 285
	1938 M Cr C 235
	177 I C 896
	39 Cr L J 956
821	1938 M W N 823
	1938-2 M L J 281
	48 M L W 330
	1938 M Cr C 238
	178 I C 59
	39 Cr L J 991
822	1938 M W N 802
	1938-2 M L J 428
823	48 M L W 242
	1938-2 M L J 283
	1938 M W N 847
	177 I C 33
824	1938 M W N 520
	48 M L W 623
827	1938 M W N 399
829	1938 M W N 379
	179 I C 55

AIR	Other Journals
832	1938 M W N 830
	1938 M Cr C 239
	1938-2 M L J 394
	48 M L W 267
	178 I C 40
	ILR 1938 M 1003
	39 Cr L J 987
833	1938 M W N 829
	48 M L W 273
	1938 M Cr C 244
	1938-2 M L J 407
	177 I C 736
	39 Cr L J 951
	ILR 1938 M 1100
835	48 M L W 249
	1938 M W N 837
	1938-2 M L J 337
836	1938 M W N 671
	1938-2 M L J 251
838	1938 M W N 733
	48 M L W 180
	1938-2 M L J 244
841	1938 M W N 138
	1938-1 M L J 216
	ILR 1938 M 696
	48 M L W 628
847	47 M L W 777
	1938 M W N 578
	1938 M Cr C 172
	176 I C 395
	39 Cr L J 712
	1938-2 M L J 456
	ILR 1938 M 902
849	48 M L W 185
	1938 M W N 810
	1938-2 M L J 756
	ILR 1938 M 1019
853	48 M L W 268
	1938 M W N 878
	1938-2 M L J 501
	179 I C 201
855	1938 M W N 804
	1938-2 M L J 447
857	48 M L W 375
	1938-2 M L J 430
	1938 M W N 918
858	1938 M W N 595
	1938 M Cr C 145
	48 M L W 639
864	1938 M W N 833
	1938-2 M L J 402
	48 M L W 290
	178 I C 503
865	1938 M W N 785
	1938-2 M L J 534
	48 M L W 292
878	48 M L W 276
	1938-2 M L J 446
	1938 M W N 976
	1938 M Cr C 258
	178 I C 532
	40 Cr L J 92
879	1938-2 M L J 372
	1938 M W N 973
	1938 M Cr C 262
	177 I C 957

AIR	Other Journals
879	48 M L W 801
	39 Cr L J 984
880	1938 M W N 884
	48 M L W 329
	1938-2 M L J 353
	1938 M Cr C 275
	178 I C 409
881	48 M L W 258
	1938 M W N 806
884	1938-2 M L J 390
	48 M L W 263
	1938 M W N 880
887	48 M L W 454
FB	1938 M W N 946
	1938-2 M L J 557
	178 I C 159
	ILR 1938 M 1031
889	48 M L W 401
FB	1938 M W N 913
	1938-2 M L J 461
	178 I C 220
893	1938 M W N 825
	48 M L W 322
	1938 M Cr C 252
	178 I C 616
	40 Cr L J 108
897	178 I C 355
898	48 M L W 239
	1938 M W N 844
	1938-2 M L J 385
	178 I C 737
900	1938 M W N 817
	48 M L W 363
	1938 M Cr C 246
	178 I C 341
	40 Cr L J 35
903	1938 M W N 840
	1938-2 M L J 488
	48 M L W 289
904	1938 M Cr C 169
	1938 M W N 871
	48 M L W 320
	1938-2 M L J 397
	178 I C 478
	40 C R L J 69
905	1938 M W N 864
	48 M L W 416
	1938-2 M L J 529
	178 I C 96
906	1938 M W N 841
	48 M L W 279
909	48 M L W 381
	1938-2 M L J 531
	1938 MWN 1105
	1938 M Cr C 304
	178 I C 126
	40 Cr L J 46
910	1938 M Cr C 155
	1938 M W N 865
	48 M L W 350
	1938-2 M L J 382
	177 I C 737
	39 Cr L J 935
911	1938 M W N 897
	48 M L W 480
	1938-2 M L J 523

AIR	Other Journals
914	48 M L W 411
	1938 M W N 922
	179 I C 121
916	1938 M W N 911
	1938-2 M L J 579
	1938 M Cr C 260
	48 M L W 657
	178 I C 266
	40 Cr L J 26
918	48 M L W 399
	1938 M W N 924
	1938-2 M L J 531
	178 I C 761
919	1938 M W N 895
	1938-2 M L J 505
921	1938 M W N 835
	48 M L W 277
922	48 M L W 380
	1938-2 M L J 487
	1938 M W N 1139
	178 I C 679
923	48 M L W 417
	1938 M W N 952
	1938-2 M L J 639
	178 I C 753
924	48 M L W 378
	1938 M W N 975
	1938-2 M L J 583
	1938 M Cr C 296
	178 I C 523
	40 Cr L J 86
925	1938 M W N 882
	1938-2 MLJ 1039
927	1938 M W N 920
	48 M L W 462
	1938-2 M L J 609
929	1938 M W N 854
	48 M L W 834
	1938-2 M L J 790
938	1938 M W N 900
	1938-2 M L J 478
	48 M L W 494
940	1938 M W N 917
	1938-2 M L J 565
	178 I C 509
941	1938 M W N 931
	48 M L W 512
	1938-2 M L J 589
945	1936 M W N 902
	48 M L W 395
	1938-2 M L J 482
947	1938 M W N 873
	48 M L W 503
	1938-2 M L J 585
949	48 M L W 382
	1938 M W N 912
	1938 M Cr C 257
	1938-2 M L J 659
	179 I C 159
950	1938 M W N 942
	48 M L W 506
	1938-2 M L J 632
953	48 M L W 408
	1938 M W N 936
	1938-2 M L J 511
	179 I C 459

AIR	Other Journals
955	48 M L W 450
	1938 M W N 950
	179 I C 446
957	1938 M W N 1012
	1938-2 M L J 648
	48 M L W 655
958	48 M L W 436
	1938 M W N 982
	1938-2 M L J 769
959	1938 M W N 933
	1938-2 M L J 775
962	48 M L W 431
	1938-2 M L J 568
	1938 M W N 996
965	1938 M W N 961
SB	1938-2 M L J 661
	48 M L W 653
	1938 M Cr C 298
	178 I C 917
966	1938 M W N 1023
	1938-2 M L J 688
	48 M L W 666
972	48 M L W 419
	1938-2 M L J 516
	1938 M W N 977
	179 I C 504
975	1938-2 M L J 520
	1938 M W N 1008
	1938 M Cr C 269
	179 I C 91
976	48 M L W 441
	1938 M W N 1009
	1938-2 M L J 843
	1938 M Cr C 337
977	48 M L W 433
	1938 M W N 979
979	1938 M W N 925
	48 M L W 517
	1938-2 M L J 642
982	1938 M W N 983
	1938-2 M L J 663
	48 M L W 829
994	1938 M W N 1006
	48 M L W 592
	1938-2 M L J 701
996	1938 M W N 908
	48 M L W 471
	1938-2 M L J 574
	1938 M Cr C 265
998	1938 M Cr C 163
	1938 M W N 867
	48 M L W 819
	1938-2 M L J 582
	178 I C 117
	39 Cr L J 980
999	48 M L W 577
	1938 M W N 1017
1004	48 M L W 476
	1938 M W N 1013
	1938-2 M L J 895
	179 I C 466
1006	48 M L W 458
	1938 M W N 953
	179 I C 524

Other Journals=All India Reporter.

I. L. R. (1938) Madras = All India Repoter

ILR	AIR		ILR	AIR		ILR	AIR		ILR	AIR		ILR	AIR	
1	1937 PC	261	220	1938 M	8	410	1938 M	102	646	1938 PC	123	888	1938 M	576
12	" M	937	233	" "	117	426	1937 "	962	667	" M	347	897	" "	643
25	" "	745	253	1937 "	840	431	1938 "	33	675	" "	349	902	" "	847
39	1938 "	92	260	" "	967	439	" "	19	688	" "	433	909	" "	604
52	1937 "	741	262	" "	951	451	" "	456	696	" "	841	923	" "	666
63	" "	604	270	1938 "	145	455	" "	192	716	" "	402	928	" "	765
66	" "	567	275	" "	218	457	" "	264	720	" "	591	933	" "	7-
72	" "	775	278	" "	141	460	" "	262	729	" "	721	968	" "	774
80	" "	711	284	" "	96	466	" "	1	734	" "	438	981	" "	498
87	1938 "	143	292	" "	124	479	1937 "	902	744	" "	360	9-8	" "	634
91	1937 PC	296	309	" "	278	523	1938 "	43	763	" "	171	1003	" "	832
104	" M	696	315	" "	390	533	" "	157	767	" "	623	1007	" "	796
113	" "	895				545	" "	248	789	1939 "	139	1019	" "	849
123	" "	961	321	1937 "	960	551	" PC	34	805	1938 "	656	1031	" "	887
127	" "	735	326	1938 "	113	563	" M	377	814	" "	815	1040	" "	608
148	" "	731	335	" "	234	578	" "	420	816	" "	722	1050	" "	727
162	" "	660	343	1937 "	944	596	" "	353	819	" "	539	1060	1939 "	80
180	" "	822				598	" "	435	829	" "	357			
183	1938 "	148	347	1938 "	74	609	" "	107	841	" "	441	1063	1938 "	449
192	" "	154	348	1937 "	755	630	" "	459	858	" "	381	1080	" "	731
203	1937 "	894	360	1938 PC	52	633	" "	399	867	" "	413	1090	" "	601
210	1938 "	75	381	" M	342	636	" "	485	873	" "	280	1094	" "	755
216	1937 "	653	399	" "	276	639	" "	551	878n	1936 "	583	1100	" "	833

(1938) 1 Madras Law Journal = All India Reporter

MLJ	AIR		MLJ	AIR		MLJ	AIR		MLJ	AIR		MLJ	AIR	
1	1938 PC	1	184	1938 M	255	368	1938 M	385	536	1938 M	531	750	1938 M	727
11	" M	145	187	" "	318	375	" "	507	539	" "	483	757	" "	599
14	" "	52	190	" "	454	378	" "	377	543	" "	594	760	" "	590
17	1937 "	703	193	" "	257	384	" "	504	545	1937 PC	296	761	" "	653
29	1938 "	278	204	" "	459	386	1937 "	597	552	1938 M	441	763	" "	612
38	" "	205	206	" "	339	391	1938 "	227	561	" "	614	767	" "	710
41	" PC	7	209	" PC	20	400	" "	570	571	" "	402	769	" "	646
45	" M	390	216	" M	841	402	" "	399	574	1937 "	599	775	" "	539
50	" "	372	229	" "	497	403	" "	529	582	1938 "	568	781	" "	718
54	" "	218	232	1937 "	967	406	" "	505	586	" "	533	785	" PC	66
56	" "	286	234	1938 "	464	410	" "	264				788	1937 "	299
61	" "	252	235	" "	313	413	" "	420	590	" PC	49	793	1938 M	711
63	" "	146	236	" "	320	417	" "	638	597	" "	123	796	" "	573
68	" "	381	238	" "	460	426	" PC	34	610	" M	542	800	" "	743
73	1937 "	811	241	" "	272	437	" M	522	616	" "	641	803	" "	741
79	1938 "	468	249	" "	325	439	" "	424	620	" "	601	806	" "	589
83	" PC	12	252	" "	340	443	" "	502	624	" "	579	813	" "	708
92	" M	221	255	" "	495	444	" "	616	628	" "	435	815	" "	712
99	" "	282	256	" "	342	450	" "	496	634	" "	576	817	" "	537
101	" "	394	268	" PC	52	453	" "	654	640	" PC	67	821	" "	721
106	" "	388	281	" M	413	458	" PC	80	647	" "	130	824	" "	762
110	" "	396	285	" "	347	467	" M	643	662	" M	498	829	" "	493
113	" "	415	289	" "	490	471	" "	449	667	" "	536	834	" PC	152
128	" PC	8	293	1937 "	833	482	" "	393	669	" "	541	849	" "	84
130	" M	148	296	1938 "	433	485	" "	535	670	" "	656	854	" M	524
135	" "	323	302	" PC	61	487	" "	631	676	" "	426	856	" "	640
139	" "	241	310	" M	503	492	" "	598	682	" "	532	857	" "	672
142	" "	380	313	" "	581	495	" "	438	685	" "	384	863	" "	730
146	" "	157	316	" "	457	502	1937 PC	261	686	" "	623	864	" "	485
154	" "	322	320	1937 "	849	509	1938 M	550	704	" PC	118	867	" "	684
159	" "	262	325	" "	504	510	" "	511	710	" M	553	871	" "	686
161	" PC	15	334	1938 "	353	514	" "	316	715	" "	555	873	" "	602
171	" M	30	342	" "	523	517	" "	713	724	" "	715	875	" "	578
174	" "	334	344	" "	349	519	" "	619	728	" "	666	876	" "	595
178	" "	482	351	" "	360	526	" "	739	731	" PC	113	882	" "	757
181	" "	398	359	" PC	78	530	" "	571	743	1937 "	256	886	" "	667

(1938) 2 Madras Law Journal = All India Reporter

MLJ	AIR		MLJ	AIR		MLJ	AIR		MLJ	AIR		MLJ	AIR	
1	1938 PC	184	22	1938 M	604	88	1938 M	774	48	1938 M	784	76	1938 M	799
11	" "	165	31	" "	709	41	" "	724	44	" "	688	79	" "	725

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
81	1938	M	248	281	1938	M	821	482	1938	M	945	663	1938	M	982	906	1939	PC	6
85	"	"	810	283	"	"	823	487	"	"	922	683	"	"	966	912	1938	"	252
93	"	"	808	285	"	"	820	488	"	"	903	701	"	"	994	918	1939	M	4
95	"	"	326	287	1939	"	228	490	"	"	525	704	1939	"	81	920	"	"	56
100	"	"	634	323	1938	PC	219	501	"	"	853	731	1938	PC	218	923	"	"	139
108	"	"	649	332	"	"	216	505	"	"	919	740	1939	M	54	934	"	"	94
112	"	"	707	337	"	M	835	511	"	"	953	745	"	"	17	936	"	"	163
115	"	PC	175	340	"	"	164	516	"	"	972	750	"	"	66	940	"	"	193
128	"	M	796	343	"	"	880	520	"	"	975	756	1938	"	849	944	"	"	6
135	"	"	560	355	"	"	509	523	"	"	911	764	1939	"	50	962	1938	PC	181
137	"	"	491	360	"	"	815	529	"	"	905	768	"	"	76	972	1939	M	170
141	"	"	749	362	"	"	801	531a	"	"	909	769	1938	"	958	977	"	"	92
148	"	"	755	372	"	"	879	531b	"	"	918	771	1939	"	59	980	"	"	282
152	"	"	795	375	"	"	819	534	"	"	865	775	1938	"	959	982	"	"	154
154	"	"	722	377	1937	"	775	557	"	"	887	780	"	PC	266	987	"	"	208
156	"	"	814	382	1938	"	910	562	"	PC	228	790	"	M	929	992	1938	PC	263
160	"	"	714	385	"	"	898	565	"	M	940	812	1939	"	58	999	1939	M	162
161	"	"	551	390	"	"	884	568	"	"	962	813	"	"	53	1001	"	"	196
165	"	"	305	394	"	"	832	574	"	"	996	815	"	"	52	1010	"	"	112
169	"	PC	191	397	"	"	904	579	"	"	916	817	"	"	31	1013	"	"	65
179	"	M	267	402	"	"	864	582	"	"	998	822	"	"	37	1016	1938	"	280
186	"	"	809	404	"	"	456	583b	"	"	924	829	"	"	46	1020	1939	"	159
189	"	"	785	407	"	"	833	585	"	"	947	833	"	"	57	1026	"	"	150
210	"	PC	169	410	"	PC	213	589	"	"	941	835	1938	"	1004	1028	"	"	109
222	"	M	742	416	"	M	758	596	"	PC	210	840	1939	"	49	1032	"	"	215
225	"	"	723	428	"	"	822	609	"	M	927	843	1938	"	976	1035	"	"	177
228	"	PC	195	430	"	"	857	623	"	"	661	846	1939	"	34	1039	1938	"	925
234	"	"	189	431	"	"	193	632	"	"	950	852	1938	PC	254	1042	1939	"	183
239	"	"	202	446	"	"	878	639	"	"	923	863	1939	M	21	1045	"	"	273
244	"	M	838	447	"	"	855	642	"	"	979	883	"	"	40	1048	"	"	157
249	"	"	745	452	"	"	565	648	"	"	957	886	"	"	172	1053	"	"	167
251	"	"	836	456	"	"	847	651	"	"	1	894	"	"	61	1054	"	"	42
266	"	"	705	461	"	"	889									1065	"	"	3
270	"	"	816	469	"	PC	198	659	"	"	949	902	1938	PC	276	1068	"	"	186
277	"	"	765	478	"	M	938	661	"	"	965	904	1939	M	95	1072	"	"	224

47 Madras Law Weekly = All India Reporter

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1938	PC	7	154	1938	M	262	268	1938	M	347	389	1938	M	641	529	1938	M	713
3	"	"	20	156	"	"	264	272	"	"	336	393	"	"	631	532	"	"	648
9	"	"	1	158	"	"	464	275	"	"	460	405	"	"	491	535	"	"	541
16	"	"	8	159	"	"	402	278	"	"	280	408	"	"	530	536	"	"	536
21	"	M	145	161	"	"	490	281	"	PC	67	409	"	PC	91	538	"	"	558
24	"	"	148	165	"	"	415	286	"	M	364	421	"	M	505	542	"	"	595
28	"	"	57	173	"	"	393	295	"	"	433	425	"	"	565	547	1937	"	849
31	"	"	326	175	"	"	398	300	"	"	479	428	"	"	591	552	1938	"	731
36	"	"	199	178	"	"	399	305	"	"	537	433	"	"	535	557	"	"	532
40	"	"	161	179	"	"	459	308	"	"	524	434	"	"	174	559	"	"	576
46	"	"	221	181	"	"	381	309	"	"	377	435	"	"	531	564	"	"	649
51	"	"	807	186	"	"	485	314	"	"	349	438	"	"	193	568	"	"	656
60	1937	"	718	188	"	"	493	320	"	"	508	448	"	"	438	573	"	"	715
64	1938	"	241	192	"	"	276	321	"	"	567	453	"	"	385	576	"	"	712
66	"	"	253	196	"	"	482	322	"	"	213	459	"	"	334	578	"	"	634
70	"	"	278	199	"	"	400	323	"	"	392	467	"	"	501	587	"	"	752
73	"	PC	23	202	"	"	454	324	"	"	511	473	"	"	613	591	"	"	666
78	"	"	12	205	"	PC	15	327	"	"	522	474	"	"	573	594	"	"	721
84	"	M	422	211	"	M	316	329	"	PC	52	477	"	"	563	596	"	PC	136
88	"	"	272	214	"	PC	38	338	"	M	507	480	"	"	571	601	"	"	121
94	"	"	250	221	"	"	71	340	"	"	654	485	"	"	502	614	"	"	118
104	"	"	390	225	"	"	65	344	"	"	953	486	"	"	529	618	"	"	129
110	"	PC	34	227	"	"	80	350	"	"	352	488	"	"	435	628	"	M	734
118	"	M	236	234	"	"	66	351	"	"	496	492	"	"	542	635	"	"	640
124	"	PC	59	236	"	M	581	354	"	"	504	498	"	"	441	636	"	"	659
128	"	M	396	239	"	PC	73	356	"	"	498	505	"	"	608	637	"	"	612
130	"	"	413	245	"	M	342	359	"	"	551	511	"	"	739	640	"	"	615
133	"	"	380	254	"	"	462	363	"	"	420	514	"	"	598	643	"	"	705
139	"	"	448	255	"	"	463	366	1937	"	717	517	"	"	579	647	"	"	321
140	1937	"	968	258	"	"	495	368	1938	"	360	520	"	"	601				
146	1938	"	340	259	"	"	497	382	"	"	638	523	"	"	645	649	"	PC	110
149	"	"	403	261	"	"	503	386	"	"	570	525	"	"	602	653	"	M	590
158	"	"	313	263	"	"	619	388	"	"	523	527	"	"	457	654	"	"	707

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
656	1938	M	646	692	1938	M	708	728	1938	M	757	751	1938	M	322	780	1938	M	711
661	"	"	589	693	"	"	323	731	"	"	486	753	"	PC	165	782	"	"	684
663	"	"	599	696	"	"	539	738	"	"	384	760	"	M	329	786	"	"	555
665	"	"	687	700	"	"	282	739	"	"	815	764	"	"	661	793	"	"	799
668	"	"	746	702	"	"	424	740	"	"	686	771	"	"	709	796	"	PC	84
673	"	"	659	705	"	"	449	741	"	"	714	772	"	"	489	799	1937	"	299
676	"	"	718	714	"	"	426	742	"	"	667	773	"	"	720	803	1938	M	672
679	"	"	468	719	"	"	616	744	"	"	816	774	"	"	743	808	"	"	727
683	"	"	305	724	"	"	741	750	"	"	550	777	"	"	847	813	"	"	710
686	"	"	562	726	"	"	683												

48 Madras Law Weekly = All India Reporter

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1938	PC	184	239	1938	M	898	416	1938	M	905	604	1939	M	106	780	1939	M	15
8	"	"	191	242	"	"	823	417	"	"	923	611	"	"	46	783	"	"	313
16	"	"	169	244	"	"	560	419	"	"	972	618	"	"	37	788	"	"	273
25	"	M	604	246	"	"	808	423	"	PC	254	623	1938	"	824	791	"	"	134
32	"	"	814	248	"	"	724	431	"	M	962	628	"	"	841	793	"	"	208
35	"	"	796	249	"	"	835	436	"	"	958	639	"	"	858	797	1938	"	372
40	"	PC	198	251	"	"	774	438	"	"	977	646	1939	"	52	801	"	"	879
47	"	"	175	258	"	"	881	441	"	"	976	648	"	"	58	803	1939	"	137
57	"	"	202	263	"	"	884	444b	"	"	248	649	"	"	53	807	"	"	196
62	"	"	195	267	"	"	819	448	"	"	456	650	"	"	40	813	"	"	21
66	"	"	189	268	"	"	853	450	"	"	955	653	1938	"	965	829	1938	"	982
70	"	"	216	273	"	"	833	452	1939	"	69	655	"	"	957	849	1939	"	204
74	"	M	745	276	"	"	878	454	1938	"	887	657	"	"	916	856	"	"	224
76	"	"	357	277	"	"	921	458	"	"	1006	659	1939	"	57	862	"	"	135
81	"	"	688	279	"	"	906	462	"	"	927	661	"	"	49	865	"	"	261
107	"	"	722	285	"	"	809	466	"	PC	259	664	"	"	169	868	"	"	151
109	"	"	755	287	"	"	832	471	"	M	996	666	1938	"	966	870	"	"	210
112	"	"	765	289	"	"	903	476	"	"	1004	679	"	"	257	881	"	"	270
115	"	"	509	290	"	"	864	480	"	"	911	688	1939	"	80	887	"	"	216
119	"	"	547	292	"	"	865	485	1939	"	70	689	"	"	50	894	"	"	247
123	"	PC	181	319	"	"	998	494	1938	"	938	692	"	"	98	899	"	"	79
127	"	"	205	320	"	"	904	498	1939	"	34	693	"	"	178	901	"	"	145
136	"	M	742	322	"	"	893	503	1938	"	947	701	"	"	94	903	"	"	282
138	"	"	795	329	"	"	880	506	"	"	950	702	"	"	1	905	"	"	280
139	"	"	675	330	"	"	821	512	"	"	941	706	"	"	150	908	"	"	187
142	"	"	723	334	"	"	929	517	"	"	979	707	"	"	6	912	"	PC	6
145a	"	"	784	350	"	"	910	522	"	"	801	722	"	"	102	916	"	M	163
146	"	"	726	353	"	PC	270	530	1939	"	76	728	"	"	112	919	"	"	139
150	"	"	806					531	"	"	56	730	"	"	109	927	"	"	256
153	"	"	651	363	"	M	900	533	1938	PC	243	735	1938	"	810	929	"	"	200
157	"	"	771	368	"	PC	250	537	"	"	266	742	1939	"	170	932	"	"	148
163	"	"	470	371	"	"	245	543	1939	M	65	746	"	"	159	937	"	"	195
170	"	"	758	375	"	M	857	546	"	"	54	751	"	"	157	939	"	"	179
180	"	"	838	378	"	"	924	549	"	"	92	754	"	"	96	945	"	"	176
185	"	"	849	380	"	"	922	551	"	PC	39	758	"	"	162	946	"	"	146
191	"	PC	228	381	"	"	909	564	"	M	42	760	"	"	152	949	"	"	184
194	"	M	749	382	"	"	949	573	"	"	17	763	"	"	167	952	"	"	202
199	"	PC	230	388	1939	"	228	577	1938	"	999	764	"	"	290	954	"	"	186
204	"	"	232	395	1938	"	945	586	1939	"	5	766	"	"	165	957	"	"	78
214	"	M	820	399	"	"	918	588	"	"	31	770	"	"	154	959	"	"	220
215	"	"	767	401	"	"	889	592	1938	"	994	774	"	"	294				
220	"	"	785	408	"	"	953	595	1939	"	61	775	"	"	114	966	"	"	276
237	"	"	725	411	"	"	914	601	"	"	59	777	"	"	3	969	"	"	265

1938 Madras Weekly Notes = All India Reporter

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1938	PC	7	30	1938	M	233	58	1938	M	250	78	1938	M	562	97	1938	M	400
8	"	M	272	31	"	"	403	60	"	"	465	81	"	"	145	99	"	"	426
7	"	"	651	36	"	"	336	64	"	"	340	83	"	PC	4	102	"	"	389
10	"	"	221	38	"	"	396	65	"	"	318	85	"	M	52	103	"	"	398
14	"	"	218	41	"	PC	8	67	"	"	322	87	"	"	380	105	"	"	415
17	"	"	217	44	"	M	364	68	"	"	422	89	"	"	398	110	"	"	385
18a	"	"	461	49	"	"	413	71	"	"	316	90	"	"	490	113	"	"	429
18b	"	"	384	51	"	"	468	72	"	"	318	98	"	"	482	117	"	"	394
22	"	"	388	53	"	"	280	73	"	"	298	95	"	"	460	119	"	"	305
24a	"	"	176	55	"	"	234	75	"	"	329	96	"	"	464	124	"	"	402

1938 Index (Mad. 8 (4pp.)

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
131	1938	M	474	321	1938	M	530	514	1938	M	741	706	1938	M	722	925	1938	M	979
134	"	PC	15	322	"	"	491	515	"	"	730	707	"	"	799	928	"	PC	245
138	"	M	841	324	"	"	570	516	"	"	757	708	"	"	779	931	"	M	941
145	"	PC	20	325	"	"	585	518	"	"	684	714	"	"	774	934	"	PC	250
149	"	M	326	330	"	"	555	520	"	"	824	718	"	"	749	936	"	M	953
152	"	PC	1	335	"	"	525	523	"	"	668	722	"	"	785	938	"	"	959
156	1937	"	314	341	"	"	608	524	"	"	720	733	"	"	838	942	"	"	950
161	1938	M	479	345	"	"	595	525	"	"	578	736	"	"	816	946	"	"	887
164	"	"	493	348	"	"	537	526	"	"	599	740	"	"	755	949	1939	"	56
166	"	"	433	350	"	"	508	527	"	PC	65	744	"	"	810	950	1938	"	956
169	"	"	278	351	"	"	535	528	"	M	590	748	"	PC	216	952	"	"	923
171	"	"	148	352	"	"	613	529	"	"	758	751	"	"	202	953	"	"	1006
174	"	"	459	353	"	"	602	535	"	"	652	753	"	"	191	955	"	PC	254
175	"	"	661	354	"	"	568	536	"	"	709	757	"	"	184	961	"	M	965
180	"	"	342	356	"	"	405	537	"	"	539	762	"	"	219	962	1939	"	283
185	"	"	454	364	"	"	643	540	"	"	718	766	"	"	189	969	1938	PC	266
186	"	"	485	366	"	"	438	542	"	"	669	768	"	"	223	973	"	M	879
188	"	"	347	369	"	"	441	545	"	PC	169	769	"	"	198	975	"	"	924
190	"	"	262	373	"	"	435	552	"	"	52	774	"	"	205	976	"	"	878
191	"	"	323	376	"	"	571	558	"	M	731	779	"	M	765	977	"	"	972
193	"	"	456	379	"	"	829	561	"	"	604	781	"	PC	12	979	"	"	977
194	"	"	509	383	"	"	603	565	"	"	745	785	"	M	865	981	1939	"	69
196	"	"	507	385	"	"	656	567	"	"	809	802	"	"	822	982	1938	"	958
197	"	"	360	387	"	"	567	568	"	"	390	804	"	"	855	983	"	"	982
201	"	"	449	389	"	"	523	572	"	"	814	806	"	"	881	996	"	"	962
207	"	"	496	390	"	PC	110	573	"	PC	66	810	"	"	849	999	1939	"	31
209	"	"	349	393	"	M	713	575	"	M	708	814	"	PC	230	1002	1938	PC	259
212	"	"	213	394	"	"	531	576	"	"	725	817	"	M	900	1006	"	M	994
213	"	"	448	395	"	"	601	577	"	"	675	820	"	"	724	1008	"	"	975
215	"	"	477	397	"	"	579	578	"	"	847	822	"	"	743	1009	"	"	976
219	"	"	264	399	"	"	827	581	"	"	686	823	"	"	821	1012	"	"	957
220	"	"	276	401	"	PC	118	582	1939	"	190	825	"	"	893	1013	"	"	1004
223	"	"	315	403	"	M	677	587	1938	"	742	829	"	"	833	1016	1939	"	49
224a	"	"	392	409	"	"	734	588	"	"	795	830	"	"	832	1017	1938	"	999
229	"	"	353	414	"	"	649	589	"	"	815	831	"	"	820	1023	"	"	966
233	"	"	457	416	"	"	495	592	"	"	784	833	"	"	864	1031	1939	"	57
235	"	"	547	417	"	"	529	593	"	"	726	834	"	PC	228	1032	1938	"	513
238	"	"	377	418	"	"	659	595	"	"	858	835	"	M	921	1041	1939	"	228
241	"	"	581	421	"	"	705	601	"	"	615	837	"	"	835	1060	"	"	65
242	"	"	497	423	"	"	524	603	"	"	710	839	"	"	819	1061	"	"	5
244	"	"	193	424	"	"	721	605	"	"	723	840	"	"	903	1062	"	"	46
250	"	"	573	426	"	"	634	606	"	"	714	841	"	"	906	1065	"	"	92
252	"	"	654	431	"	"	715	608	"	"	640	844	"	"	898	1066	"	"	61
255	"	"	551	433	"	"	666	609	"	"	806	847	"	"	823	1070	"	"	50
257	"	"	560	435	"	"	612	611	"	"	667	848	"	PC	232	1072	"	"	37
258	"	"	504	437	"	"	739	613	"	"	707	854	"	M	929	1076	"	"	106
259	"	"	542	439	"	"	598	614	"	PC	59	864	"	"	905	1080	"	"	54
262	"	"	338	440	"	"	623	616	"	M	321	865	"	"	910	1082	"	"	58
264	"	"	498	449	"	"	614	618	"	PC	71	867	"	"	998	1083	"	"	17
266	"	"	503	450	"	"	501	621	"	"	73	871b	"	"	904	1086	"	"	42
269	"	"	357	452	"	"	738	626	"	"	80	873	"	"	947	1092	"	"	70
272	"	"	420	453	"	"	645	630	"	M	646	875	1939	"	34	1098	"	"	169
274	"	"	331	455	"	"	752	633	"	"	282	878	1938	"	863	1099	1938	"	767
277	"	"	638	457	"	"	424	634	"	"	746	880	"	"	884	1102	1939	"	40
280	"	"	583	465	"	"	852	636	"	"	384	882	"	"	925	1103	"	"	52
282	"	"	511	466	"	"	462	637	"	PC	136	884	"	"	880	1105a	1938	"	909
283	"	"	489	467	1937	"	717	640	"	M	486	885	"	PC	195	1105b	1939	"	21
284	"	"	505	468	1938	"	463	643	1937	"	849	888	"	"	175	1116	"	"	59
286	"	"	727	471	"	PC	123	646	1938	PC	67	895	"	M	919	1118	"	"	15
290	"	"	532	477	"	M	483	650	"	M	576	897	"	"	911	1120	"	"	3
291	"	"	801	478	"	"	553	653	"	"	672	900	"	"	938	1121	"	"	96
296	"	"	533	481	"	PC	165	656	"	"	307	902	"	"	945	1124a	"	"	198
298	"	"	631	487	"	"	152	666	"	PC	183	905	1939	"	66	1124b	1938	"	205
301	"	"	470	493	"	"	121	667	"	M	808	908	1938	"	996	1127	1939	"	204
305	"	"	565	496	"	M	381	669	"	PC	181	911	"	"	916	1181	"	"	76
309	"	"	522	499	"	"	589	671	"	M	836	912	"	"	949	1132	"	"	95
310	"	"	641	500	"	"	687	673	"	"	619	913	"	"	889	1133	"	"	114
312	"	"	399	502	"	"	711	677	"	"	716	917	"	"	940	1134	"	"	94
313	"	"	591	503	"	PC	98	678	"	"	796	918	"	"	857	1185	"	"	150
316	"	"	536	505	"	"	130	682	"	"	688	920	"	"	927				
317	"	"	541	511	"	M	712	699	"	"	616	922	"	"	914				
319	"	"	550	513	"	"	683	702	"	"	771	924	"	"	918				

MWN		AIR		MWN		AIR		MWN		AIR		MWN		AIR		MWN		AIR	
1136	1939	M	137	1161	1939	M	115	1206	1939	M	102	1245	1939	M	163	1276	1939	M	177
1139a	1938	"	502	1166	"	"	109	1210	"	"	268	1247	"	"	196	1278	"	"	21
1139b	"	"	922	1169	"	"	1	1211	"	"	208	1251	"	"	134	1279	"	"	184
1140	"	"	325	1171	"	"	168	1214	"	"	81	1252	"	"	280	1286	"	"	202
1142	"	"	320	1173	"	"	313	1224	"	"	290	1254	"	"	80	1288	"	"	255
1143	1939	"	224	1176	"	"	170	1225	"	"	193	1255	"	"	270	1289	"	"	120
1147	1938	"	372	1178	1937	"	833	1227	"	"	273	1258	"	"	130	1304	"	"	263
1148	1939	"	159	1180	1939	"	216	1229	"	"	145	1264	1938	PC	243	1311	"	"	253
1152	"	"	112	1185	"	"	162	1230	"	"	210	1266	"	"	34	1312	"	"	294
1153	"	"	154	1186	"	"	165	1235	"	"	183	1271	"	"	276	1313	"	"	318
1155	"	"	157	1189	"	"	98	1236	"	"	247	1272	1939	M	266	1332	"	"	352
1158	"	"	152	1194	"	"	6	1240	"	"	135	1274	"	"	269	1337	"	"	337
1160	1933	"	594	1203	1938	"	43	1241	"	"	261	1275	"	"	53				
								1243	"	"	151								

1938 Madras Criminal Cases = All India Reporter

MCrC		AIR		MCrC		AIR		MCrC		AIR		MCrC		AIR		MCrC		AIR	
1	1938	M	477	99	1938	M	705	155	1938	M	910	228	1938	M	806	287	1939	M	283
4	"	"	541	102	"	"	659	163	"	"	998	231	"	"	276	296	1938	"	924
5	"	"	460	106	"	"	536	169	"	"	904	235	"	"	820	298	"	"	965
6	"	"	392	110	1939	"	66	172	"	"	847	238	"	"	821	299	"	"	349
8	"	"	336	117	1938	"	656	180	"	"	795	239	"	"	832	301a	"	"	909
37	"	"	393	121	"	"	535	181	"	"	686	241	"	"	726	305	"	PC	266
39	"	"	490	122	"	"	654	186	"	"	667	244	"	"	833	310	"	M	634
42	"	"	396	128	"	"	551	188	"	"	743	246	"	"	900	315	1939	"	178
55	"	"	508	132	"	"	448	190	"	"	815	250	"	"	305	317	"	"	21
56	"	"	529	133	"	"	591	191	"	"	758	252	"	"	893	331	"	"	59
64	"	"	537	137	"	"	315	200	"	"	615	257	"	"	949	334	"	"	96
67	"	"	675	140	"	"	712	202	"	"	742	258	"	"	878	337	1938	"	976
70	"	"	403	141	"	"	613	204a	"	"	784					338	1939	"	3
75	"	"	482	142	"	"	567	210	"	"	723	260	"	"	916	340	"	"	53
78	"	"	464	143	"	"	715	212	1939	"	190	262	"	"	879	342	"	"	109
84	"	"	524	145	"	"	858	217	1938	"	714	265	"	"	996	346	"	"	15
88	"	"	709	151	"	"	653	218	"	"	264	269	"	"	975	349	"	"	266
92	"	"	595	153	"	"	724	219	"	"	640	275	"	"	880	352	"	"	168
96	"	"	550	154	"	"	710	220	"	PC	130	278	"	"	819	354	"	"	115
97	"	"	721																

10 Income Tax Cases = All India Reporter

ITC		AIR		ITC		AIR		ITC		AIR		ITC		AIR		ITC		AIR	
1	1936	L	872	121	1937	L	445	176	1937	S	201	274	1938	S	54	414	1938	B	47
5	"	"	856	126	"	"	308	181	"	M	393	293	1937	L	338	433	1937	R	257
7	"	P	532	131	"	N	154	198	"	R	102	319	"	C	583	438	"	"	337
26	"	A	817	136	"	M	300	218	1938	C	148	386	"	B	493	454	1938	L	194
32	1937	P	1	146	"	"	515	250	1937	S	234	390	1938	"	83	461	1937	"	878
39	1936	PC	238	154	"	"	316	255	1939	"	61	391	1937	"	479	465	"	"	814
77	1937	B	214	163	"	PC	36	258	1938	L	44	395	1935	"	423	473	"	O	416
102	"	L	172																

1938 Income Tax Reports = All India Reporter

ITR		AIR		ITR		AIR		ITR		AIR		ITR		AIR		ITR		AIR	
8	1938	M	352	148	1938	B	83	265	1938	C	557	445	1939	B	43	616	1938	L	749
25	"	B	350	151	"	P	159	297	"	L	545	470	1938	R	435	625	"	"	867
31	"	"	207	165	"	C	636	336	"	A	452	474	"	L	864	632	"	PC	243
36	"	PC	1	180	"	M	360	355	"	L	852	476	"	P	567	663	"	R	276
44	"	B	345	194	"	R	151	370	"	"	741	485	"	"	577	675	1939	A	7
51	"	S	54	206	"	PC	118	385	"	"	551	502	"	R	260	686	"	P	107
61	"	PC	8	210	"	R	315	390	"	A	367	518	"	"	287	705	"	M	79
94	"	P	91	217	"	A	310	395	1939	C	196	521	"	PC	232	713	"	"	78
95	"	R	154	234	"	C	562	414	1938	PC	175	534	"	L	620	720	"	"	77
124	"	B	241	243	"	L	580	427	1939	B	45	536	"	P	611	725	"	"	302
				255	"	N	485	434	1938	A	464	603	"	"	490				

CASES OVERRULED & REVERSED

IN

A. I. R. 1938 MADRAS

Alagaisundaram Pillai v. Midnapore Zamindary Co. Ltd., (1920) 12 M L W 767=29 M L T 40 =A I R 1920 Mad 556=54 I C 816	Overruled in A I R 1938 Mad 441 (F B).
Chinnayya Naidu v. Srinivasa Naidu, (1935) 67 M L J 912=43 M L W 48=A I R 1935 Mad 206=156 I C 250	Overruled in A I R 1938 Mad 785 (F B).
District Munsif of Tiruvallur In re, (1914) 37 Mad 17=24 M L J 637=A I R 1914 Mad 652=20 I C 775 (F B)	Overruled in A I R 1938 Mad 438 (F B).
Gopala Padayachi v. Rajagopal Naidu, (1926) 1926 M W N 757=A I R 1926 Mad 1148=98 I C 75	Overruled in A I R 1938 Mad 785 (F B).
Kanakayya v. Kotayya, (1921) 41 M L J 75 = 13 M L W 637=1921 M W N 437=A I R 1921 Mad 587=63 I C 285	Overruled in A I R 1938 Mad 539 (F B).
Kanthavadivelu v. Ramaswami, (1928) 54 M L J 357=27 M L W 606=A I R 1928 Mad 497= 109 I C 661	Overruled in A I R 1938 Mad 441 (F B).
Krishnaswami Naidu v. Akkulammal, (1919) 9 M L W 90=1919 M W N 29=24 M L T 489 =A I R 1919 Mad 312=50 I C 185	Overruled in A I R 1938 Mad 441 (F B).
Narayya v. Seshayya, (1900) 23 Mad 24	Overruled in A I R 1938 Mad 349 (F B).
Nataraja Naicken v. Ayyaswami Pillai, (1917) 32 M L J 354=21 M L T 405=1917 M W N 230 =5 M L W 410=A I R 1917 Mad 61=38 I C 339	Overruled in A I R 1938 Mad 377 (F B).
Official Assignee, Madras v. P. Suryakanthammal, (1937) 1937 M W N 1251 = 46 M L W 900= A I R 1938 Mad 175=175 I C 543	Reversed in A I R 1938 Mad 927.
Pappu Reddiar v. Pichu Ayyar, (1935) 1935 M W N 898 = 42 M L W 435 = A I R 1935 Mad 961=161 I C 963	Reversed in A I R 1938 Mad 493.
Poornananthachi v. Gopalaswami Odayar, (1932) 55 Mad 835=35 M L W 679 = 1932 M W N 557=62 M L J 665 = A I R 1932 Mad 484= 138 I C 663.	Overruled in A I R 1938 Mad 796 (F B).
Rachi Reddi Nagi Reddi v. Saki Reddi, (1924) 18 M L W 29=1923 M W N 510 = A I R 1924 Mad 44=74 I C 703	Overruled in A I R 1938 Mad 796 (F B).
Rakka Kudumban v. Arulayi, (1936) 1936 M W N 789=A I R 1937 Mad 228=169 I C 318	Reversed in A I R 1938 Mad 501.
Rakkappan Ambalam v. Suppiah Ambalam, (1930) 32 M L W 691 = A I R 1930 Mad 485=124 I C 53	Overruled in A I R 1938 Mad 75.
Rangachariar v. Venkataswami Chetty, (1935) 58 Mad 513=67 M L J 873=1934 M W N 1088 =40 M L W 834 = 1934 M Cr C 229 = 1935 Cr C 55=36 Cr L J 311=A I R 1935 Mad 56 =153 I C 322	Overruled in A I R 1938 Mad 847.
Rathinaswami v. Nataraja, (1933) 1933 M W N 208=A I R 1933 Mad 346=142 I C 613	Overruled in A I R 1938 Mad 864
Samu Asari v. Anachi Ammal, (1926) 49 M L J 554=22 M L W 462=A I R 1926 Mad 37= 91 I C 561	Overruled in A I R 1938 Mad 864.
Tirappayya v. Ramaswami, (1913) 24 M L J 428= 1913 M W N 364=19 I C 362	Overruled in A I R 1938 Mad 853.
Vencheswara Sastri v. Narayana Iyer, (1933) 36 M L W 918=A I R 1933 Mad 251=141 I C 169	Overruled in A I R 1938 Mad 75.
Venkatanadham In re, (1933) 56 Mad 705=1933 M W N 86=64 M L J 122=37 M L W 106= A I R 1933 Mad 330=141 I C 602	Overruled in A I R 1938 Mad 435 (F B).

THE
ALL INDIA REPORTER
1938
Madras High Court

* A. I. R. 1938 Madras 1

LEACH C. J. AND VARADACHARIAR J.

S. Meera Sahib & Bros.—Appellants.

v.

Hajee M. Abdul Azeez Sahib and another—Respondents.

Appeals Nos. 20 and 29 of 1937, Decided on 19th August 1937, against judgment of Gentle J., D/- 7th December 1936.

*** (a) Trade Mark—Infringement—Relief—In a passing off action, relief can only be granted on ground of defendant's doing something calculated to deceive—Essentials to be shown in such action stated.**

In India there are no statutory enactments of the nature of the Trade Mark Acts which have been passed in England, and relief here can only be granted on the ground that the defendant has done something which is calculated to deceive. It is essential in a passing off action to show that there has been a false representation. It is not enough for a plaintiff to claim that he has adopted a device as a trade mark and that the defendant has copied this device or used one so like it that deception is probable. The plaintiff must show that he has used the mark claimed by him in his goods or in connexion with them and that the mark has become associated in the minds of the public with his goods. There must be user of the mark, because without user no reputation can be acquired. [P 2 C 2]

*** (b) Trade Mark—Infringement—Right of action—Merchant is entitled to protection for trade mark if it is associated in market with goods he sells—It is immaterial whether goods are made for him in his country or abroad—Supplier's acquiring reputation in other country does not affect such merchant—It is not necessary that purchaser must know actual name of owner of goods.**

A merchant who sells particular goods under particular trade mark is entitled to protection for that mark if he can show that it is associated in the market with the goods which he sells, because the law will not permit a person to pass off his goods for those of another. This is the governing principle and it matters not whether the merchant has goods made for him abroad or whether he has them made for him within the country. If a merchant establishes his reputation in connexion with a particular mark, the fact that the suppliers of the goods have also acquired a reputation in connexion with it in another country does not affect him. It is not necessary that the ultimate purchaser must know the actual name of the owner of the goods. It is sufficient if the ultimate purchaser knows that the goods bearing a particular mark have a reputation and that this mark denotes the goods he wishes to buy : *Case law referred.* [P 3 C 1, 2; P 4 C 1]

K. Krishnaswamy Iyengar and E. Antony Lobo—*for Appellants.*

V. K. John and C. M. Kuruvilla — *for Respondents.*

Leach C. J. — This appeal and Appeal No. 29 of 1937 arise out of a suit which was filed on the Original Side of this Court for an injunction in a passing off action and as they have been heard together they will be dealt with in one judgment. The appellant in this appeal was the defendant in the suit, and the appellant in Appeal No. 29 was plaintiff 1. The respondent in this appeal was plaintiff 2. It will be convenient to refer to them as plaintiff 1, plaintiff 2 and the defendant respectively. Plaintiff 2 is a piece-goods merchant carrying on business in Madras. For 12 years before the suit he had been in the habit of buying white twill from plaintiff 1, a company carrying on business in London. For the purposes of the case plaintiff 1 has been treated as the manufacturer of the goods, although he in fact did not make them. Having bought the twill from plaintiff 1 and imported it into Madras, plaintiff 2 sold it in the Madras Presidency where it has become well known as "diamond" twill. It is known as "diamond" twill because on it is stamped in gold the picture of a diamond with lines representing radiation from the diamond. Above the diamond is printed

in gold the word "diamond", and below, the word "twill". The form of these letters is unusual. The mark was designed by plaintiff 1 and so far as business in England is concerned it has been accepted as belonging to plaintiff 1, but it is common ground that plaintiff 1 has never sold goods in India bearing this mark. His business has been confined to selling twill to plaintiff 2, who with the full consent of plaintiff 1 has sold it in India as his own "diamond" twill. In fact, the goods have been shipped by plaintiff 1 to plaintiff 2 with the mark stamped on them, and in a letter dated 12th July 1928 written by plaintiff 1 to plaintiff 2, plaintiff 1 said :

> We have already assured you that we would not under any conditions supply other dealers with twill stamped with your trade mark.

The words "your trade mark" refer to the diamond mark. In the plaint however it was claimed that the plaintiffs were jointly entitled to the exclusive use of the mark and an injunction was asked for on this basis. The defendant is also a Madras piece-goods merchant doing business throughout the Presidency. He like plaintiff 2 imports twills and other classes of piece-goods for sale here. From 1933 to 1935 he was importing twill under a mark which he called the "gold-star" mark. It consisted of a five pointed star with another star in the centre of it. Around this central star were ten other smaller stars. From the star were thin lines intended to represent radiation. Above the star were the words "gold-star" and underneath the word "twill". The lettering was of an entirely different character to the lettering of the mark used by plaintiff 2. In 1935 the defendant changed his mark in the following respects : (i) he altered the form of the letters to the very distinctive form used by plaintiff 2; (ii) he filled in the body of the star which had the effect of changing its appearance considerably and made it more in conformity with the plaintiff's diamond; and (iii) he changed the thin lines representing rays of light to thicker ones and thus made them more like the lines in the diamond mark. It is this new mark which the plaintiffs allege constitutes a colourable imitation of the diamond mark and in respect of which they seek the injunction.

The case was tried by Gentle J. who held that the defendant had deliberately changed his mark for the purpose of making it look like the diamond mark and that in its altered form it constituted a colourable imitation of that mark. After discussing the evidence, the learned trial Judge rejected the contention that the plaintiffs were the joint owners of the mark, but held that plaintiff 2 was entitled to an injunction on the ground that the mark had become associated in the public mind with the goods sold by him. Accordingly he dismissed plaintiff 1 from the suit, but granted an injunction to plaintiff 2 with costs. He also awarded him a sum of Rs. 500 by way of damages. The defendant has appealed against the decree passed against him, and plaintiff 1 has appealed against the order embodied in it dismissing him from the suit.

I will first deal with the appeal against the dismissal of plaintiff 1 from the suit. In India there are no statutory enactments of the nature of the Trade-mark Acts which have been passed in England and relief here can only be granted on the ground that the defendant has done something which is calculated to deceive. It is essential in a passing off action to show that there has been a false representation. It is not enough for a plaintiff to claim that he has adopted a device as a trade-mark and that the defendant has copied this device or used one so like it that deception is probable. The plaintiff must show that he has used the mark claimed by him on his goods or in connexion with them, and that the mark has become associated in the minds of the public with his goods. There must be user of the mark because without user no reputation can be acquired. In this case the evidence does not show any reputation in plaintiff 1 so far as India is concerned and this finding is sufficient to dispose of plaintiff 1's appeal. It will be necessary to return to the question of user when discussing the position of plaintiff 2, but plaintiff 1 having clearly failed to establish a cause of action against the defendant his appeal must be dismissed. I might add that in the course of his arguments the learned advocate for plaintiff 1 pointed out that it was not necessary for the plaintiffs, in view of the attitude of the defendants, to lay any stress in the trial Court on the plea of joint ownership. The defendant there conceded that either plaintiff 1 or plaintiff 2 or both of them together had the exclusive right to the use of the diamond mark in India. We appreciate this, and it is our intention merely to

deal with the case so far as it affects the defendant and to say as little as possible with regard to the rights of the plaintiffs inter se.

Turning now to the defendant's appeal, I have no doubt that the defendant deliberately changed his mark in 1935 in order to make it resemble the mark used by plaintiff 2 and that he did this with the object of acquiring part of plaintiff 2's trade. I am further of the opinion that the alteration was of such character as to make it likely that the mark would be mistaken for the diamond mark. We have here a deliberate intention to defraud. The learned advocate for the defendant however contends that plaintiff 2 is not entitled to the injunction granted to him for two reasons. In the first place he says that plaintiff 2 is not the maker of the goods, but merely an importer and therefore he must show that the mark has become associated with his name in some special way as the importer of the goods and not merely as the seller. In the second place he says that before plaintiff 2 can obtain relief he must also show that the ultimate purchaser associates the mark with his name. He maintains that these conditions have not been fulfilled in this case.

On the first point the learned advocate for the defendant has cited many cases, but a detailed discussion of them is not called for. His argument is really based on a passage in the judgment of the Privy Council in (1924) A C 755[1] where it was pointed out that an importer might get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage or because his local character is such that the article acquires a value by his testimony to its genuineness, and if therefore goods though of the same make are passed off by competitors as being imported by him, he will have a right of action. But this statement does not pretend to be exhaustive and to declare all the circumstances in which an importer may acquire the right to the exclusive use of a trade-mark. A merchant who sells particular goods under a particular trade-mark is entitled to protection for that mark if he can show that it is associated in the market with the goods which he sells, because the law will not permit a person to pass off his goods for those of another. This is the governing principle and it matters not whether the merchant has goods made for him abroad or whether he has them made for him within the country. A decision of the Privy Council which has a direct bearing on this case is that in (1908) A C 443.[2] The plaintiffs there were manufacturers of watches in Switzerland and had acquired the business and trade-marks of another Swiss firm of watch manufacturers. The firm from which the plaintiffs had acquired these trade-marks had been in the habit of supplying watches to a customer carrying on business at Hong Kong who sold them under the manufacturers' trade-marks. The plaintiffs instituted a passing off action in Hong Kong against another dealer there on the ground that he was infringing the rights which they had acquired. Their Lordships held that the trade in Hong Kong belonged to the original importer and that the plaintiffs had not sufficient interest to found a cause of action. The same principle was applied by this Court in 24 Mad 163[3] and by the Bombay High Court in 35 Bom 425.[4]

In this case the evidence does establish the fact that the diamond mark is associated with the twill sold by the second plaintiff and having established his reputation in connection with this mark the fact that the suppliers of the goods have also acquired a reputation in connection with it in another country does not affect him. The manufacturer has never used the mark in India, and it was open to the second plaintiff to adopt it for his business in India, which as I have already pointed out he did with the full consent of the manufacturer. The defendant has altered his mark for the purpose of gaining for himself part of the business which his rival has built up and in view of the probability of deception the second plaintiff has a cause of action. The contention of the defendant that the second plaintiff must show that the ultimate purchaser

1. Imperial Tobacco Co. of India Ltd. v. Albert Bonnan, A I R 1924 P C 187=80 I C 1018=51 I A 269=51 Cal 892=(1924) A C 755=93 L J P C 216=41 R P C 441=131 L T 642=40 T L R 618 (P C).

2. Ullamann & Co. v. Leuba, (1908) A C 443=78 L J P C 41=99 L T 531=25 R P C 673.

3. Ebrahim Currim v. Essa Abba Sait, (1901) 24 Mad 163.

4. West End Watch Co. v. Berna Watch Co., (1911) 35 Bom 425=10 I C 805=13 Bom L R 212.

associates this mark with his name is also fallacious. A reputation must be established, but that does not mean that the ultimate purchaser must know the actual name of the owner of the goods. In this connection I will refer to certain passages in the judgments in (1897) A C 710,[5] which is the well-known "*Yorkshire Relish*" *case*. Lord Halsbury observed (page 713) :

> It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants "Yorkshire Relish" to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not "Yorkshire Relish" in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other.

In the same way it would be a fraud to place in the hands of a customer who wanted diamond twill, twill bearing the mark of the defendant. In the course of his judgment Lord Herschell said (p. 715) :

> In the present case it seems to me that "Yorkshire Relish" meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was indentified, but that it meant a particular manufacture, and that when a person sold "Yorkshire Relish" as the defendants did, by selling it as "Yorkshire Relish" and calling it "Yorkshire Relish" they represented to the public that it was that manufacture which was known as and by the name of "Yorkshire Relish".

In 41 Bom 49[6] Scott C. J. held that where goods have acquired by a particular fancy description, combination or device, a reputation in the market, it is immaterial that the customers do not know who the maker is, and relied on the remarks of Lord Halsbury in the "*Yorkshire Relish*" *case*[5] and similar remarks of Lord Hatherley in (1872) 5 H L 508.[7] It is, therefore, quite clear that plaintiff 2 has not got to show that the ultimate purchaser knows his name and associates his name with the diamond mark. It is sufficient if the ultimate purchaser knows that goods bearing this mark have a reputation and that this mark denotes the goods which he wishes to buy. We do not regard the damages awarded as excessive and the only further question requiring consideration is the form of injunction. The learned trial Judge has issued an injunction prohibiting the use of the offending mark on all classes of piece-goods. It has been said on behalf of the defendant that this is too wide. In their plaint, the plaintiffs asked for an injunction in respect of all classes of piece-goods and in the trial Court it was not contended by the defendant that an injunction of this nature would be too wide if the plaintiffs succeeded in establishing their rights to the diamond mark. It was in fact taken for granted that they would be entitled to an injunction in this form if the right to exclusive user was proved. Plaintiff 2 and the defendant deal in the same kind of piece goods and the diamond mark has become associated in the trade with plaintiff 2. In these circumstances we see no reason to alter the form of the injunction. Both the appeals are accordingly dismissed. In Appeal No. 20, plaintiff 2 will be entitled to costs against the defendant, but the defendant will be entitled to costs in Appeal No. 29, as he has been successful there.

Varadachariar J.—I agree. I wish to add a few words with reference to the decision in 43 M L W 210,[8] as the learned counsel for the appellant relied on some observations of mine there as supporting his contention that the plaintiff in a "passing off" action must show that the persons purchasing the goods knew of the manufacturer or merchant by name and associated such name with the goods. That this is not the law is shown by the observations quoted by my Lord from the "*Yorkshire Relish*" *case* (1897) A C 710.[5] To the same effect there are also statements in (1911) A C 693[9] at pp. 702 and 705, and (1910) 1 Ch 257.[10] *See also* 50 Bom 402[11] at p. 412. As the observations

5. Birmingham Vinegar Brewery Co. Ltd. v. Powell, (1897) A C 710=66 L J Ch 768=76 L T 792.
6. Madhavji Dharmsey Manufacturing Co. Ltd. v. Central India Spinning Weaving and Manufacturing Co., A I R 1916 Bom 183=34 I C 529=41 Bom 49=18 Bom L R 206.
7. Wotherspoon v. Currie, (1872) 5 H L 508=42 L J Ch 130=27 L T 393.
8. Batchayi Rowther v. Ramaswami Pillai, A I R 1936 Mad 8=160 I C 428=43 M L W 210.
9. Williams Edge & Sons Ltd. v. William Niccolls & Sons Ltd., (1911) A C 693=80 L J Ch 744=105 L T 459=28 R P C 582=55 S J 737=27 T L R 555.
10. Slazenger v. Spalding & Brothers, (1910) 1 Ch 257=79 L J Ch 122=102 L T 390=27 R P C 20.
11. Von Wulfing v. Jivandas & Co., A I R 1926 Bom 200=93 I C 857=50 Bom 402=28 Bom L R 243.

of Lord Herschell in the "*Yorkshire Relish*" *case*[5] have been referred to in my judgment in 43 M L W 210,[8] it will not be a fair interpretation of that judgment to suggest that there is anything in it to support the appellant's present contention. The point I had then to determine was whether the plaintiff has shown a right to sue at all. He had certainly to establish some connection, in a sense known to law, such as manufacturer, seller, importer etc., between himself and the article which was alleged to have obtained a reputation. On the evidence in that case it appeared that it was his brother that had been manufacturing and selling the goods but the plaintiff did not claim in his brother's right. There was very little evidence as to what happened after the brother's death. It was on those facts that after making a quotation from 33 Mad 402,[12] I observed that there was

no evidence to establish any such association in the public mind between the plaintiff's business and the goods bearing the mark in question.

C.R.K./S.C. *Appeals dismissed.*

12. Mahomed Esuf v. Rajaratnam Pillai, (1910) 33 Mad 402=5 I C 712.

A. I. R. 1938 Madras 5

LEACH C. J. AND VARADACHARIAR J.

K. A. Dawood Sahib — Appellant.

v.

V. A. Sheik Mohideen Sahib and another — Respondents.

Appeal No. 3 of 1937, Decided on 3rd August 1937, from judgment of Gentle J., D/- 12th October 1936.

Partnership Act (1932), Ss. 13 and 17—Agreement between two partners of firm as to share of profits and losses — Death of one partner and substitution of son in his place —No new agreement between them as to share in profits and losses—Son held entitled to share on same basis as his father under S. 17—S. 13 held inapplicable.

In an established firm of two partners it was agreed between them that one was to have 9½ annas share and the other was to have 6½ annas share. After the death of the former, his son stepped in and continued the partnership on the same lines as before. There was no agreement between the son and the surviving partner as to the share of each in the profits and losses of the newly constituted firm :

***Held* that only a change had occurred in the constitution of the firm and under S. 17 of the Act the rights and duties of the partners in the re-constituted firm remained unchanged. The son of the former partner was therefore entitled, like his father into whose shoes he had stepped, to the 9½ annas share of the profits. S. 13 did not apply as it governed only cases where a new partnership was formed, and there was no agreement between the parties as to the share of each partner in the profits and losses sustained by the partnership firm.** [P 6 C 1, 2]

W. V. Rangaswamy Iyengar — *for Appellant.*

C. Srinivasachari and V. S. Arunachelam — *for Respondents.*

Leach C. J.—This appeal arises out of a suit filed by respondent 1 on the Original Side of this Court. The appellant was defendant 1. The suit was for the taking of the accounts of a partnership between the plaintiff and defendant 1. It appears that the father of the plaintiff and defendant 1 entered into partnership on 14th April 1920. On 10th April 1931 the plaintiff's father died, which meant in law the dissolution of the partnership. The partnership business was however carried on by the plaintiff (who took the place of his deceased father) and defendant 1. This partnership carried on business until 1933 when defendant 1 gave notice to the plaintiff dissolving the partnership. When the original partnership was formed, that is the partnership between the plaintiff's father and defendant 1, it was agreed that they should share equally in the profits. They had each contributed a sum of Rs. 250 towards the capital. The plaintiff's father however was not satisfied with a division of profits on this basis, and on 16th November 1922 it was agreed between the plaintiff's father and defendant 1 that the plaintiff's father should be deemed to have a share of 9½ annas and defendant 1 a share of 6½ annas. This of course meant sharing both the losses and profits in these proportions. At an early stage in the original partnership, partnership moneys were advanced on mortgage. Two sums were in fact so advanced on the same property —a sum of Rs. 2,500 and another of Rs. 1,900. The mortgagors were unable to redeem the mortgages and were eventually compelled to convey the mortgaged property to the two partners in consideration of the mortgage debt plus a small monetary payment. The learned trial Judge gave the decree asked for and held that the profits and losses should be shared between the plaintiff and defendant 1 on the basis of 9½ annas and 6½ annas respectively and that they were

entitled to share in these proportions the property which they had bought. The appeal is concerned with these findings.

The appellant says that in regard to the business subsequent to April 1931, the account should be taken on the basis that the parties were entitled to share equally in the partnership profits and that the house property also should be divided on this basis. The learned advocate for the appellant rightly abandoned the contention with regard to the house on having his attention drawn to the provisions of S. 48, Partnership Act, and therefore it is only necessary to discuss whether he is entitled to succeed on the other point. In the trial Court, the plaintiff contended that he was entitled to have the accounts taken on the basis that he had a share of 9½ annas on the ground that this had been expressly agreed. Defendant 1 similarly set up an express agreement to share equally. The learned Judge disbelieved the evidence of both the plaintiff and defendant 1 and held that there was no express agreement at all. The parties had merely agreed to carry on the partnership business, the plaintiff taking the place of his deceased father and nothing being said about the shares. On this finding he held that the plaintiff was entitled to the share of his deceased father, and we consider that this decision is correct. The learned advocate for the appellant has relied on the provisions of S. 13, Partnership Act. Cl. (b) of that section states that the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm. But the provisions in this section are all governed by the opening words of the section which are: "subject to contract between the partners". If there was no agreement between the parties and a new partnership was formed, the partnership would be governed by this section. But here we are dealing with a case where an established partnership business was continued on the same lines as before, after one of the partners had died, and S. 17 has application. That sections says :

Subject to contract between the partners : (a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be; (b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will; (c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

There was no special contract between the parties when the plaintiff and defendant 1 decided to continue the old business, but a change had occurred in the constitution of the firm. In these circumstances the Act contemplates that the rights and duties of the partners in the reconstituted firm shall remain unchanged. There is no doubt that from 1922 up to the time of his death the plaintiff's father was entitled to a share of 9½ annas, and we consider that in the circumstances of this case his son is entitled to a division on the same basis. The appeal will therefore be dismissed with costs.

C.R.K./K.B. *Appeal dismissed.*

---

* A. I. R. 1938 Madras 6

VARADACHARIAR J.

Malireddi Narayanaswamy —
Appellant.

v.

Kondapalli Gopalaswamy and others—
Respondents.

Second Appeal No. 736 of 1933, Decided on 27th April 1937, against decree of Sub-Judge, Masulipatam, in A. S. No. 19 of 1931.

*** Hindu Law—Gift—Gift by Hindu father to daughter on marriage—Daughter dying issueless and husband claiming estate—Considerations to be borne in mind in construing such gift—It is not illegal to make gift carrying absolute estate in one contingency but cutting it down to life estate in other contingencies.**

The quantum of estate given under a document has to be determined on a construction of the whole document and not merely on the words used in a portion thereof. [P 7 C 1]

In interpreting a gift by a Hindu father to his daughter, two considerations have to be borne in mind : (1) that he ordinarily desires that that property should devolve only on the children born to her and not upon other heirs in her husband's family and (2) that such a parent making a gift to his daughter soon after her marriage thinks it inauspicious to refer in terms to her death without issue and often employs circumlocutory language to indicate that contingency. It is not illegal to make a gift which in one contingency will carry an absolute estate, but (as the result of a gift over clause or of a cessor clause) be cut

down in effect to a life-interest in other contingencies. [P 7 C 1, 2]

A father gifted certain property to his daughter on her marriage. The deed contained three clauses relating to heritability, power of disposition and the exclusion of particular heirs, making exception against the passing of the estate to other heirs than the donee's descendants. On the death of the daughter issueless, her husband claimed the estate contending that the condition as to heirs was repugnant to the absolute estate already conferred or amounted to a defeasance on an indefinite failure of the issue :

Held that on reading the document as a whole the three clauses related to the period of the daughter's ownership of the gifted property and not as involving a condition or limitation intended to be indefinitely imposed, and it did not contain a provision for a cessation or defeasance of her interest on an indefinite failure of issue. The deed therefore did not convey an absolute estate to the daughter so as to devolve on her husband by inheritance on her death without issue : *4 Cal 23 (P C), Rel. on.* [P 7 C 2]

A. Lakshmayya—*for Appellant.*

V. Govindarajachari and G. Lakshmanna—*for Respondents.*

Judgment.—The decision of this second appeal turns on the interpretation of Ex. B (dated 22nd April 1922), a deed of gift executed in favour of the plaintiff's deceased wife by her father. The donee died without issue within a couple of years after Ex. B and that led to disputes between the plaintiff and his father-in-law. There are some portions of the document which are not very aptly worded, but, taking the document as a whole, I feel no serious doubt as to the intention of the donor. In interpreting the document, two considerations have to be borne in mind : (1) that a Hindu father making a gift to his daughter ordinarily desires that that property should devolve only on the children born to her and not upon other heirs in her husband's family and (2) that such a parent making a gift to his daughter soon after her marriage thinks it inauspicious to refer in terms to her death without issue and often employs circumlocutory language to indicate that contingency. That portions of Ex. B if read by themselves will amount to the creation of an absolute interest in the donee, there can be no doubt. But the quantum of estate given under a document has to be determined on a construction of the whole document and not merely on the words used in a portion thereof; and decisions beginning with 4 Cal 23[1] recognize that as a matter of law it is possible to make a gift which in one contingency will carry an absolute estate but (as the result of a gift over clause or of a cessor clause) be cut down in effect to a life-interest in other contingencies. Bearing these considerations in mind, it seems to me that the Courts below have put a right construction upon Ex. B in holding that in the events that have happened the plaintiff's wife did not have an absolute estate which could devolve by inheritance on her husband.

On behalf of the appellants, Mr. Lakshmayya contended that the later portions in Ex. B which make an exception against the passing of the estate to other heirs than the donee's descendants must either be regarded as a condition repugnant to the absolute estate already conferred or as amounting to a defeasance on an indefinite failure of issue. If the clause is read in either of the above senses, it will of course be inoperative. But having carefully considered the frame of the document, it seems to me that the object of the exclusion of other heirs is not an attempt to lay down a different rule of succession from the ordinary law in respect of the devolution of an absolute estate, but an attempt to indicate that the lady should take a heritable estate only if she had descendants of her own body to inherit the estate. The three clauses which respectively relate to heritability, power of disposition and the exclusion of particular heirs are all worded as qualifications to the gift in favour of the daughter and all the three may reasonably be read in the context as relating to the period of her ownership and not as involving a condition or limitation intended to be indefinitely imposed. There is thus no reason to read the document as providing for a cessation or defeasance of her interest on an indefinite failure of issue. The authorities relied on by Mr. Lakshmayya emphasize this very distinction, namely between cases where cessation or defeasance of the grantee's interest is to take place on events happening at the death of the grantee and cases where it is to happen on an indefinite contingency. I accordingly agree with the decision of the Courts below and dismiss the second appeal with costs. (Leave refused.)

C.R.K./A.L. *Appeal dismissed.*

1. Bhooban Mohini Debia v. Hurrish Chunder Chowdhary, (1879) 4 Cal 23=5 I A 138=2 C L R 339=3 Sar 815 (P C).

A. I. R. 1938 Madras 8

VARADACHARIAR AND KING JJ.

Chittaluri Sitamma and another — Appellants.

v.

Saphar Sitapatirao and others — Respondents.

Appeal No. 112 of 1931 and Second Appeal No. 1214 of 1932, Decided on 19th March 1937.

(a) Benami — Wife having separate income of her own though its amount uncertain — Purchase of properties in her name — Mere impossibility to connect any of sale deeds with particular item of her asset is no inference that purchase is by husband with family fund — Even if money has been contributed by husband, it is no conclusive proof of benami character of purchase.

Where a wife has a separate income of her own, though the amount thereof is not known, and certain properties are purchased in her name, the mere fact that it is found impossible to connect any of the sale deeds relating to the properties with a particular item of asset belonging to the wife does not necessarily lead to the inference that the purchases have been made with the family funds by the husband. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to the husband, whether in a smaller measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion. It is true that in the Indian law, the English rule as to presumption of advancement has not been adopted, but S. 82, Trusts Act, recognizes that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not. Where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of beneficial interest and not as a mere benami transaction. [P 10 C 2 ; P 11 C 1]

(b) Benami — Onus.

The onus lies upon the person who pleads that certain transaction executed and registered in the name of a person is benami. [P 10 C 2]

(c) Limitation Act (1908), Arts. 142 and 144 — Certain property in possession of tenants — Attempts by rival claimants to property to get tenants to attorn to one side or other — Suit by one for possession — Art. 144 and not Art. 142 applies.

A certain property was in the possession of the tenants. In a dispute between two rival claimants to the title of the property, each claimant made attempts to get the tenants to attorn to the one side or to the other. Subsequently one of the claimants sued the other for possession of the property :

Held that in circumstances of such kind the principle of Art. 144 and not Art. 142 should be applied. [P 11 C 2]

B. Satyanarayana and V. Govindarajachari — *for Appellants*

K. Umamaheswaran and A. Rama Rao Saheb — *for Respondents.*

JUDGMENT

Second Appeal No. 1214 of 1932 — This appeal arises out of a suit for recovery of possession of 15 items of properties on the ground that the plaintiff has become entitled thereto under a gift deed (Ex. A) executed in his favour by one Seetha Bai Ammal on 4th September 1914. Seetha Bai Ammal was the widow of one Jagannadha Rao and the mother-in-law of defendant 1. As defendant 1 is also called Seetha Bai Ammal, we will refer to defendant 1 when necessary as the daughter-in-law. Jagannadha Rao died some time in 1903 leaving him surviving his widow Seetha Bai Ammal and an adopted son Subba Rao who died in May 1914. The evidence shows that during the last days of Subba Rao or soon after his death the relations between the mother-in-law and the daughter-in-law became strained and the plaintiff who is the grandson of a brother of the mother-in-law and who had been living in Subba Rao's family for some years, managed to persuade the old lady to execute a gift in his favour of properties in respect of which the title stood in her name. The old lady died a few months after the date of the gift ; and for several years thereafter, the plaintiff on the one hand and defendant 1 on the other have been endeavouring to secure the tenants in possession of these properties to their respective sides till ultimately the plaintiff instituted this suit just when the period of 12 years from the date of the gift deed was about to expire.

The plaintiff claimed that the properties in respect of which the title deeds stood in the donor's name were her stridhanam properties and that she was accordingly competent to make a gift thereof. Defendant 1 who was the contesting defendant pleaded that though the title to these properties stood in Seetha Bai Ammal's name,

they had all been purchased with the funds belonging to Jagannadha Rao, benami in her name. A plea of limitation was also raised. The question of benami formed the subject of issue 1 and the question of limitation of issue 2. The learned Subordinate Judge found issue 1 in plaintiff's favour; on issue 2 he found that as regards five items, namely items 1 to 3, 13 and 15, the plaintiff had not shown that he or his donor had been in possession within 12 years of the institution of the suit, but that in respect of the other items the plaintiff's possession within the statutory period had been proved. He accordingly dismissed the suit so far as it related to items 1 to 3, 13 and 15 and gave a decree in the plaintiffs favour in respect of the other items. Defendant 1 has filed this appeal against so much of the decree as is against her and the plaintiff has filed a memorandum of objections in respect of the items disallowed to him.

In dealing with the question of benami, we may mention at the outset that it has not been suggested that Jagannadha Rao had any creditor from whom he desired to screen these properties. It is obvious from the written statement that defendant 1 was hard put to it to suggest a motive for a benami transaction. It is true that Jagannadha Rao took defendant 1's husband in adoption in 1884 and some of the letters exhibited in the case show that as a young boy he was not easily persuaded to come and live with his adoptive parents and preferred to go back to the place where he had theretofore been living. These letters relate to a period when defendant 1's husband was eight or nine years old and it would be too much to suggest that at that time such conduct brought about any differences between Jagannadha Rao and the adopted son with reference to which the necessity for resorting to benami transactions could be explained. In para. 3 of the written statement it is stated that Jagannadha Rao took such precautions as he liked in order to avoid among other things the possibility of the adopted son quarrelling with him and squandering the properties and in order to ensure the obedient conduct of the adopted son to his dictates and to avoid the possibility of the members of his natural family instigating the adopted son to act adversely to the interests of the adoptive father. In the course of the evidence one or two further reasons have been suggested, such as a desire on Jagannadha Rao's part to keep apart some properties for the benefit of any aurasa son that he still expected might be born to him or a desire to ensure that the adopted son would behave respectfully towards Sita Bai Amma by making it appear that she was the owner of some properties. We find it hard to believe that any of these motives would have led to a benami transaction rather than to a real transaction in favour of the wife.

The principle argument of Mr. Govindarajachari before us on behalf of the appellant was that as the attempt on the plaintiff's side to establish that these properties were acquired with the lady's funds had failed, it must be held that they were purchased by Jagannadha Rao with funds belonging to the joint family of himself and his adopted son, and that as sufficient provision for her maintenance had been made by Ex. B and also by the provision in the adoption deed itself in the possible contingency of differences between her and the adopted son, there was nothing to rebut the presumption arising under the law that the purchases made in the wife's name with family funds were only made for the benefit of the family. It seems to us that this argument puts the effect of the evidence much too high, and that the legal implications therein contained are not altogether tenable. It appears from the documentary evidence, as well as from the admissions made by defendant 1 herself and by D. W. 13, that Seetha Bai Ammal did have some moneys of her own and some money-lending transactions of her own. It is, however, not possible to fix the amount that she was thus in possession of. The evidence also establishes that at least after 1886 she must have been entitled to an annual income of between Rs. 100 and Rs. 200 from the properties set apart for her under Ex. B, while the collection of that income was being made by Jagannadha Rao himself. In such circumstances the mere fact that the plaintiff or his witnesses do not now find it possible to connect any of the sale deeds relating to the suit properties with a particular item of asset belonging to the lady does not necessarily lead to the inference that the purchases should have been made with family funds by Jagannadha Rao. Some of the transactions under which the suit properties were acquired were for comparatively small prices. The only substantial acquisition was under Ex. D in 1896,

the consideration therefor being made up of the amount which accrued due on a usufructuary mortgage of 1887 for a sum of Rs. 2,250 and a cash payment of Rs. 700.

In the light of the circumstances stated above, there is nothing that necessarily suggests that the Rs. 700 paid in cash at the time of Ex. D must have been Jagannadha Rao's money and could not have been the lady's. As regards the Rs. 2,250 advanced on the usufructuary mortgage in 1887, we have no evidence suggesting whether it could have been the lady's money or Jagannadha Rao's money. The position therefore at best only comes to this: here is a lady, the wife of a comparatively well-to-do man with an income of more than Rs. 1,500 per annum, the lady herself having some means of her own, though the amount thereof is not known. The husband had no intelligible motive for entering into any benami transaction. He gets documents executed in her name with a distinct statement that the moneys paid for the purchases constituted the stridhanam property of the lady. In relation to the properties thus acquired, he takes registered lease deeds in the lady's name and also gets a power of attorney executed by that lady appointing her own agent to attend to her affairs. It does not appear that during all the time that Jagannadha Rao was alive, he ever took a single lease deed in his name in respect of these properties, except as regards one house which was leased to the Postal Department. There is no doubt evidence that the realization of the income from these properties was attended to by Jagannadha Rao or his men, but that would have been equally the case even if these properties belonged to the lady and not to Jagannadha Rao. It is admitted that in respect of a mortgage under which money was due to this lady long prior to the adoption and in respect of the properties settled on this lady by Ex. E, the interest or income used to be realized by Jagannadha Rao or his men.

It is clear from the adoption deed and from Ex. B that Jagannadha Rao was alive to the possibility of the relations between his wife and the adopted son turning out to be unfriendly, and it is nothing strange if in those circumstances a man in that position desired to put the lady in a position of some independence without depending upon the adopted son or being obliged to sue him for maintenance or for a share in terms of Ex. I. It is also significant that even during the period when he was taking sale deeds in his wife's name in respect of the suit properties, he was entering into other transactions of sale and mortgage in his own name, thus showing that he had no reason at that time to make it appear that he had no properties of his own other than the ancestral properties. Having regard to these circumstances, we think the learned Subordinate Judge was justified in coming to the conclusion that the sale deeds relating to the suit properties were not taken in Seetha Bai Ammal's name benami for her husband or for the family. The onus lies in the first instance on the defendant who pleads that these transactions are benami. The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao, whether in a smaller measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction though it is an important criterion. It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but S. 82, Trusts Act, as well as the observations of the Judicial Committee in 37 All 557[1] at pp. 564 and 565 recognize that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not.

The observations in 17 M L J 339[2] are not opposed to this view, because there was evidence in that case to suggest that

1. Mt. Bilas Kunwar v. Desraj Ranjit Singh, A I R 1915 P C 96=30 I C 299=42 I A 202=37 All 557 (P C).
2. Sanjivaroya Pillai v. Balambika Ammal, (1907) 17 M L J 339.

the transfers were taken in the wife's name with a view to screen the property from creditors. In 4 M L W 193[3] and 67 M L J 541[4] reference has been made to the terms of S. 82, Trusts Act, and an attempt has been made to read the observations of the Judicial Committee in earlier cases consistently with the provisions of that section. The observations of their Lordships in 33 Cal 773[5] at p. 784, and of Venkatasubba Rao J. in 67 M L J 541[4] also show that where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction.

Mr. Govindarajachari next suggested that if and in so far as any moneys of Jagannadha Rao had gone to make the purchases of the suit property in his wife's name, a gift thereof would be invalid as a gift of joint family property. This question was not raised in the Court below in that form and the appellants' learned counsel explains it by pointing out that the plaintiffs' attempt in the lower Court was to establish that the purchases were made with the lady's funds and not with the family funds. Assuming that that contention can be raised at this stage, it will be material to consider it only if there is positive evidence that funds belonging to the joint family had been used for the purpose of these purchases. The mere fact that the plaintiff is not able to establish that the purchases were made with the lady's funds, will not entitle defendant 1 to ask the Court to take it for granted that joint family monies must have been utilized for these purchases. We accordingly confirm the finding of the lower Court on issue 1.

With reference to the plea of limitation, we are not satisfied that the lower Court was justified in dealing with the case as one governed by Art. 142, Lim. Act. The allegations in the plaint as well as the evidence tendered during the course of the trial establish that all the suit properties were in the possession of tenants. It is true that during Subba Rao's time he was taking muchilikas in his name and collecting the income from the suit properties. But as he and his adoptive mother were living together amicably, it cannot be seriously suggested that his possession or management was adverse to the mother's interest. As we have already said, the relations between the mother-in-law and the daughter-in-law became strained as soon as Subba Rao died and the plaintiff's interference with a view to securing some benefit to himself seems to have made matters worse. A scramble accordingly began after Subba Rao's death by the attempts made on each side to get the tenants to attorn to the one side or to the other. In circumstances of that kind, the principle of Art. 144 and not Art. 142 should be applied. Considering the evidence on this basis, the conclusion seems to us to be that in respect of most of the suit items, defendant 1 has failed to show that she got the tenants in possession to attorn to her more than 12 years before the institution of the suit. In many instances registered muchilikas have been taken from the tenants in the mother-in-law's name and there is evidence that some of these tenants were sued for rent on the basis of such muchilikas and decrees were obtained. As against such evidence on the plaintiff's side, the story related on the defendant's side of oral arrangements and payments of rent to her can scarcely be seriously pressed.

As regards one of the items of property, namely item 14, a house in Rajahmundry, a further point was pressed before us on behalf of the appellant, namely that only a part of the house was in the occupation of the tenant who had attorned to the mother-in-law and that the other part was in the possession of a lady named Pankajam who refused to attorn to the old lady. In the suit for rent instituted by the plaintiff against these two tenants, the suit was decreed only against the former and not against the latter. It was accordingly contended that at least to the extent of the interest in one-half of the house in the possession of Pankajam the plaintiff's suit should be held to be barred by limitation. But if, as we have already pointed out, the principle to be applied is that of Art. 144, it is not sufficient for the defendants merely to suggest that Pankajam

---

3. Rahiman Beebi v. Khatoon Bee, A I R 1917 Mad 926=35 I C 569=4 M L W 198.
4. Tulasi Ammal v. Official Receiver, Coimbatore, A I R 1934 Mad 671 = 153 I C 478=67 M L J 541.
5. Ismail Mussajee v. Hafiz Boo, (1906) 33 Cal 773=33 I A 86=8 C L J 484=10 C W N 570 (P C).

had not attorned to the old lady or to the plaintiff. It is only on proof that she had attorned to defendant 1 that the plaintiff's suit could be held to be barred even as regards the portion in her possession. Defendant 1's evidence is only that sometime after 1915 Pankajam paid 10 months rent in respect of her portion to defendant 1. Even taking this to be true, that is within 12 years of the institution of the suit, we see no reason to differ from the conclusion of the lower Court in respect of items 4 to 10, 11, 12 and 14.

As regards the items disallowed to the plaintiff by the lower Court, we see no reason to interfere with its conclusion in respect of items 1, 13 and 15. But in respect of items 2 and 3, we are unable to agree with the lower Court's decision. These items were in the possession of one Chinnam Raju as a tenant under Subba Rao under a lease (Ex. 26) executed in 1911. Very soon after Subba Rao's death, the plaintiff succeeded in taking a lease in Seetha Bai Ammal's name, i. e. Ex. J.10 from one Bapiraju, a brother of Chinnam Raju. It is true that if the new lessee was a stranger and the former tenant in possession attorned to defendant 1, the Court may reasonably hesitate to believe that the new tenant got peaceful possession. It is apparently on this assumption that the learned Subordinate Judge observed in para. 26 of his judgment that it was difficult to believe that the old tenant gave up possession of these items to Bapiraju. But the evidence of D. W. 4 and Ex. 18 establish that Chinnam Raju, the former tenant, must have died in 1913 or early in 1914 and it appears from Ex. 18 itself that in February 1914 it was Bapiraju who sent the rent due in respect of these items to Subba Rao. We therefore see no reason to think that it was unlikely that Ex. J.10 represented a real transaction of lease or that Bapiraju would not have got into possession under it. The defendants' story that Chinnam Raju's widow Venkatammal was in possession and paid her rent, does not seem entitled to weight in the face of the registered lease executed by Bapiraju and the circumstances above adverted to. We would accordingly set aside the decree of the learned Subordinate Judge in respect of items 2 and 3 and give a decree to the plaintiff in respect of these items as well.

As regards item 15, it will follow from our finding on the question of benami that the title thereto also is in the plaintiff. But the learned Subordinate Judge has not given the plaintiff a decree in respect of that item because in the connected suit, O. S. No. 17 of 1929, he held that the present plaintiff had not shown that he had possession of this item within 12 years of the institution of the suit. Apart from the observation we have already made that in the circumstances of of the present case the principle of Art. 144 and not Art. 142 should be applied, the learned Judge's observation that the plaintiff was not in possession of this item within 12 years of the institution of the suit seems to rest upon a misapprehension, because D. W. 9, the tenant who is alleged to have been in possession of this item under defendant 1, admits that for at least a year after Subba Rao's death the plaintiff was occupying a portion of this house. We accordingly hold that the learned Judge's finding on the question of limitation even in respect of this item is not correct. But as his decision has been set aside on appeal by the District Court in A. S. 9/31, it is not necessary that we should pass a formal decree for possession in the present plaintiff's favour in respect of this item. It will be sufficient if there is a declaration of title in plaintiff's favour in respect of this item.

As regards items 2 and 3 which we have allowed in plaintiff's favour, the plaintiff will also be entitled to mesne profits from defendant 1 at a flat rate of Rs. 30 per annum for the three years before suit (1923-1925) and future mesne profits at the same rate from 1926 till delivery of possession of the suit items or until the expiry of three years from this date whichever happens earlier. We do not, however, think it necessary to interfere with the direction in the lower Court's decree as to costs. The appeal is dismissed with costs. In the memorandum of objections there will be no order as to costs as the parties succeed in part and fail in part. For the reasons given above, S. A. No. 1214 of 1932 is dismissed with costs.

Appeal No. 112 of 1931.

Varadachariar J.— Before the decree in this appeal was finally drawn up, it was brought to our notice by the learned counsel for the appellants that in dealing with issue 4, the lower Court had omitted to give the appellants credit for payments

made by them in respect of public charges like land revenue and cesses. The case was accordingly directed to be posted for being spoken to. The respondents' learned counsel points out that the course adopted by the lower Court in para. 35 of the judgment was to adopt the figures as to income shown by the lease deeds of a much earlier date though the income relating to the period in respect of which mesne profits were claimed by them prior and subsequent to suit would have been much greater, and that the Court, in order to avoid an inquiry, preferred to adopt the earlier figures on the understanding however that details of disbursements made by the defendants during the period of their possession need not be taken into account. The parties are not able to agree before us as to the precise basis on which the lower Court proceeded.

Theoretically, the plaintiff is entitled to an inquiry as to mesne profits in respect of the period to which the issue relates and the appellants are entitled to deduction in respect of public charges disbursed by them. Both parties would undoubtedly have saved considerable time and expense if they could have agreed on some figures. But in the absence of such agreement, we have no alternative but to set aside the finding of the Court below on issue 4 and send the case back to the lower Court for an inquiry in respect of mesne profits in the manner prescribed by law as regards items 4 to 12 and 14. The figures arrived at after such inquiry will be inserted by the lower Court in the place of the figure now entered in its decree. As regards the two other items which we allowed in the appeal, namely items 2 and 3, our judgment has already fixed the rate and this amount has only to be added to the figure which the lower Court may arrive at.

C.R.K./D.S. *Order accordingly.*

*** A. I. R. 1938 Madras 13**

VENKATARAMANA RAO J.

Dimala Narasu — Appellant.

v.

Ingili Baitharu and others — Respondents.

Second Appeal No. 702 of 1933, Decided on 5th May 1937, against decree of Sub-Judge, Berhampore, D/- 6th October 1932.

*** Minor — Decree against — Grounds for setting aside such decree stated — Compromise decree against minor can also be set aside even if it is sanctioned by Court — Grounds for setting aside such compromise decree stated.**

A decree suffered by a next friend or guardian ad litem of the minors in a suit can be set aside on their attaining majority on the ground of fraud, collusion or gross negligence of the next friend or guardian ad litem. What is gross negligence depends on the facts of each case, but it must be such negligence as would lead to the loss of a right which would have been successfully asserted if the suit had been conducted or resisted with due care. Failure of a guardian to do his duty in getting all the available material and placing it before the Court would amount to gross negligence on the part of the guardian. A decree by consent stands on the same footing as other decrees. A consent decree obtained with the sanction of Court cannot be set aside except upon very strong grounds, such grounds as amount to fraud in the party claiming the benefit of the compromise decree. [P 15 C 2; P 16 C 1]

An obligation is laid on both the parties to place all the materials in their possession where minors are concerned in order to enable the Court to judge the fairness of the compromise, and where a party seeking the benefit of the compromise against a minor has no honest belief in the claim he is making and the claim is absolutely without any foundation, the compromise will not be allowed to stand as the Court is not apprised of the real state of facts and the compromise sanctioned by the Court must be deemed to have passed on a misapprehension of material facts having been withheld by the party who had knowledge of the same. Such withholding will in law amount to fraud : *Case law referred.* [P 16 C 2]

T. A. Anantha Ayyar for B. Jagannadha Das — *for Appellant.*

G. Lakshmanna and G. Chandrasekhara Sastri — *for Respondents.*

Judgment.—This second appeal arises out of a suit brought by the two daughters of one Lingaraju Bytharu, a resident of Pandyajholi village, Berhampore taluk, Ganjam district, for a declaration that the compromise decree suffered by their grandmother Dimmala Mutyalu in O. S. No. 178 of 1921 on the file of the Court of the District Munsif of Berhampore is null and void and not binding on them. The ground alleged was that the properties, which were dealt with by the compromise decree, belonged to their father in his sole and absolute right, that they were devised by him before his death in favour of his daughters, the plaintiffs in this suit and another daughter since deceased, on certain terms mentioned in his last will and testament dated 12th August 1920, and that by reason of the gross negligence of their grandmother she was induced to enter into a compromise by Somanatha Bythari, the

father of the defendants, and the paternal uncle of their father by reason whereof they lost a considerable portion of the property. The learned District Munsif upheld their plea and set aside the compromise decree. The learned Subordinate Judge reversed the decision of the learned District Munsif. He was of the opinion that as the compromise was certified by the counsel appearing for the plaintiffs in the prior litigation and sanctioned by the Court, it could not be set aside in view of the state of circumstances that existed at the time of the compromise. He further found that the father of the defendants was under no obligation to place before the Court any material opposite to the contention which he was advancing in the said suit. This second appeal has been preferred against the decision of the learned Subordinate Judge by plaintiff 2, plaintiff 1 being made a party to the appeal.

It is strenuously contended in appeal by Mr. Anantha Ayyar on behalf of the appellant that the learned Judge has not correctly appreciated the law bearing on the question as to how far the compromise decree suffered by the guardian of the minors can be set aside and that in arriving at the conclusion he did, he has omitted to consider several material facts which were admittedly beyond dispute. Before dealing with the contention, it is necessary to state exactly the circumstances and the facts that existed at the time the compromise was entered into. Lingaraju Bytharu, the father of the plaintiffs, was one of the four sons of one Jagannatho Bytharu, the other sons being Panchakshari, Gangadharo, the grandfather of the defendants and the father of Somanath Bytharu and Lokanatha Bytharu. Both Panchakshari and Lokanatha had no issue, male or female. Lokanatha appears to have died very early leaving his widow Mahalakshmi. It was found by the learned District Munsif that in or about 1890 there was a reference to arbitration as evidenced by Ex. J to divide the family properties and the parties thereto were Lingaraju, Panchakshari, Gangadharo and Mahalakshmi, widow of Lokanatha, and in pursuance thereof there was a division in and by which the family properties were divided in certain shares. This finding was not disturbed by the learned Subordinate Judge in appeal. Subsequent to the said date the brothers have been living separately and enjoying their properties and dealing with them separately. That the brothers were in enjoyment of their properties separately has been found by the learned District Munsif and this finding has not been challenged in second appeal. Further it could not be attacked in view of the undisputed documentary evidence in the case. So far as Lingaraju is concerned, he seems to have obtained about 1 acre odd lands and a house in Lati village.

Subsequent to the said partition, he appears to have purchased about 7 acres of land in the village of Satto Pandva in or about 1897 (Ex. P). All these properties were without any doubt admittedly enjoyed by Lingaraju; the pattas stood in his name, muchilikas were obtained from tenants in his name and even after his death the plaintiffs' grandmother successfully recovered rents from the tenants in spite of the opposition of Somanath whose title the tenant set up: *vide* Exs. H and H-1. The muchilikas are evidenced by Ex. Q series, the pattas are evidenced by Ex. R series and the cist receipts are evidenced by Ex. S series in the case. Shortly before his death, Lingaraju executed a registered will Ex. M wherein he asserted that the property was purely ancestral and self-acquired. This is true because part of his property, namely the house and lands in Lati village, is ancestral and part of the property, namely the lands in Sathopandya village, is self-acquired. He further stated that they were all then in his undisputed right and enjoyment. He devised the properties absolutely to his daughters to be taken by them in the manner provided for them in the said will. Thus, so far as Lingaraju is concerned, from 1890 up to the date of his death in 1920, his conduct was that of a divided member of the family enjoying the properties in his own right. So far as Panchakshari is concerned, he mortgaged in 1911 by Ex. D certain property which he got in the partition in favour of one Mallayya. The recital therein is very important. It runs thus:

> Whereas I have executed in your favour possessory mortgage deed in respect of the lands which are mentioned in para. 3 hereinbelow, and which having formed my ancestral acquisition and fallen to my share on partition, have till this day been in my rightful ownership, and put you in possession thereof. . . . .

Thus it will be seen that there was a distinct admission by Panchakshari of the partition and the acquisition of that property in partition and an assertion that

the said property has been in his rightful ownership and possession on the date he was purporting to mortgage the said property. Three years thereafter by a document Ex. C dated 8th February 1914, he disposed of the said property absolutely in favour of Lingaraju Achari. So far as Somanath, the father of the defendants, is concerned, he seems to have dealt with the property which he got in the partition in 1915; by a document Ex. E dated 13th October 1915 he sold certain lands and a house in favour of his wife Bavuri Amma. The recital therein also is significant. It states:

> Whereas I have this.day sold to you for Rupees 1,000 . . . . . for the two items my ancestral immoveable property in land which is mentioned in para. 3 hereinbelow, and which till this day remains in my rightful ownership and enjoyment together with the occupancy right therein possessed by me and put you in possession thereof. . . . . .

That this was acted on is evidenced by the Settlement Register Ex. K from which it appears that the patta for the lands was transferred in favour of Bavuri Amma. Thus it will be seen that Somanath makes a distinct admission that the property which he disposed of was the ancestral acquisition and was in his rightful ownership and possession. This could only have been possible on the footing of a partition. From the proceedings in a later suit, O. S. No. 400 of 1922 on the file of the Court of the District Munsif of Berhampore and from the admission of Somanath Bythari in his written statement in O. S. No. 178 of 1921 (Ex. N), it appears that the family had two houses in Panyajoi; one appears to have fallen to the share of Mahalakshmi and the other to defendant 7 Somanath, which was disposed of under Ex. E. In Ex. E the southern boundary of the said house is described as the house belonging to Kasarapu Mahalakshmi. This seems to indicate that Mahalakshmi obtained a house. From Ex. K it appears that certain survey numbers which stood in the joint names of defendant 7 and Mahalakshmi were thereafter transferred in favour of Somanath's wife Bavuri Amma and in favour of Mahalakshmi.

Lingaraju, as I stated, died some time after the will. Somanath seems to have created trouble and trespassed the title to the lands and thereupon two suits were instituted, one being O. S. No. 178 of 1921 by plaintiff 2 represented by her grandmother Dimmala Mutyalu for a declaration that the suit house belonged to her under her father's will and that the property belonged to her father, and the other being O. S. No. 320 of 1921 by both the present plaintiffs represented by their grandmother, the said Dimmala Mutyala, seeking for a declaration of title to the lands devised under their father's will in their favour. The defence of Somanath was that the family was an undivided one, that there was no division, that the properties were separately being enjoyed for the sake of convenience and that he got the property by survivorship and that he was not aware of the will left by his brother and the dispositions therein were not binding on him. It was in this state of facts that the compromise was entered into as evidenced by Ex. T.1 dated 19th April 1922. Under the said compromise, the plaintiffs have completely lost the right to the house except the right of residence and in regard to the lands they have lost half the right therein, both with reference to the lands in Lathi village and Satyapandya village. There can be no question that the plaintiffs have suffered real detriment or loss by reason of this compromise if the property had belonged absolutely to their father. It may also be stated in this connexion that very soon after this compromise in respect of the property disposed of by Panchakshari, Somanath seems to have also trespassed on the suit property and in regard to that there was a suit filed by the vendee to which Somanath and the present plaintiffs were parties, the suit being O. S. No. 400 of 1922 on the file of the District Munsif of Berhampore, wherein it was found that there was a partition in the family in 1890 and ever since the brothers were in separate enjoyment and possession of the properties which fell to their shares and were dealing with them separately, and Somanath did not appeal against that decision.

In this state of facts, the question is whether the compromise entered into by the plaintiffs' grandmother can be sustained. It is not disputed that a decree suffered by a next friend or guardian ad litem of the minors in a suit can be set aside on their attaining majority on the ground of fraud, collusion or gross-negligence of the next friend or guardian ad litem. What is gross negligence will depend on the facts of each case, but it must be such negligence as would lead to the loss of a right which must have been suc-

cessfully asserted if the suit had been conducted or resisted with due care : *vide* 6 C L J 621.[1] The omission to prosecute a claim (*vide* 3 W R 46[2]), to set up a valid plea (*vide* 27 M L J 486[3]), to offer evidence to support a plea (*vide* 67 M L J 27[4]), have been held in the circumstances of a particular case to amount to a gross negligence as would warrant giving relief to a minor by setting aside the decree. A decree by consent would, it seems to me, stand on the same footing as other decrees. But Mr. Lakshmanna contends otherwise. He strongly relies on the decisions in 28 Bom L R 362[5] and A I R 1929 Mad 96.[6] It seems to me that no such distinction can be drawn though a consent decree obtained with the sanction of the Court cannot be set aside except upon very very strong grounds as was pointed out by Turner, L. J. in (1865) 2 De G J & S 373=46 E R 419.[7] In that case, in discussing the circumstances which would furnish sufficient ground for impeaching such a decree, the Lord Justice observed thus :

> They must be such as to amount to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud, but what in the eye of this Court is considered as amounting to fraud. A compromise of doubtful rights between adult parties cannot, as I conceive, be set aside on any other ground. If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed, but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts in the view of a Court of Equity to fraud. The rule which applies to adults seems to me to be not less applicable to compromises by the Court on behalf of infants.

Later on he observes as follows :

> If the compromise was fairly and honestly entered into at the time, its validity cannot, as I conceive, be affected by what subsequently occurred. The true question in this very complicated case seems to me to be, was this compromise fairly and honestly made at the time ? If it was, the plaintiff must be bound by it. If it was not, he must be entitled to be relieved against it.

In that case he set aside the compromise on the ground that a material document which would have influenced the Court and which was in the possession of the party who was seeking an order against the minor, had not been placed before the Court. In relation to that he observed :

> It is sufficient to say that in my opinion this document shows that the materials necessary to enable a fair judgment to be formed upon the question whether this compromise was for the benefit of the infant were not fairly and properly brought under the Master's consideration that there was a suppression of material facts which were within the knowledge of Lord Mostyn and his advisers, and were not within the knowledge of the plaintiff or of those who acted for him. It may be said, perhaps, that the Master was satisfied with the information laid before him and called for no further information, but the question is not whether the Master called further information, but whether the parties having this further information in their possession were justified in withholding it. I am satisfied that information was withheld which was material to have been given, and which, if given, might have altered the conclusion arrived at, and I think the fact of such information having been withheld amounts in the eye of this Court to fraud.

Thus it will be seen that the learned Lord Justice lays down that an obligation is laid on both the parties to place all the materials in their possession where minors are concerned in order to enable the Court to judge the fairness of the compromise and it is not, as the learned Subordinate Judge thought, that it is not incumbent upon Somanatha to lay before the Court any fact which was within his knowledge. It is also clear from this judgment that there must be a compromise of doubtful rights and there must be equal knowledge on both sides. It was therefore held that where a party seeking the benefit of the compromise against a minor had no honest belief in the claim he was making, and the claim was absolutely without any foundation as in 45 Cal 17,[8] or 47 Mad 181,[9] the compromise would not be allowed to stand. The reason assigned is that the Court is not apprised of the real state of facts and the compromise sanctioned by the Court must be deemed to have been passed on a misapprehension of a material fact having been withheld by the party who had knowledge of the same. Such withholding would in law amount to fraud. Failure of a guardian to do his

1. Lilabati Misrain v. Bishun Chobey, (1907) 6 C L J 621.
2. Mt. Maneerun v. Mt. Luteefun, (1865) 3 W R 46.
3. Subbanna v. Narasamma, A I R 1915 Mad 384 =26 I C 16=27 M L J 486.
4. Jaddu Padhi v. Chokkappa Boddu, A I R 1934 Mad 469=150 I C 76=58 Mad 155=67 M L J 27.
5. Dhairyasingh v. Kissandas, A I R 1926 Bom 291=94 I C 104=28 Bom L R 362.
6. Ramaswamy v. Alagathai Anni, A I R 1929 Mad 96=116 I C 116.
7. Brooke v. Lord Mostyn, (1865) 2 De G J & S 373=46 E R 419=33 Beav 457=34 L J Ch 65=11 L T 392=10 Jur (N S) 1114=13 W R 115.
8. Gungeshwar Kunwar v. Durga Prasad Singh, A I R 1917 P C 146=42 I C 849=44 I A 229 =45 Cal 17 (P C).
9. Kondama Naicker v. Kandasami Goundar, A I R 1924 P C 56=79 I C 961=51 I A 145= 47 Mad 181 (P C).

duty in getting all the available material and placing it before the Court would amount to gross negligence and stand on the same footing. In this connexion I should like to refer to the observations of the Vice-Chancellor Malins in (1874) 18 Eq 573[10] at page 576 :

> The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience. . . . The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and will protect her interests.

Judged in the light of these principles, can the compromise in this case stand? On the facts I have already indicated, there can be no question that Lingaraju and his brothers became divided in or about 1890, and for a period of 30 years to the date of Lingaraju's death, they have been in separate enjoyment and possession of the properties. So far as Somanath is concerned, he was fully aware of the fact that he was a member of a divided family and this is strongly evidenced by his own conduct in executing Ex. E. This fact and this document were entirely within his knowledge and control and it was not made available to the Court or to the legal advisers on behalf of the plaintiffs. He chose to assert a claim which to his knowledge is false and the compromise was arrived at on the footing that they were members of an undivided family whereas in fact it was not so. If the guardian ad litem had taken a little more care, as was expected of her, she could have got possession of Exs. E and K and the documents which were executed by Panchakshari, namely Exs. D.1 and C, which place beyond doubt all the facts of partition and support Ex. J. If these documents had been placed before the Court, it cannot be said that the Court could have sanctioned the compromise because, even apart from these documents, the state of facts was that the parties were admittedly in separate enjoyment and possession of the properties for a considerably long time which might have supported an inference of division. The learned Subordinate Judge observes:

> The partition alleged was not evidenced by a partition deed which was in the possession of the party against whom the compromise is now sought to be vacated on the ground of its wilful suppression by him. The partition is inferred from certain transactions and conduct of the parties which was within the knowledge of both parties, and in fact the plaintiff's next friend's case itself was that. Under such circumstances Somanath was not under any obligation to prove the opposite of his contention.

The learned Judge's view is entirely wrong. The document Exs. E, K, D.1 and C would have removed any doubt that might have remained at the date of the compromise in regard to the inference of division to be drawn. There is thus in this case both a withholding of real facts by the father of the defendant and a neglect of duty on the part of the guardian. Neither Kumaraswami Sastri J. nor Reilly J. in A I R 1929 Mad 96[6] lays down that under such circumstances the compromise can be upheld. Referring to 45 Cal 17,[8] Kumaraswami Sastri J. observed thus:

> It was held that on the facts disclosed in that case there could be no question of a bona fide compromise where a person knowingly raises a dispute by setting up a false claim which he knows to have no foundation and in fact induces the other party to settle the claim.

Referring to 47 Mad 181[9] Reilly J. observed thus :

> It is clear that in both cases the Court which sanctioned the compromise was deceived and fraud was practised upon it. Each of those compromises must have come before the Court concerned as a compromise reached by free consent by parties negotiating at arm's length with full knowledge of the facts. But in each case it was found that the compromise was procured by the party who knowingly put forward a false plea and procured by taking advantage of the helplessness of the minor's guardian. In each of those cases there was plain fraud on the Court, which was deceived into believing that there was a compromise by free consent when there was no such consent.

In this case it will be seen that the plaintiffs represented by their grandmother had no independent male advice and she was on the date of the compromise in distressed circumstances. She lost both her daughter and son-in-law. It appears from the evidence that one Sanyasi, P. W. 5, was present at the compromise but he does not appear to have taken any part therein. Whatever it is, it has not been shown that the documents referred to by me and the materials which they disclose were available to the plaintiffs' grandmother, whereas they were certainly available to Somanath. The decision of the Privy Council in 45 Cal 17[8] is very

10. In re Hoghton's Estate; Hoghton v. Fidday, (1874) 18 Eq 573=43 L J Ch 758=22 W R 854.

instructive. In that case a decree for partition passed with the sanction of Court was set aside. There were two brothers Durga Prasad Singh and Bishambar Prasad Singh. Bishambar Prasad Singh died on 2nd August 1902 leaving his only child the plaintiff and his widow Mussammat. Durga Prasad filed a suit on 7th May 1904 against Mussammat and her daughter the plaintiff who was a minor then and also at the time of the Privy Council decision. In that suit Durga Prasad stated that his brother Bishambar Prasad had been born blind and therefore excluded from inheritance to his father's estate. In that suit there was a compromise by which Durga Prasad gave to Mussammat six villages. A suit was filed to set aside that compromise on the ground that it was to the detriment of the minor plaintiff. The Subordinate Judge in that case set aside that compromise but the High Court reversed it. Their Lordships of the Judicial Committee found that on the evidence it was fairly clear that Bishambar Prasad was not born blind and was entitled to a half share in the property. They further found that the fact of congenital blindness should have been known to every member of the family if it was a fact. Their Lordships also noticed that Mussammat, the mother of Durga Prasad, did raise an objection in certain succession proceedings on behalf of Durga Prasad that Bishambar Prasad was born blind. The parties apparently in view of this contention had the matter compromised by the sanction of the Court. But their Lordships nevertheless observed that Bishambar Prasad was admittedly not born blind on the evidence and that Durga Prasad could not possibly have been in doubt as to that fact, and had, when he induced Mussummat to enter into the compromise, no honest and bona fide belief in the claim which he was making and therefore the compromise which was made in pursuance of it, could not be allowed to affect in any way the right of the minor. Similarly, a partition decree was set aside in 47 Mad 181[9] on the ground that the compromise decree proceeded on the footing that there was no division in status in the family, whereas in fact there was a knowledge of division in the person who set up that there was no division.

In the view I have taken on the facts there is nothing in 28 Bom L R 362[5] which would help Mr. Lakshmanna. In that case the actual question that arose for decision was how far the learned Judge who granted the sanction can be guided by the representations made by the counsel before him and how far he should call further information. In that case Madgavkar J. after pointing out that the considerations in deciding the question of sanction are entirely different from the considerations in deciding the issues and the reliefs in a contested suit, observed thus:

> If among the materials in para. 62 of the plaint there had been one or two documents or facts, so decisive in favour of the present ancestral character of the Girgaum property, and Gordhandas had deliberately omitted or even perhaps failed to bring them to the notice of the Court, when it considered the question of sanction, then possibly it might have been a plausible contention for the appellants that Gordhandas's action fell within the rule of culpable or wilful negligence tantamount to fraud or misrepresentation on material facts, which alone in law would enable the minors to avoid the compromise sanctioned.

In that case the father in entering into the compromise was acting as guardian on behalf of his minor sons. In regard to the conduct of the father Madgavkar J. observed thus:

> In my opinion no negligence—much less gross negligence — least of all misrepresentation or fraud, on the part of Gordhandas, is proved in the materials or the sanction obtained.

I have already shown in this case that Somanath withheld all the available material in his possession. I have also pointed out that even if Somanath was not guilty of any fraud, the grandmother, by neglecting to get all the material which was available and place it before the Court, was guilty of gross negligence. This would entitle the Court to say that all the material which ought to have been placed before the Court was not placed in considering the question of sanction and set aside the decree. As there is thus both fraud on the part of Somanath and neglect on the part of the guardian, I am of the opinion that the compromise decree in this case should be set aside. In the result, I reverse the decision of the learned Subordinate Judge and restore that of the learned District Munsif. But I direct each party to bear his own costs throughout. Leave to appeal refused.

C.R.K./A.L. *Appeal allowed.*

* A. I. R. 1938 Madras 19

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Nagarur Sambayya — Appellant.

v.

Nagarur Pedda Subbayya —

Respondent.

Appeals Nos. 449 and 450 of 1931, Decided on 13th August 1937, against decrees of Dist. Court, Cuddappah, D/- 31st December 1930.

*** (a) Provincial Insolvency Act (1920), S. 28 (7) — S. 28 (7) enunciates English doctrine of relation back — Only difference is as to time when insolvency commences.**

Section 28 (7) enunciates the well-known doctrine of relation back in insolvency law. The principle underlying the doctrine is that the adjudication has relation to the act of bankruptcy and the property vests by relation from that time in the trustee in bankruptcy. This is the English rule. Under the English law, the insolvency commences either on the date of the presentation of the petition or from the earliest act of insolvency committed within three months before the date of the presentation of the petition and the title of the trustee in bankruptcy relates to that date. Under S. 28, Cl. 7, however, the insolvency commences from the date of the presentation of the petition. The only difference is as to the point of time when the insolvency commences: *(1893) 1 Q B 455*; *A I R 1916 Mad 144* and *A I R 1927 Mad 163*, *Rel. on.* [P 20 C 1]

(b) Provincial Insolvency Act (1920), S. 78 (2) Suit on annulment of insolvency on pro-note executed before petition for insolvency—Plaintiff can deduct only period from order of adjudication to order of annulment and not from date of petition for insolvency.

The statute of limitation for the maintenance of an action at law, once it has commenced to run, will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment, and if the adjudication is annulled the period between the date of the adjudication and that of annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. So a prudent creditor, in order to keep his debt alive, will be obliged to file a suit to save it from the bar of limitation in spite of insolvency. Thus a plaintiff, who sues after annulment of insolvency on a promissory note, executed before the petition of insolvency is filed, is entitled to deduct for limitation, only the period from the order of adjudication to the order of annulment and not from the date of the presentation of the petition: *A I R 1935 Mad 817*, *Dissent.*; *A I R 1927 Mad 163*, *Disting.*; *Case law referred.* [P 20 C 2; P 21 C 1; P 22 C 1]

(c) Limitation Act (1908), S. 19 — Word 'prescribed' includes period which party is entitled to exclude under any law in force.

The word 'prescribed' in S. 19, Lim. Act, is not limited to the period in Sch. 1 of the Act; in computing the period prescribed, the period which a party is entitled to exclude under any law for the time being in force, e. g. S. 78 (2), Prov. Insol. Act, should be taken into account: *A I R 1935 P C 85*, *Rel. on.* [P 22 C 2]

B. Sitarama Rao and C. V. Subramania Ayyar — *for Appellant*

B. Somayya and Kasturi Seshagiri Rao — *for Respondent.*

Venkataramana Rao J.—This appeal raises a question of limitation. The suit was to recover a sum of money due in respect of two promissory notes dated 7th May 1922 executed by the defendant in favour of the plaintiff. Subsequent to the execution of the promissory notes, the creditors presented a petition in insolvency on 7th November 1922 to adjudicate the defendant an insolvent. The order of adjudication was passed on 21st March 1923. The adjudication order was annulled on 5th April 1928. The suit was instituted on 23rd October 1930. The plaintiff seeks to escape the bar of limitation by alleging that he is entitled to exclude the whole period during which the proceedings in insolvency were pending, that is from 7th November 1922, the date of the presentation of the insolvency petition, to 5th April 1928 the date of annulment. The contention of the defendant is that the plaintiff is entitled to exclude only the period from the date of the order of adjudication, namely 21st March 1923 to 5th April 1928, the date of annulment. The learned District Judge has given effect to the contention of the defendant and hence this appeal is preferred by the plaintiff. The question is, is this view right? The relevant provision bearing on the question is S. 78, Cl. 2, Provl. Insol. Act, which runs thus:

> Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-s. (2) of S. 28 which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded.

Unfettered by authority, according to the plain terms of the section, the period of exclusion is that from the date of the order of adjudication to the date of the order of annulment. But it is contended that the date of the order of adjudication

in S. 78, Cl. 2 must be deemed to be the date of the presentation of the petition, and reliance is placed on S. 28. Cl. 7, Prov Insol Act, which provides that

> an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made.

The contention is outlined thus. S. 28, Cl. (7) is a general section relating to 'adjudication and the consequences of adjudication' and must govern the interpretation of the expression 'the order of adjudication' wherever it occurs in the Act. This contention seems to be untenable on an examination of the principle underlying that provision and other sections of the Act where the expression 'order of adjudication' occurs. S. 28, Cl. (7) only enunciates the well known doctrine of relation back in insolvency law. The principle underlying that doctrine is that the adjudication has relation to the act of bankruptcy and the property vests by relation from that time in the trustee in bankruptcy, i. e. the title of the trustee in bankruptcy or receiver relates back to the commencement of the insolvency. This is the English rule. Under the English law, the insolvency commences either on the date of the presentation of the petition, or from the earliest act of insolvency committed within three months before the date of the presentation of the petition and the title of the trustee in bankruptcy relates to that date. It is also the law under the Presidency Towns Insolvency Act. Under S. 28, Cl. 7, Prov. Insol. Act, the insolvency commences from the date of the presentation of the petition. We do not think that a different rule from the English law and that laid down in the Presidency Towns Insolvency Act was intended to be laid down in regard to the legal consequences flowing from the doctrine of relation back. The only difference as pointed out by Mulla (page 413) is as to the point of time when the insolvency commences.

The whole of S. 28 deals with the property of the insolvent and the order of adjudication relates back and takes effect from the date of the presentation of the petition vesting the property of the insolvent in the Official Receiver as from that date. As explained in (1893) 1 Q B 455,[1] the result of the relation back is that all subsequent dealings with debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed.

Vide 39 Mad 693[2] at p. 699 wherein (1893) 1 Q B 455[1] is cited with approval. And the same view is expressed in 50 Mad 300,[3] a case on which strong reliance was placed by the appellant, where the learned Judges observe at p. 302 that:

> Section 28, Cl. 7, is a general clause which applies to all dealings by or with the insolvent, unless any particular dealing is expressly exempted from its operation.

The question now under consideration has nothing to do with any dealing by or with the insolvent but it relates to the maintainability of the action on a debt due by him in a Court of law. The relevant provisions which deal with the effect of the insolvency on the maintainability of the actions are Ss. 28, 29 and 78. It will be seen from these three sections that the material date is the date of the order of adjudication. The insolvency does not per se bar the maintenance of an action. Before the date of the adjudication the action is maintainable without the leave of the insolvency Court, but thereafter, that is after the date of the order of adjudication, the action is not maintainable without leave. If an action has been commenced before the date of the order of adjudication, the moment the order of adjudication is passed, the Court before which the suit is pending can either stay or continue it. The statute of limitation for the maintenance of an action at law, once it has commenced to run will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment and if the adjudication is annulled, the period between the date of the adjudication and that of annulment is excluded and the statute begins to run immediately on annulment. If no order of adjudication is made, the insolvency does not save the claim from being barred by limitation. So under the law as it stands, a prudent creditor in order to keep his debt alive, will be obliged to file a suit to save it from the bar of limitation in spite of insolvency. No doubt,

1. In re Pollitt, (1893) 1 Q B 455=62 L J Q B 236=4 R 253=68 L T 866=41 W R 276=10 Morrell 35=62 L J Q B 236.

2. Kalianji v. Bank of Madras, A I R 1916 Mad 144=31 I C 583=39 Mad 693=29 M L J 788.

3. Rangiah v. Appaji Rao, A I R 1927 Mad 163 =99 I C 241=50 Mad 300=51 M L J 719.

it may in a sense be futile, if an order of adjudication takes place; but he runs the risk of losing the claim altogether if no adjudication is made.

If the presentation of an insolvency petition per se laid the creditor under a disability, of course, it may stand to reason that the time occupied by the pendency of the insolvency, that is, commencing from the date of the petition should be excluded; but since the creditor is placed under no such disability, the Legislature has provided that the period during which he is under a disability should be excluded. Considerable reliance was placed on the decision in 58 Mad 1032.[4] It was no doubt held in that case that a suit filed and a decree obtained therein after the date of presentation of the insolvency petition and before the date of adjudication were held to be incompetent because the leave of the insolvency Court had not been obtained before the commencement of the suit. With respect, we are unable to follow this decision. If a suit can be filed by a creditor without leave before the date of the order of adjudication and the Court before which it is filed has jurisdiction to entertain it and pass a decree thereon, it is difficult to understand how an order passed *ex post facto* by another Court could render such a suit incompetent and the decree passed therein void. The learned Judges have not given due weight to the word 'thereafter' in S. 28, Cl. 2 and to the provisions of S. 29 of the Act which clearly apply to a state of affairs which occurred in the case with which they were dealing. Under S. 29, it was competent to the Court to pass an appropriate order and it was not necessary to pronounce the suit to be incompetent or the decree void. It seems to us that to apply the doctrine of relation back to a suit instituted before an order of adjudication is against the plain language of S. 28, Cl. (2). The view expressed by Ramesam J. in 53 M L J 142[5] seems to be sound, viz.:

> Once the order (adjudication) is made, the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition or in other words the commencement of the insolvency. For all purposes of the Insolvency Act, this fiction has to be used and it is a very useful fiction; but outside those purposes, it has no place. The filing of a suit prior to the adjudication may be regarded as being outside these purposes with reference to the provisions of S. 28, Cl. (2).

The result of the decision in 58 Mad 1032[4] is that if a creditor files a suit without obtaining leave of the insolvency Court before the date of the order of adjudication, his suit is incompetent; but if he does not file a suit and no order of adjudication is made, he may find his claim barred. We do not think that such a state of affairs was contemplated by the Legislature in enacting S. 28, Cl. 7, and we are therefore unable to adopt the interpretation placed by the learned Judges in 58 Mad 1032.[4] Again, an examination of several other sections of the Act does not lead to the conclusion that wherever the date of the order of adjudication occurs it must mean the date of the presentation of the petition. The Legislature has kept in view the distinction between these two dates. For example, see Ss. 30, 74, Cl. (5) and Proviso to S. 55 where the contrast between the two dates is clearly brought out. There is no direct decision on the point with which we are now dealing, but our attention has been drawn to certain observations in two reported cases, viz. 51 Mad 862[6] and A I R 1933 Rang 75.[7] In both these cases, the question was whether a creditor is entitled to rely on S. 78 (2) in regard to a suit filed while the insolvency proceedings were pending and there was no annulment of adjudication. The learned Judges in both the cases rightly held that S. 78 (2) would not apply. In 51 Mad 862,[6] there is an observation to the following effect:

> If the order of adjudication is annulled, the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property.

We do not think that the learned Judges meant, having regard to the context, that the insolvency proceedings would include for the purpose of exclusion under S. 78 (2) the period between the date of the presentation and the date of adjudication. In A I R 1933 Rang 75[7] no doubt there are observations to the effect that the whole of the proceedings commencing

4. Ramayya Garu v. Official Receiver, East Godawary, A I R 1935 Mad 817=158 I C 460 =58 Mad 1032=69 M L J 241.
5. Kallaperumal Naicker v. Ramchandra Iyer, A I R 1927 Mad 698=102 I C 444=53 M L J 142.
6. Machanjeeri Ahmed v. Govinda Prabhu, A I R 1928 Mad 977=114 I C 227=51 Mad 862=55 M L J 661.
7. Bandeally Jaffer v. Peer Mohammed, A I R 1933 Rang 75=146 I C 124.

from the date of the presentation of the petition should be excluded; but the observations are entirely obiter and are not necessary for the decision of that case. Again, considerable reliance was placed on a recent decision reported in (1937) 1 M L J 637,[8] where it was held that even though a debt is barred before the date of adjudication, it can be proved in insolvency under S. 34 (2). It seems to us that it is unnecessary to examine the correctness of the decision for the purpose of this case; probably that decision may be explainable upon the principle that once the order of adjudication is made, the administration of the insolvent's estate is under the supervision of the bankruptcy Court and all the property is vested or must be deemed to have vested in the trustee in bankruptcy from the date of the presentation of the petition by the doctrine of relation back and the trustee in bankruptcy is deemed to be a trustee for the creditors who cannot plead the statute of limitation against the creditors for whose benefit he is administering the estate. This seems to derive support from the decision in 2 Glyn & J 46 & 330[9] cited with approval in (1914) 2 Ch 68,[10] where Channell J. observed thus:

Ex parte Ross[9] shows that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only in the bankruptcy.

The proof of bankruptcy is one thing and the maintainability of an action in a Court of law is another. However, as we have stated, we think it unnecessary to express an opinion in regard to the construction of S. 34, as the debt in the present case was not barred on the date of the adjudication. We therefore hold that under S. 78 (2) a creditor is entitled to deduct only the period from the date of adjudication to the date of annulment. The decision of the lower Court is therefore correct and we accordingly dismiss the appeal with costs.

Appeal No. 450 of 1931.

This appeal also raises the same question of limitation, but the facts are slightly different. The material dates are as follows:

The date of the pronote	8th January 1920.
The date of the presentation of the petition in insolvency	7th November 1922.
The date of adjudication.	21st March 1923.
The date of the annulment of the adjudication.	5th April 1928.
Acknowledgment of the debt.	6th June 1927.
The date of the filing of the suit.	23rd September 1929.

But for the acknowledgment relied on, the suit would be obviously barred by limitation in the view we have taken in the connected Appeal No. 449 of 1931. The question is whether the acknowledgment on the said date would not save the bar of limitation. The learned District Judge has held that the acknowledgment relied on cannot have the effect of extending the time on the ground that it was made after the period of limitation had expired. It seems to us that this view is wrong. Under S. 19, Limitation Act, where before the expiration of the period prescribed for a suit an acknowledgment of liability is made, a fresh period of limitation shall be computed from the date of the acknowledgment. The word 'prescribed' in S. 19, Limitation Act, is not limited to the period in Sch. 1 of the Act; in computing the period prescribed, the period which a party is entitled to exclude under any law for the time being in force, should be taken into account. This is clear from the recent decision of the Privy Council in 57 All 242,[11] where their Lordships observe thus:

> In order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period.

If this principle is given effect to, there can be no question that the acknowledgment in the present suit was made before the expiration of the prescribed period. The suit is therefore in time. We therefore reverse the decision of the learned District Judge and pass a decree in favour of the plaintiff for the amount claimed with interest at six per cent. from the date of the plaint with costs here and in the Court below.

C.R.K./S.C. *Order accordingly.*

8. Subramania Iyer v. Meenakshisundaram Chettiar, A I R 1937 Mad 577=I L R (1937) Mad 679=(1937) 1 M L J 637.
9. Ex parte Ross, (1827) 2 Glyn & J 46 and 330.
10. In re Benzon; Bower v. Chetwynd, (1914) 2 Ch 68=83 L J Ch 658=110 L T 926=21 Manson 8=58 S J 430=30 T L R 435.
11. Maqbul Ahmed v. Pratab Narain Singh, A I R 1935 P C 85=155 I C 205=62 I A 80 =57 All 242 (P C).

A. I. R. 1938 Madras 23

BEASLEY C. J.

Panchayat Board, Samalkot —

Petitioner.

v.

Narava Ramasami and others —

Respondents.

Civil Revn. Petns. Nos. 227 to 231 of 1936, Decided on 28th April 1937, from decrees of Dist. Munsif, Cocanada, in S. C S. Nos. 402, 403, 404, 492 and 628 of 1935.

Madras Local Boards Act (14 of 1920), S. 228, Sch. 4, Rr. 11 and 28—Professional tax—President, Panchayat Board, rejecting assessee's returns and making assessments arbitrarily — Assessee making payment and appealing against assessment—Board rejecting appeal— Suit by assessee for refund of tax illegally collected—Suit held was maintainable as R. 11 of Sch. 4 was neglected—Tax held was paid under R. 28 and as such was not voluntary.

The assessees sued the Panchayat Board to recover the profession tax paid by them on the ground that the Board acted improperly in rejecting the return of income submitted by them and that the President acted illegally in fixing the assessment himself in an arbitrary manner without having regard to R. 11 (4) of Sch. 4. Before filing the suit, the assessees appealed against the assessment to the Board after paying the tax but the appeal was rejected. On behalf of the Board it was contended that the suits were not maintainable in virtue of the provisions of S. 228 and that as the assessees had made a voluntary payment of the profession tax, a claim for a refund of them could not be allowed :

Held that S. 228 did not protect assessments from impeachment in a Civil Court as it had not been shown that the return of income of the assessees was incorrect. The President had entirely neglected the provisions of R. 11 (2), (3) and (4) and so the suits were maintainable.

[P 23 C 2 ; P 24 C 1]

Held further that though payments were made without any protest accompanying them, they were not voluntary, because under R. 28 of Sch. 4 of the Act no appeal to the Panchayat Board would be heard unless the tax had been paid or deposited in the office of the Panchayat Board and therefore a payment made under a statutory provision as a condition precedent to get an official act done, which but for such payment would not be done could not be said to be voluntary : *A I R 1937 Mad 559* ; *A I R 1929 Mad 179* ; *A I R 1934 Mad 420 and A I R 1937 Mad 559, Disting.*

[P 24 C 2]

K. Bhashyam Ayyengar for K. Raja Iyer — *for Petitioner.*

D. Narasaraju — *for Respondents.*

Order.—The suits, the subject of these civil revision petitions, were for a refund by the petitioner Panchayat Board of profession tax illegally collected from the respondents. The points for consideration are common to all the petitions and in the lower Court were dealt with in one judgment and I propose to do the same. The plaintiffs were all served with notices under S. 97, Local Boards Act, calling upon them to file returns of their income or profits for the half-year ending 30th September 1934. They duly filed returns, but the President of the Panchayat Board deeming the returns to be incorrect, fixed an assessment himself and served notices on the plaintiffs directing each of them to pay profession tax in respect of their separate assessments. All the plaintiffs appealed to the Board and the appeals appear to have been dismissed as being out of time although from the judgment it is not clear whether all were dismissed on that ground or which, if any of them was dismissed, on the merits. The defendants raised various defences amongst which two have been argued in this Court, namely that the suits were not maintainable and that the payments of profession-tax made by the plaintiffs were voluntary payments and therefore no claim for a refund of them could be allowed. The first point depends upon whether the provisions of the Local Boards Act have in substance and in effect been complied with and on this point the District Munsif finds that those provisions have not been complied with and that the levy was altogether illegal. With this conclusion I entirely agree. The power of the President of the Panchayat Board to make an assessment himself on a reputed income basis only arises in the event of the assessee's return being incorrect and not otherwise. The District Munsif seems to assume that the returns were not correct, but it appears to me that they were. At any rate it has not been shown satisfactorily before me that any of the returns were not correct. He therefore had no power at all to make an assessment under Sch. 4, R. 11 (2) (3) and (4), Local Boards Act, but assuming, as the District Munsif did, that the President was entitled to make such assessment under Cl. (3) of the rule, he has, in the opinion of the District Munsif, had no regard whatsoever to the provisions of R. 4 which reads :

> The President may when classifying any company or person under sub-r. (3), do so on general considerations with reference to the nature and reputed value of the business transacted, the size and rental of residential and business premises, the quantity and number of articles dealt with, the number of persons employed and the income-tax paid to Government.

With this conclusion I entirely agree. The assessments in question appear to be entirely arbitrary. At any rate no attempt was made to show that they proceeded upon any basis and I am certainly of the opinion that the provisions of sub-cl. (4) were entirely neglected. S. 228, Local Boards Act, only protects assessments from impeachment if the provisions of the Act have been in substance and effect complied with and having regard to the neglect of the very material provisions it is clear that the suit is maintainable in a Civil Court. On the defence that the payment was a voluntary one and its refund cannot be claimed, 45 M L W 489[1] was cited by Mr. K. Bashyam Ayyangar as decisive of this question in his favour. The headnote of that case reads :

> Where a person, on whom the Municipality had served a notice of demand of profession tax which stated that in default of payment his property would be distrained, paid up the tax and subsequently brought the present suit for refund of the tax paid on the ground of non-liability to pay that tax, *held* that the conventional threat of distraint contained in the ordinary notice of demand was not a real threat operating on the mind of the payer without which he would not have paid and hence the payment must be held to be voluntary and irrecoverable as such.

This matter was also considered by Pandalai J. in 67 M L J 566.[2] 45 M L W 489[1] however does not govern this case. The payments in respect of which the claim for a refund was made were payments made after an appeal preferred against the assessment had been dismissed by the Municipal Board to whom the appeal lay and it will be seen from the judgment of Mockett J. that although dissatisfied with the decision the assessee continued to pay the tax from 1928 until 1930 and without any protest accompanying the payments. In all the cases the subject of these petitions, the payment of profession tax, was made before or at the time the appeals against the assessment were lodged and it is here that R. 28 of Sch. 4 of the Act applies. That rule provides that no appeal to a panchayat shall be heard (1) unless it reaches the office of the panchayat within 30 days after the tax complained of has been demanded, and (2) unless (except when the President otherwise directs on the ground of poverty) the tax in respect of which the appeal is presented has been paid or deposited at the office of the panchayat within the period specified in Cl. (1). It is clear therefore that if R. 28 (2) had not been followed the appeals could not have been heard. It is a condition for hearing the appeal that the tax must first of all be paid and it is by force of that statutory provision that the tax was paid and the respondents had no alternative but to pay it if they wished their appeals to be heard. It seems to me to follow clearly that if the appeals had resulted in a reduction of the assessment, the local authority would have been bound to refund the excess payment. How therefore can the payment be described as in any sense a gift? Some authorities were cited on this question in addition to those already referred to, but I do not think that on the facts of this case any authority is needed to reach the conclusion that the payments here were involuntary. However, I would refer first of all to 55 M L J 770.[3] There a claim was made to recover an amount wrongly paid in respect of income which was not assessable under the Act and it was held that the payment was made under a mistake of the general law of British India applicable to all persons in the position of the assessee holding permanently settled estates, and not under duress or coercion and consequently the amount could not be recovered. After dealing with a number of authorities where payments wrongly made were held to be irrecoverable as not made under duress and therefore voluntary, Devadoss and Mackay JJ. on page 776 say :

> The case would be different if for the purpose of getting an official act done a person pays something more than what is proper, for in order to get the act done he must pay the amount demanded, otherwise the act would not be done. In such cases it can be said that the payment is not a voluntary payment nor is it a payment made under a mistake of law. The cases in (1887) 56 L J Q B (N S) 457[4] and (1853) 8 Ex 625[5] are cases where in order to get a certain thing done, the plaintiff had to pay the amount demanded. In (1887) 56 L J Q B (N S) 457,[4] the Corporation of Exeter exacted harbour dues from the plaintiff in respect of exempted articles. The

1. Chairman, Municipal Council, Rajahmundry v N. Subba Rao, A I R 1937 Mad 559=169 I C 330=(1937) 1 M L J 496=45 M L W 489.
2. Municipal Council, Tuticorin v. Ralli Brothers, A I R 1934 Mad 420=150 I C 890 =67 M L J 566.
3. Rajah of Ramnad v. Secretary of State, A I R 1929 Mad 179=114 I C 829=52 Mad 12=55 M L J 770.
4. Hooper v. Mayor and Corporation of Exeter, (1887) 56 L J Q B (N S) 457.
5. Steele v. Williams, (1853) 8 Ex 625=22 L J Ex 225=17 Jur 464.

plaintiff paid in ignorance of the exemption. It was held that the plaintiff was entitled to recover back the money so paid.

After quoting from the judgment of Lord Coleridge C. J. they add :

The plaintiff in this case could not have landed his limestone, the article exempted, without paying harbour dues. In (1853) 8 Ex 625[6] the facts were that the plaintiff's clerk applied to the defendant, a parish clerk, for liberty to search the register book of burials and baptisms. He told the defendant that he did not want certificates but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The clerk searched through four years and made 25 extracts, for which the defendant charged him 3 s. 6 d. each and he accordingly paid the defendant £ 4-7-6. It was held first that the charge for extracts was illegal since 6 & 7 Will. IV, Ch. 86, S. 35 only authorizes a charge for a search and for a certified copy and secondly that the payment was not voluntary so as to preclude the plaintiff from recovering back the excess. Parke B, observed: "In the first place I think that there is evidence that this payment was not voluntary but necessary for the exercise of a legal right".

In 67 M L J 566,[2] the case already referred to, Pandalai J. distinguishes between voluntary and involuntary payments; but that case is distinguishable from this on the ground that the payments there were not made in order to get the appeal heard and the facts were similar to 45 M L W 489.[1] In my view, the payments here were involuntary payments and on this ground the plaintiffs were entitled to make a claim for a refund and, as the suits were maintainable and the assessments made by the President were arbitrarily made without regard to the provisions of the Act, it follows that the plaintiffs were entitled to succeed. The District Munsif has awarded them the sums found to be due calculating the assessment on the basis of income tax returns and no point was taken before me that the basis adopted by him was incorrect.

All the C. R. Ps. will therefore be dismissed with costs in each of them. I observe that in the lower Court the District Munsif disallowed the plaintiff's costs because he thought that they had made false returns which provoked the defendant to act in this manner. On that assumption with which I by no means agree, he was entitled to make that order as to costs. Here different considerations apply, because the petitioners did not remain satisfied with the lower Court's order but have further pursued the matter to the High Court and without success and must therefore suffer the natural consequences. Although I am not influenced at all by it in making my order as to costs, I feel bound to observe that the procedure adopted by the President of the panchayat Board as it appears from the facts was grossly irregular and his conduct is certainly not such as to inspire confidence in the minds of others.

C.R.K./B.D. *Petitions dismissed.*

A. I. R. 1938 Madras 25

VENKATARAMANA RAO J.

Sultan Nachi and others—Appellants.

v.

Salamar Bibi — Respondent.

Second Appeal No. 523 of 1933, Decided on 25th March 1937, against decree of Sub-Judge, Cuddalore, in A. S. No. 116 of 1932.

(a) Debtor and creditor — Debtor making gift to creditor of amount equal to or greater than debt — Question whether such payment is towards satisfaction of debt due is question of fact—Rule of English law that it is to be taken in satisfaction of debt due does not apply to India.

Where a debtor who owes a certain amount to a creditor makes a gift or legacy to him of an amount either equal to or greater than the amount of the debt due to him, the question whether such payment is towards satisfaction of debt due is a question of fact and the decision of such question depends on the facts of each case. [P 26 C 1, 2]

The rule of English law that a gift or legacy in such case shall be taken in satisfaction of the debt due is not favoured and is not made applicable to India by the framers of the Succession Act : *37 Bom 211 and A I R 1932 P C 13, Rel. on; 7 Beng L R 643 (P C), Ref.* [P 26 C 2]

A Mahomedan widow sued to recover the dower debt of Rs. 700 from the other heirs of her deceased husband. The defendants relied on a statement made by her in other proceedings that she had received a gift of Rs 3,000 from her husband just before his death and contended that the statement amounted to an admission by her that her dower debt was satisfied by such gift. No evidence was let in by the defendants to prove that the gift was in payment of the dower debt :

Held that as there was no evidence adduced by the defendant to prove that the gift was in satisfaction of the dower debt, if the statement was to be relied upon as an admission, it should be taken as an admission that the amount was paid to her by way of gift and not by way of satisfaction of her dower debt. It was not open to the Court to go behind the admission. The defendants were therefore liable for the dower debt. [P 27 C 1]

(b) Mahomedan Law — Dower — Liability of heirs of deceased is not personal but only with respect to assets of deceased.

Where the widow of a Mahomedan sues the heirs of her deceased husband for the recovery of her debt, a personal decree cannot be passed against them but a decree for realising the debt only from the assets of the deceased in their hands can be passed. [P 27 C 1]

C. Padmanabha Aiyangar — *for Appellants.*

Basheer Ahmed Sayed — *for Respondent.*

Judgment.—This second appeal arises out of a suit instituted by the plaintiff to recover a sum of Rs. 700 as and by way of dower settled as payable to her at the time of her marriage in October 1925 by her deceased husband. The husband died in 1927 and the suit was instituted in 1930 within three years from the date of his death. Both the Courts have concurrently found that the husband did agree to pay the said sum of Rs. 700 as and by way of dower. This cannot be challenged in second appeal. The main defence of the contesting defendants who are the other heirs of her husband was that in a petition for leave to sue in forma pauperis in regard to some other claim the plaintiff stated that her husband shortly before his death, while he was very ill, had made provision for her by giving certain immovable properties and also by making a gift of Rs. 3,000 in cash; and therefore the dower debt must be deemed to have been discharged by this gift. It may be noted that the factum of gift is not admitted by the defendants but her claim was sought to be defeated on the strength of the admission made by her. Both the lower Courts proceeded to treat the case on the said footing and not upon the factum of the said gift having been made. The learned District Munsif non-suited her on the ground that having regard to the fact that the husband made a gift of such a large sum of money he could not be deemed to have died indebted and therefore a presumption must be drawn that the dower debt was discharged by the gift. The learned Subordinate Judge reversed this decision and held that the alleged gift of Rs. 3,000 must be deemed to have been made by way of a present having regard to the disproportion between the amount of the debt and the amount of the gift, though he might be inclined to draw the presumption if the amounts were equal. It is against this decision that the second appeal has been preferred. The question whether a certain payment was made by way of gift or by way of satisfaction of a debt is a question of fact as pointed out by their Lordships of the Privy Council in 7 Beng L R 643.[1] But Mr. Padmanabha Iyengar contends that in arriving at this finding of fact the learned Subordinate Judge has misdirected himself on the question of law bearing on the case. He contends that the correct principle of law to be applied here should be that if a debtor makes a gift or gives a legacy of an amount either equal to or greater than the amount of debt, the presumption must be that the gift or legacy was by way of satisfaction of the debt. In support of this contention he relies upon the rules of English law in regard to the satisfaction of debts by legacies which is thus stated by Jarman in his book on Wills, Edn. 7, at p. 1136 :

> If one being indebted to another in a sum of money does, by his will, give him a sum of money as great as or greater than the debt without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt so as that he shall not have both the debt and the legacy.

Mr. Jarman points out that this rule is however not favoured and that equity leans against legacies being taken in satisfaction of debts. So far as India is concerned, this rule is not favoured and has not been adopted by the framers of the Succession Act : *vide* S. 164 of the old Act and S. 177 of the present Act. Beaman J. in 37 Bom 211[2] at p. 214 is inclined to think that the rule of English law is not applicable to this country. Their Lordships of the Privy Council had to consider this question in 6 Luck 556[3] with reference to the case of a dower. In that case it was found that a Mahomedan husband agreed to pay at the time of the marriage a large sum of Rs. 50,000 by way of dower and that before his death he made gifts of amounts from time to time which far exceeded this sum of Rs. 50,000. Under such circumstances it was contended that the dower debt must be deemed to have been discharged by this gift; and 7 Beng L R 643[1] was relied on before their Lordships of the Privy Council. But their Lordships doubt if the principle has any application as between husband and wife

1. Iftikarunissa Begam v. Nawab Amjad Ali Khan, (1871) 7 Beng L R 643 (P C).
2. Hasanalli Moledina v. Popatlal Parbhudas, (1913) 37 Bom 211=17 I C 17=14 Bom L R 782.
3. Mohammad Sadiq Ali Khan v. Fakr Jahan Begam, A I R 1932 P C 13=136 I C 385=59 I A 1=6 Luck 556 (P C).

and distinguished the decision in 7 Beng L R 643[1] as having given on the facts of the said case. In 7 Beng L R 643[1] the thing transferred was substantial in amount and character, the equivalent of that which the debtor ought to have provided for the creditor. On the facts of that case, their Lordships said a presumption ought to be drawn that the payment must be deemed to have been made in satisfaction of the debts and not by way of additional gift. Further their Lordships point out being a question of fact as both the Courts below concurrently found that the payment was in satisfaction of the debt, that they were not inclined to disturb the said findings; and they have not enunciated any general rule or presumption.

In this case what is relied on is not the fact of the gift but an admission made by the lady of having received such a gift. If the statement made by the lady is to be relied on as an admission, her admission is that the amount was paid by way of gift and not as satisfaction of debt. It is not open to the Courts to go behind the said admission. The plaintiff swore that the payment was made not in satisfaction of the dower debt. There is no evidence contra. The defendants have not chosen to adduce any evidence to repudiate her claim. And further the fact that the amount of gift is considerably larger than and quite disproportionate to the amount of the debt, is an additional factor to be taken into consideration as was done by the learned Judge in the Court below in arriving at the conclusion whether the payment was made in satisfaction of the debt or by way of gift. It seems to me that the finding arrived at by the lower Court is correct and I do not see my way to disturb it. In the result the second appeal fails and is dismissed with costs. It has been brought to my notice that the lower Court has granted a personal decree. The lower Court is wrong in doing so. The amount should be realised only from the assets of the deceased.

C.R.K./A.L. *Appeal dismissed.*

A. I. R. 1938 Madras 27

VARADACHARIAR J.

Abdul Hafiz Saheb — Petitioner.

v.

Abdul Sukkur Saheb and another — Respondents.

Civil Revn. Petn. No. 369 of 1936, Decided on 20th August 1937, from order of Court of Small Causes, Trichinopoly, D/- 2nd December 1935.

(a) Execution—Transfer of decree to another Court for execution — Report under S. 41, Civil P. C. not sent to original Court—Application made to transferee Court for arrest of judgment-debtor is one presented to 'proper Court'.

Unless in the order of transfer there is any express limitation of the purpose for which the transfer is made, there is no reason to limit the powers of the Court to which a decree has been transferred for execution. The original Court of jurisdiction is deprived of its power to execute its decree once the decree has been sent to another Court for execution till the certificate under S. 41 is received from the transferee Court. [P 28 C 2]

Where therefore a decree has been sent to another Court for execution and no report has been sent to the original Court under S. 41, so as to deprive the transferee Court of the power to execute the decree any further, an application to the transferee Court for arrest of the judgment-debtor is one made to the 'proper Court' : *A I R 1916 P C 16, Rel. on*; *A I R 1933 Mad 110, Disting.* [P 28 C 1]

(b) Civil P. C. (1908), S. 39 (1) (a), (b) and (c) —Even in cases falling under Cls. (a), (b) and (c), powers of transferee Court are not limited.

It is not right, even in a case falling under Cls. (a), (b) and (c) of S. 39 (1), to limit the powers of the Court to which the decree is sent. Those clauses only deal with the circumstances justifying a transfer and they need not necessarily define the powers of the Court to which decree is sent for execution, because that is provided for in other sections of the Code : *A I R 1936 Cal 521, Not foll.* [P 29 C 1]

T. A. Anantha Ayyar — *for Petitioner.*

V. S. Rangachari — *for Respondents.*

Order.—The only question arising for determination in this revision petition is whether the execution petition which has been ordered by the lower Court was in time. This in turn will depend upon whether an earlier execution petition dated 7th August 1933, which was presented to the District Munsif's Court, Trichinopoly, was an application in accordance with law and presented to the "proper Court". The decree under execution is one passed by the Court of Small Causes at Trichinopoly. As one of the defendants had immovable property within the Munsif's jurisdiction, the decree seems to have been transferred to the District Munsif's Court and as a

result of proceedings taken there, some of the immovable properties were sold and part of the decree amount realized during the year 1930. On 7th August 1933, an application was made to the District Munsif's Court for an order to arrest defendant 2 in the suit. It is now common ground that by that date no report had been sent by the District Munsif's Court to the Court of Small Causes so as to deprive the Munsif's Court of the power to execute the decree any further. The Munsif's Court however returned the application of 7th August 1933 with the following endorsement:

> Legal representatives cannot be added in this Court. This application may be made to the Small Cause Court.

This endorsement refers to the fact that by that time defendant 1 was dead and if the decree-holder wanted to bring his legal representatives on record, an application for that purpose must be presented only to the Court which passed the decree. In answer to this endorsement it was rightly pointed out on behalf of the decree-holder that execution was at that time sought only against defendant 2 and that when he thought fit to take execution proceedings against the legal representatives of defendant 1 he would apply to the Court which passed the decree. For some reason not appearing on the record, the District Munsif's Court nevertheless returned the application stating that the petitioner will apply for re-transfer of the decree to the Small Cause Court and ask for arrest therein. After re-transfer and re-presentation, that petition was dismissed for non-payment of batta by the Court of Small Causes.

It has been argued before me that this petition to the Munsif's Court dated 7th August 1933 is not one presented to the "proper Court" because the transfer to the Munsif's Court must be taken to have been made only for the purpose of proceeding against the immovable properties situate within that Court's jurisdiction and that as the Small Cause Court was competent to issue a warrant for the arrest of defendant 2, the application for that purpose should have been made to the Small Cause Court and not to the District Munsif's Court. I am not able to accede to this contention. S. 38, Civil P. C., provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution; and in O. 21, R. 10 there is a provision that the holder of a decree who desires to execute it shall apply to the Court which passed the decree, or if the decree has been sent to another Court, then to such Court. S. 42 enacts that the Court executing a decree shall have the same powers in executing such decree as if it had been passed by itself.

Taking these three provisions together, it seems to me that their natural effect is that unless in the order of transfer there is any express limitation of the purpose for which the transfer is made—assuming that such limitation, if any, can control the provisions of the Code as to jurisdiction—there is no reason to limit the powers of the Court to which a decree has been transferred for execution. Indeed it is possible to construe the observations of the Judicial Committee in 39 Mad 640[1] as depriving the original Court of jurisdiction to execute its decree once the decree has been sent to another Court for execution till the certificate under S. 41 is received from the transferee Court. A Division Bench in this Court has distinguished that case in the decision reported in 63 M L J 788.[2] The latter case is clearly distinguishable because the application there was made by the assignee decree-holder for the purpose of having himself recognized as the assignee and it is well settled that an application for that purpose can be made only to the original Court. On the other hand, a Division Bench of the Bombay High Court went so far as to hold that even an application for transfer of the decree to another Court ought not to be made to the original Court before the certificate under S. 41 has been received from the Court to which the decree was first sent for execution. The question I am now concerned with is, however, not whether the original Court retains jurisdiction or not, but what is the extent of the jurisdiction of the Court to which the decree has been transferred for execution.

Mr. Anantha Ayyar seeks to impose restrictions upon its powers by reason of the considerations mentioned in sub-cls. (a), (b) and (c) of S. 39 as justifying the transfer. He concedes that the present case will not properly fall under sub-cl. (a), (b) or (c).

1. Maharaja of Bobbili v. Narasaraju Bahadur, (1916) 3 A I R P C 16=36 I C 682=43 I A 238=39 Mad 640 (P C).
2. Subba Rao v. Ankamma, (1933) 20 A I R Mad 110=140 I C 591=63 M L J 788.

Obviously in a case falling under sub-cl. (d) or in a case falling under Cl. 2 of that section, no such limitation can exist at all. I may add that I do not think it right even in a case falling under sub-cl. (a), (b) or (c) to limit the powers of the Court to which the decree is sent. Those clauses only deal with the circumstances justifying a transfer and they need not necessarily define the powers of the Court to which the decree is sent for execution, because that is provided for in other sections of the Code. I admit that there are observations in A I R 1936 Cal 521[3] which lend some support to Mr. Anantha Ayyar's contention; but, with all respect, I hesitate to follow them. In the present case we do not even have on record the petition on which the original order was made transferring the decree to the District Munsif's Court nor have we even a copy of the order of transfer. It must merely be a matter of speculation as to what the reasons for the transfer might have been. It is also unnecessary in this case to decide on the conflict between 60 Cal 1119[4] and A I R 1936 Rang 184[5], because the application of 7th August 1933 was undoubtedly one for execution of the transferred decree and not for stay of its execution. The revision petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

3. Chatrapat Singh v. Kharaj Singh, (1936) 23 A I R Cal 521=168 I C 391=63 Cal 1210.
4. Saradakripa Lala v. Comila Union Bank Ltd., (1934) 21 A I R Cal 4=148 I C 165 = 60 Cal 1119=37 C W N 846=57 C L J 444.
5. Chettiyar Firm v. Vanappa Chettiyar, (1936) 23 A I R Rang 184=162 I C 865.

A. I. R. 1938 Madras 29

NEWSAM J.

In re Annum Kesanna Chetty and others
Petitioners.

Criminal Revision Case No. 290 and Petition No. 268 of 1937, Decided on 13th September 1937, from judgment of Joint Magistrate, Penukonda, in Criminal Appeal No. 5 of 1937.

(a) Madras Gaming Act (3 of 1930), Ss. 5 and 6—Drafting is defective.

The drafting of Ss. 5 and 6 is certainly defective. [P 29 C 2]

(b) Madras Gaming Act (3 of 1930), Ss. 5 and 6 — Reasons for issue of search warrant not before Court – Mere finding of instruments of gaming by itself is not sufficient evidence that place is common gaming house.

If the reasons which induced a Magistrate or a senior Police Officer to issue a search warrant are not put before the Court, the mere finding of cards or instruments of gaming in the execution of such a search warrant, though evidence, ought never by itself to be treated as sufficient evidence, i. e. proof that the place is a common gaming house. [P 30 C 1]

V. Rajagopalachari—*for Petitioners.*

Public Prosecutor—*for the Crown.*

Order.—This petition raises an interesting question as to the scope and meaning of certain sections in the Madras Gaming Act (3 of 1930). A "common gaming house" is defined as a place where cards or other instruments of gaming are kept for the profit of the person who owns or occupies the place. In other words it is a place open to all comers for gambling purposes and run by some person for profit either by hiring the room or by hiring the cards, etc. The persons punishable under the Act are the keeper or owner of such a place and persons who frequent such a place for gaming. Gaming in a private house or in a club is not an offence punishable under this Act. S. 9 of the Act contains a presumption that any one found in a common gaming house during gaming was there for the purpose of gaming. S. 7 states that a man may be convicted of keeping a "common gaming house" even though it be not proved that any one played for money in that place. These two sections clearly show that the Legislature was oppressed by the difficulty of obtaining proof in such cases. The greater part of this short Act is in fact devoted to overcoming that initial difficulty by creating special rules of evidence. But it is S. 6 which presents the greatest difficulty. That section read with S. 5 is to the effect that any cards or instruments of gaming found in any place searched under a search warrant issued by a salaried Magistrate or Deputy Superintendent of Police who has reason to believe that the place is used as a common gaming house shall be evidence that such place is used as a common gaming house and that the persons found therein were there for the purpose of gaming, even though no gaming was seen by the search party. The drafting of these sections is certainly defective. It is quite clear, pace the phraseology of S. 6, that cards or instruments of gaming cannot of themselves be evidence of anything.

The obvious meaning is that the finding of cards or of instruments of gaming in such circumstances shall be deemed to be

evidence: shall be a ground for the inference that the place is a common gaming house. Now, in most private houses cards or other instruments of gaming are to be found, and therefore there must be some special circumstances to justify the inference that the place is a common gaming house. It is clear that the mere finding of cards or of other instruments of gaming is not sufficient to justify such an inference. The one safeguard provided in the Act for people who have cards in their private houses is that before their houses are searched "a salaried Magistrate" or a "senior policeman" must have reason to believe that their house is a common gaming house. If he thinks he has reason to believe that and issues a search warrant and cards are found, that is evidence that the house is a common gaming house But is it sufficient evidence by itself? Obviously not. The reasons which prevailed with the Magistrate or with the senior policeman to issue the warrant must normally be put before the Court and must be tested before a man can be convicted of keeping a common gaming house on such flimsy evidence. Otherwise, the conviction would be based partly on purely artificial evidence and partly on secret information, which cannot possibly have been the intention of the Legislature. Nor does the language of Ss. 5 and 6 support such a conclusion. There is a world of difference between saying that a certain fact is evidence of something and saying that it is proof of something. In my judgment each case must be decided on its merits and regard must be had to all the circumstances and the discretion of Magistrate to accept a case as proved or to reject it as not proved is wholly unfettered and unaffected by S. 6. All that I am concerned to point out is that if the reasons which induced a Magistrate or a senior Police Officer to issue a search warrant are not put before the Court, the mere finding of cards or instruments of gaming in the execution of such a search warrant, though evidence, ought never by itself to be treated as sufficient evidence, i. e., proof that the place is a common gaming house.

Turning to the present case, petitioner 1 has been fined for keeping a common gaming house and eight others for being found gaming there. The search warrant (Ex. B) was issued by a Magistrate who stated therein that he had been led to believe that the house of petitioner 1 was used as a place for gambling on a large scale. I think it unfortunate that he should confess that he was only led to believe this and shrank from saying plainly that he had good reason to believe it It is also a strange suggestion that the scale on which gambling was indulged in was a relevant consideration. The really important and relevant matter seems to have escaped the Magistrate altogether, viz., whether there was reason to believe that the house was a common gaming house. Moreover, I find that the only evidence offered by the prosecution was the evidence of P. W. 1, the Inspector of Police who conducted the search. He says that at 11 P. M. on the night of the search he was informed that gambling was going on in petitioner 1's house on a large scale. He hastily obtained a search warrant and raided the house at 12-30 A. M. In these circumstances and in this state of the evidence, if the Inspector had found only cards or instruments of gaming, I would certainly not have been able on the principles above laid down to support the convictions in this case. But what he did find was this. The doors were shut and bolted inside. Through a window the nine petitioners were observed gambling. Eight of them were pilgrims who were visiting that town for a religious festival. When the police broke in, the gamblers scattered, put out the lights, hid, pretended to be asleep. In all, the police seized Rs. 171 4 10 from the petitioners and by far the bulk of this (Rs. 107-3-2) was found on the person of petitioner 1 the owner of the place. In these circumstances, I think it is a proper inference that the place was kept by petitioner 1 as a common gaming house. I am not prepared therefore to interfere in revision with the convictions or with the sentences imposed. I dismiss the petition.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1938 Madras 30

VENKATARAMANA RAO J.

A. L. A. R. R. M. V. Vellayan Chettiar — Appellant.

v.

Mahalinga Pathan and others — Respondents.

Second Appeal No. 1313 of 1932, Decided on 20th August 1937, against decree of Dist. Court, West Tanjore, in A. S. No. 135 of 1931.

Court-fees Act (1870), S. 7, Cl. (i) — Sub-mortgagee asking for sale of property originally mortgaged — Court-fee payable is on amount due on original mortgage.

The court-fee payable by a sub-mortgagee asking for a sale of the property mortgaged to the original mortgagee is on the amount due and payable in respect of the original mortgage under S. 7 (i), and not on the amount due and payable in respect of the sub-mortgage. [P 31 C 2]

S. Narasimha Ayyengar — *for Appellant.*

M. S. Venkatarama Ayyar — *for Respondents.*

Judgment.—The question in this second appeal is when a sub-mortgagee sues for sale of the properties mortgaged to his mortgagor, i. e. the original mortgagee impleading the original mortgagor, should he pay court-fee on the amount due under the original mortgage or on the amount due under the sub-mortgage? Ordinarily a sub-mortgagee's right, just like any other mortgagee, is to enforce his mortgage and bring to sale the property mortgaged to him, i. e. the interest of the mortgagee in the property mortgaged to the latter. But the law permits him to enforce sale of the said property under circumstances and conditions which would entitle the original mortgagee to bring the properties to sale. To such a suit the original mortgagor should be made a party. The principle on which this is allowed is that a sub-mortgagee's claim is by a derivative title from the mortgagee and he is in fact an assignee of the mortgagee. When a mortgagee effects a mortgage of his mortgage interest, he is creating a transfer of his right as mortgagee though not absolutely. Therefore, when a sub-mortgagee sues for sale of the property, he is enforcing the right of the original mortgagee. The amount claimed by him is the amount due under the said mortgage though as sub-mortgagee he is only entitled to a portion of the said amount. He is in effect asking for a decree for the amount due on the original mortgage and in default the property should be brought to sale. No doubt in such a suit accounts between the original mortgagor and the original mortgagee on the one hand and the latter and sub-mortgagee on the other are taken once for all and the respective claims of the three parties are adjusted and settled at the same time: *see* 20 Mad 35[1] at page 39. But this does not alter the nature of the claim. A reference to the form No. 11 of Appendix D to the Civil P. C., which provides for a decree in a case where the sub-mortgagee sues for sale of the property, renders the position very clear. A decree is passed on the basis of the original mortgage and the principal, interest and costs payable are calculated as if a suit was instituted by the original mortgagee, and on payment into Court of the said sum so declared to be due to the original mortgagee by the original mortgagor, the sub-mortgagee is at liberty to apply for the payment of the amount due to him.

It is thus clear that the amount claimed in the suit is the amount due to the original mortgagee. Under S. 7, Cl. (i), Court-fees Act, the court-fee has to be paid on the amount claimed. It is contended that the sub-mortgagee is entitled only to claim the amount due on his mortgage and he cannot claim more and therefore he cannot be made to pay more court-fee by virtue of the fact he is asking for sale of the property. This contention proceeds on the misconception of the right the sub-mortgagee is enforcing in the suit. The property mortgaged to him is the original mortgagee's interest and ordinarily he can only claim a sale of that interest for the realization of the amount due on his sub-mortgage, and if he was therefore praying only for this relief the amount claimed by him in the suit would be the amount due on his sub-mortgage in which case the court-fee will be on that basis. But when he is asking for the sale of the property, the amount claimed by him is as assignee of his mortgagor the amount due to the latter, and it is only after getting a decree for the same he gets a subsidiary relief for the payment of the amount due to him. I am therefore of opinion that the court-fee payable by a sub-mortgagee asking for a sale of the property mortgaged to the original mortgagee is on the amount due and payable in respect of the original mortgage and not on the amount due and payable in respect of the sub-mortgage. The property mortgaged to the appellant in this appeal comprised two sets of properties: (1) A schedule properties wherein his mortgagor had an absolute interest, and (2) B schedule properties wherein he had the interest of a mortgagee. In so far as the appellant prayed for the sale of B schedule properties, the view of the lower Courts that he should pay the court-fee on the amount due and payable in respect of

1. Muthu Vijaya v. Venkatachallam Chetty, (1897) 20 Mad 35=6 M L J 285.

the original mortgage, is correct; and the second appeal therefore fails.

Further judgment. — After I delivered judgment in this case last week, Mr. S. Narasimha Iyengar submitted that his client may be permitted to pay the deficit court-fee and that the issue as to the amount payable under the original mortgage may be directed to be determined, and I directed the office not to issue the decree and to have this matter posted to be spoken to. After hearing the learned counsel on both sides, I vary my prior order and give leave to the appellant to pay the deficit court-fee in regard to the relief claimed in respect of the B schedule properties; and on payment of the said fee the Court of the District Munsif of Tanjore is hereby directed to determine the issue relating to the discharge raised in issue 2 and give the appropriate relief to the plaintiff. The case is therefore remanded for disposal to the District Munsif's Court of Tanjore. The appellant will pay costs of the respondents in this second appeal. Time for payment of the necessary court-fee will be one month from the date of the receipt of the order by the District Munsif of Tanjore.

C.R.K./S.C. *Case remanded.*

---

* A. I. R. 1938 Madras 32

VARADACHARIAR J.

Kaliaperumal Pillai—Petitioner.

v.

Visalakshmi Achi—Respondent.

Civil Revn. Petn. No. 1314 of 1936, Decided on 13th August 1937, against decree of Sub Judge, Mayavaram, in S. C. S. No. 124 of 1936.

*** Contract Act (1872), Ss. 148 and 149— Lady handing over jewels to goldsmith to be melted for making new jewels — Every day lady receiving half-made jewels and keeping them in box in goldsmith's house with key in her possession - Goldsmith held could not be regarded as bailee.**

A lady handed over to a goldsmith certain jewels for the purpose of being melted and being utilized for the making of the new jewels. Every evening as soon as the goldsmith's work for the day was over, the lady used to receive the half-made jewels from the goldsmith, and put them into a box in the goldsmith's room and keep the key in her possession :

Held that the mere leaving of the box in a room in the goldsmith's house, when the lady herself took away the key of that room, could not amount to delivery within the meaning of Ss. 149 and 148 and hence the goldsmith could not be regarded as a bailee in respect of the gold or the half finished jewels. [P 32 C 2; P 33 C 1]

V. Viswanatha Sastri—*for Petitioner.*

N. S. Mani and K. V. Sesha Iyengar — *for Respondent.*

Order.—Much as I sympathise with the plaintiff, I am unable to hold that the circumstances disclosed by the evidence warrant the decree which the lower Court has passed against the defendant. The question is whether the defendant can be charged as a bailee and made liable for the loss of some gold belonging to the plaintiff. The evidence shows that the plaintiff arranged that certain jewels which she desired to be made should be got made by certain goldsmiths working in the defendant's house, apparently because there was more convenient accommodation there. The plaintiff admits that she used to attend every day in the defendant's house during the time that the goldsmiths were at work. It is true that even according to the defendant's written statement he received at the outset two old jewels from the plaintiff for the purpose of being melted into gold and being utilized for the making of the new jewels; but any bailment that could be gathered from that admission must be taken to have come to an end as soon as the plaintiff was put in possession of the melted gold. There is nothing in the evidence to suggest that the gold that thus came into the plaintiff's possession was ever thereafter "delivered" to the defendant by the plaintiff. All that the evidence discloses is that every evening, as soon as the goldsmiths' work for the day was over, the plaintiff used to receive the half made jewels from the goldsmiths, put them into a box which the defendant had given her for her use and put the box in a room in the defendant's house. One of the plaintiff's witnesses adds that even the key of that room was kept in the plaintiff's possession. On these facts, I do not see my way to hold that the defendant can be regarded as a bailee in respect of the gold or the half finished jewels.

Under the provisions of Ss. 148 and 149, Contract Act, delivery is necessary to constitute the bailment. It is true that the delivery may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee; but the mere leaving of the box in a room in the defendant's house, when the

plaintiff herself took away the key of that room, cannot certainly amount to delivery within the meaning of the provision in S. 149. If on those facts the plaintiff wanted to fasten a liability upon the defendant for the loss of the goods, she must make out an affirmative ground of liability, and cannot ask the Court to treat the defendant as a bailee and throw upon him the onus of accounting for the loss of the jewels. The evidence shows that one morning, when the plaintiff went into the room to take out the jewels for further work, the jewels were found missing. It is not the plaintiff's case that on the previous day she handed over the unfinished jewels to the defendant. I cannot agree with the contention of the learned counsel for the respondent that because in the first instance the old jewels were handed over to the defendant the bailment thereby constituted continued for all time. Every day when the unfinished jewels were handed back by the goldsmith to the plaintiff, the jewels came back to her possession and if at the later stages she desires to throw upon the defendant the onus of exonerating himself from the obligations of a bailee, she must prove some acts whereby the articles could be held to have gone into the defendant's possession. I find no such proof in the present case.

In these circumstances I do not think it necessary to consider whether, even if the defendant could be regarded as a bailee, the circumstances are such as to protect him under Ss. 151 and 152, Contract Act. I must however observe that I see nothing whatever in the evidence and in the circumstances of the case to warrant the learned Judge's suggestion that "it is not unlikely that the defendant appropriated the property and made a show of theft in his house". Though the plaintiff denies any knowledge of the defendant having complained of theft in his house, her second witness admits that the defendant did complain of a theft and that the plaintiff was also aware of such complaint. But in the view that I have taken that no bailment has been proved, it is unnecessary to consider this question further. The revision petition must be allowed and the decree of the lower Court set aside. The petitioner will be entitled to his costs in this Court; but I direct that in the lower Court each party will bear his costs.

C.R.K./D.S. *Petition allowed.*

1938 M/5 & 6

A. I. R. 1938 Madras 33

VENKATASUBBA RAO AND NEWSAM JJ.

Collector of Kistna, Masulipatam — Appellant.

v.

Sreemanthu Raja Yarlagadda Sivarama Prasad — Respondent.

Appeals Nos. 290 to 295 and 354 to 391 of 1935, Decided on 3rd August 1937, against decree of Dist. Court, Kistna at Masulipatam, in C. C. Nos. 1 etc. of 1935.

Land Acquisition—Melawaram Interest—Method of assessing capital value explained—Gross income minus peshkush and costs of realizing revenue at 10 per cent. is nett income—This nett income multiplied by number of years' purchase according to prevalent rate of interest plus addition of 15 per cent. gives value for compulsory acquisition.

The principles which should be applied in assessing the capital value of the melwaram interest in land may be thus stated. It is necessary to start with the one known fact—the gross income of the zamindar from the land which is being acquired. The next step should be to ascertain the nett income. This can be done only roughly by deducting a proportion of the peshkush payable by the zamindar to Government and also a proportion of the cost of revenue collection and administration. It would be fair and equitable to make a deduction of 10 per cent. of the gross income towards the expenses of a revenue collecting and administrative staff. Having thus ascertained the nett annual revenue of the zamindar from the land being acquired, it must be capitalized by computing the number of years' purchase. Twenty times the nett revenue from property has in the past been commonly taken to be the capital value of any property or interest in property, and the true justification for this was that approximately 5 per cent. was the prevalent rate of interest. But it is clear that the number of years' purchase must depend on the rate of interest prevailing on gilt-edged securities at the time of the acquisition, i.e. on the date of the notification under S. 4, Land Acquisition Act. The higher the rate of interest on that date, the fewer will be the number of years' purchase. Twenty times the nett income would be fair if the prevailing rate of interest was 5 per cent., but if it was 2½, nothing less than 40 times the nett income would be adequate compensation. To the figure thus arrived at must be added the usual 15 per cent. for compulsory acquisition: *16 Mad 369 (P C) and 10 Cal 769, Ref.*

[P 34 C 1]

Govt. Pleader — *for Appellant.*

V. Govindarajachari — *for Respondent.*

Newsam J.—The short question arising for decision in all these appeals is what is the proper method of valuing the melwaram interest in land which is being acquired for public purposes. The method adopted by the Land Acquisition Officer in these cases was to deduct the proportionate peshkush from the melwaram revenue and

then to multiply the nett income thus found by 20. The learned District Judge was unable to find a better method but thought that the nett income should have been multiplied by 30. Many of the reasons which he gave for adopting the figure 30 in preference to the figure 20 do not at all commend themselves to us. These appeals have been filed by Government with the object of restoring the award passed by the Land Acquisition Officer. Cross appeals have also been filed by the zamindar.

Now, it seems to us that the principles which should be applied in assessing the capital value of the melwaram interest in land may be thus stated. It is necessary to start with the one known fact—the gross income of the zamindar from the land which is being acquired. The next step should be to ascertain the nett income. This can be done only roughly by deducting a proportion of the peshkush payable by the zamindar to Government and also a proportion of the cost of revenue collection and administration. Neither calculation presents any real difficulty. We think that it would be fair and equitable to make a deduction of 10 per cent. of the gross income towards the expenses of a revenue collecting and administrative staff. Having thus ascertained the nett annual revenue of the zamindar from the land being acquired, it must be capitalized by computing the number of years' purchase. Twenty times the nett revenue from property has in the past been commonly taken to be the capital value of any property or interest in property, and the true justification for this was that approximately 5 per cent. was the prevalent rate of interest. But it is clear that the number of years' purchase must depend upon the rate of interest prevailing on gilt-edged securities at the time of the acquisition, i. e. on the date of the notification under S. 4 of the Act. The higher the rate of interest on that date, the fewer will be the number of years' purchase. Twenty times the nett income would be fair if the prevailing rate of interest was 5 per cent., but if it was $2\frac{1}{2}$ per cent. nothing less than 40 times the nett income would be adequate compensation. Of course, to the figure thus arrived at must be added the usual 15 per cent. for compulsory acquisition.

Applying these principles to the cases in hand, we find that both the Land Acquisition Officer and the learned District Judge failed to make any deduction from the gross income on account of the costs of a revenue establishment. Further we find that the notifications in these cases were made at the end of 1933 in some cases and at the beginning of 1934 in others, when the rate of interest on gilt-edged securities was approximately $3\frac{1}{2}$ per cent. In the circumstances we are not prepared to interfere with the District Judge's order adopting 30 years' purchase as the proper estimate of the capital value of the melawaram, but the income to be multiplied by 30 should first be reduced by 10 per cent. in order to arrive at a true estimate of the zamindar's income by allowing for essential establishment charges. We direct therefore that 10 per cent. be first deducted from the gross income to allow for collection charges, then proportionate peshkush should be deducted and the result multiplied by 30. Finally 15 per cent. should be added as compensation for compulsory acquisition. The Government appeals have thus succeeded in part, though not on the grounds urged, while the cross appeals have failed. In the circumstances, each party will bear his own costs in appeals and in the memos of objections. Let these cases fall into two batches (one batch A. S. Nos. 290 to 295 of 1935 and the second batch A. S. Nos. 354 to 391 of 1935) for the purpose of computing the fees between the Government and the Government Pleader.

Venkatasubba Rao J.—I agree. The only real question that these appeals raise is, what is the number of years' purchase at which the rental of the lands acquired should be capitalized? The contention of the learned Government Pleader that there prevails a rule to be rarely departed from that no more than 20 years' purchase should be allowed, does not rest upon any sound principle. What does the 20-year purchase rule imply? It means that the value of the property might be taken to be a capital sum which, if invested at the rate of 5 per cent. per annum, would yield an income equivalent to the rent. Thus, if Rs. 500 represent the annual return and the 20-year rule is adopted, the capitalized value of the property would be Rs. 500 x 20, i. e. Rs. 10,000. Now let this sum be invested at 5 per cent. interest. It would yield a return of Rs. 500. Therefore the 20-year purchase rule rests upon this assumption. The owner of the

property compulsorily acquired, if paid twenty times the annual rental, would get a 5 per cent. return upon his money (5 per cent. of any given amount being the 1/20th of it). There is another assumption upon which this rule rests, namely that the return expected from immovable property is 5 per cent. and that therefore if the rental is capitalized at 20 years' purchase, the owner would be properly compensated for the acquisition. It will thus be seen that the rule of the number of years' purchase is not a theoretical or legal rule, but depends upon economic factors, such as the prevailing rate of interest. That there is no uniform or rigid principle in regard to the number of years' purchase is illustrated by several decisions. In 11 C W N 875[1] at p. 878 and 16 Mad 369[2] the rentals were capitalized at 25 years' purchase, and in 10 Cal 769[3] at p. 774, 23 years' purchase was awarded.

The return from landed property, generally speaking, reflects the prevalent rate of interest on money investments. One of the criteria in determining the compensation to be awarded is the market value of the land at the date of the publication of the notification under S. 4 (1) (S. 23, Land Acquisition Act). In the present cases the relevant notifications were published towards the end of 1933 and the beginning of 1934. The Government of India loan at that time took the form of a 3½ per cent. issue liable to income-tax. The issue price was reckoned at Rs. 96 per cent. and the loan was repayable at par between 1947 and 1950. When there is definite evidence that the actual return on investments is 3½ per cent., it would be wrong to adopt the arbitrary rule of the 20 years' purchase. The return having been ascertained, the years' purchase is arrived at by dividing 100 by the figure of such return. In the present cases the return is about 3½ per cent. and the number of years' purchase, which it would be right to allow, would therefore be about 30.

The learned District Judge has capitalized the rentals at 30 years' purchase and with his conclusion we agree, although as pointed out by my learned brother, his reasons are wrong. The rent that is to be capitalized is the nett and not the gross rent and the question arises, what should be the deduction on account of collection charges and other contingencies? Here again there is no uniform rule, but having regard to the nature of the property acquired, we think that besides the peshkush, 10 per cent. of the gross collections may be deducted on account of out-goings. On this basis the computation should be made and to that sum will be added the statutory allowance of 15 per cent.

C.R.K./B.D. *Order accordingly.*

1. Harischunder Neogi v. Secy. of State, (1907) 11 C W N 875.
2. Secy. of State v. Shanmugaraya Mudaliar, (1893) 16 Mad 369=20 I A 80 (P C).
3. Secy. of State v. Sham Bahadur, (1884) 10 Cal 769.

A. I. R. 1938 Madras 35

NEWSAM J.

In re K. S. Rathinam Pillai and another — Petitioners.

Criminal Revn. Case No. 228 and Petn. No. 214 of 1937, Decided on 27th September 1937, from order of First Class Subdivisional Magistrate, Mayavaram, in M. C. No 40 of 1936.

(a) Criminal P. C. (1898), S. 117 (5)—Charge against two persons that they are desperate and dangerous — There can be no intimate connexion between two persons in regard to their character and so joint enquiry cannot be held.

A joint inquiry under S. 117 (5) is out of the question when one charge at least is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly can be no such intimate connexion between two individuals in regard to their characters as to render them liable to a joint inquisition : *A I R 1923 All 35; A I R 1925 Mad 189 and 27 Cal 781, Rel. on.* [P 36 C 2; P 37 C 1]

(b) Criminal P. C. (1898), S. 110 — Applicability — S. 110 cannot be used against merely undisciplined people as local bosses and faction leaders.

Section 110 is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry, to humble their pride by treating them as criminal mad men and to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it. The section is intended to protect the public against irresponsible criminal maniacs and desperadoes and the weapon of public opinion is the only one adapted to the suppression of undisciplined local dictators. [P 37 C 1, 2]

(c) Criminal P. C. (1898), S. 117 (4) — Conviction by public opinion should take the place of conviction by Court only in exceptional circumstances—Person never accused of any crime—No presumption that he is criminal.

Section 117 (4) is an exception to the general rule of evidence and like all exceptions to be

sparingly used and only in exceptional circumstances. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes, and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof and in such unusual circumstances the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal. [P 37 C 1, 2]

K. S. Jayarama Ayyar for K. Venkataramani and R. Sundaralingam — *for Petitioners.*

T. S. Anantharaman for Public Prosecutor — *for the Crown.*

Order. — This is a petition asking the Court to quash security proceedings initiated by the Subdivisional Magistrate of Mayavaram against the two petitioners who are mirasdars and residents of Manigramam. By an order dated 21st November 1936, the petitioners were called upon to show cause why they should not furnish security for their good behaviour for two years. The order stated that it was based on information that they habitually committed the offences of extortion, mischief, theft and assault and were so dangerous and desperate as to render their being at large, without security, hazardous to the community. It purported in fact to be made under Cls. (a), (d), (e) and (f) of S. 110, Criminal P. C. The substance of the information given to the Magistrate was set out in an appendix consisting of 21 heads of charge. 117 witnesses were cited to prove the information. 24 of these were examined between 9th December 1936 and 23rd February 1937 (i. e. in 2½ months) and they were examined by the Magistrate, who is a touring officer, at several sittings in nine different camps in his division. As the end was still not in sight, the petitioners then presented this petition and proceedings were stayed.

Various grounds have been urged on behalf of the petitioners for quashing the entire proceedings ; one grievance is that in 1936 counter-petitioner 1 was shot at and wounded by some members of the opposite faction who were tried and convicted for the offence. Some persons who gave evidence on behalf of the accused in that case are now witnesses for the prosecution in this case. Another ground taken is that the time and place at which the incidents mentioned in the heads of charge took place are not given. Some of the incidents are stale, some were the subject matter of criminal complaints which were dismissed. In the third place it is urged that there is no justification at all for a joint inquiry. It is not even pretended that the two counter-petitioners (petitioners herein) have been habitually associated together or in all the matters now under inquiry. The first incident for example (looting of houses in 1936) relates to counter-petitioner 2 only. His men were tried for this alleged offence and were acquitted. The second incident (extortion of Rs. 2.4.0) relates to counter-petitioner 1 only, according to the evidence of P. Ws. 8 and 9. But there is no indication in the order that both incidents do not relate to both petitioners, and no details of time and place were given for either.

I propose to take this latter point first. S. 117 (5), Criminal P. C., states that where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just. It has not been denied before me that the two counter-petitioners were not associated together in all the matters under inquiry, and therefore it is not only not just, but it is not legal to deal with them both in the same inquiry. That such a joint inquiry prejudices the counter-petitioners in cases of this nature has been repeatedly laid down. Walsh J. in a case reported in 45 All 109[1] has said :

> Common sense and common justice dictates that proceedings against a man for badmashi should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable.

And Madhavan Nair J. in a case reported in 47 M L J 689[2] approved of these remarks and further approved of a comment in 27 Cal 781[3] that a joint inquiry is out of the question when one charge at least is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the

1. Emperor v. Angnu Singh, (1923) 10 A I R All 35=71 I C 865=24 Cr L J 257=45 All 109= 20 A L J 881.
2. Kutti Goundan In re, (1925) 12 A I R Mad 189=86 I C 49=26 Cr L J 673 = 47 M L J 689.
3. Hari Telang v. Queen-Empress, (1900) 27 Cal 781=4 C W N 531.

community. There certainly can be no such intimate connexion between two individuals in regard to their characters as to render them liable to a joint inquisition. On this ground alone, I think, the present proceedings should be terminated.

But there is another and I think an even stronger ground for quashing the present proceedings. Neither of the petitioners has ever been convicted of any crime. A mere perusal of S. 110 is sufficient to show that it is intended to deal with ex-convicts or habitual criminals and dangerous and desparate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient deterrents or adequate safeguards for the public. As an additional measure of protection against this hopelessly irresponsible class of persons, the section provides that they may be called upon to find truly responsible and reliable persons willing and able to answer for the good behaviour of their proteges. In other words, persons so addicted to crime that the ordinary sanctions of law are powerless to control their incurable proclivities are placed in much the same category as lunatics. They must either find eligible and responsible guardians or be temporarily confined for the public safety.

The section is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry, to humble their pride by treating them as criminal mad men, to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it. It is only possible to do so by interpreting S. 117 (4), Criminal P. C., as if it laid down a general rule of evidence for every security case. The section is as follows :

For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community *may be proved* by evidence of general repute or otherwise.

The words underlined [*italicised*] make it quite clear that this is an exception to the general rule of evidence and like all exceptions to be sparingly used and only in exceptional circumstances. The general rule of law, of course, is that every man is presumed not to be a criminal or an offender until he has been found guilty by a competent Court. Conviction by public opinion should only be permitted to take the place of conviction by a Court in rare and exceptional circumstances, as for example, where the advent of a suspicious stranger in a village coincides with a series of crimes and suspicion waxes so strong and is so well justified that it may fairly be allowed to take the place of proof and in such unusual circumstances the section sanctions an experimental use of the security sections. But where a person has lived all his life in a locality and has never even been accused before a Court of law for any crime, far less convicted, there is absolutely no justification for any such experiment or for making any presumption that he is a criminal, not to say a habitual criminal.

In the present case the allegations against the counter-petitioners amount to this : that they are tyrannical and high-handed, self-appointed village dictators ; that they fine poor people who disobey them, force people in a better position to put themselves in their power by executing pronotes in their favour, punish labouring men for alleged disrespect to them (such as not dismounting from a bicycle when passing their house), and even gratuitously interfere in marriages between third parties. As no complaints were ever made by any of the people thus bullied, it is safe to conclude either that they were not themselves wholly blameless and had to acknowledge that rough justice had been done to them or that they admire bullies and like being bullied.

It is only necessary to repeat that S. 110, Criminal P. C., is intended to protect the public against irresponsible criminal maniacs and desperadoes and that the weapon of public opinion is the only one adapted to the suppression of undisciplined local dictators. For the above reasons, I direct that these proceedings be terminated.

C.R.K./S.C. *Proceedings quashed.*

* A. I. R. 1938 Madras 38

VARADACHARIAR AND PANDRANG ROW JJ.

V. N. Subramania Iyer — Appellant.

v.

K. M. S. R. M. Kannappa Chetti and others — Respondents.

Appeal No. 218 of 1934, Decided on 5th May 1937, against decree of Sub-Judge (Principal), Kumbakonam, in O. S. No. 29 of 1931.

(a) Limitation Act (1908), Arts. 89, 90— Agent serving his principal under salary chit for period of three years—Agent given power of attorney to facilitate conduct of business —On expiry of term, another salary chit executed by which salary and percentage commission were only changed—Suit by principal for accounts on termination of agency alleging excess of authority in certain transactions—Suit held governed by Art. 89 and not by Art. 90 Period of agency under two salary chits held single one.

The defendant was the agent of the plaintiff under a salary chit dated 28th April 1919 which was for a period of three years. He was also given a power of attorney to facilitate the conduct of business. In May 1922 another salary chit was executed wherein the salary and the percentage of commission were varied but the same power of attorney was continued. The business of the agency was terminated on 29th January 1925. The principal instituted the suit for accounts against the agent on 25th January 1928 and in the plaint he also alleged that in certain transactions the agent had acted in excess of his authority. The agent pleaded bar of limitation under Art. 90, and alternatively that the two agencies under the two salary chits should be treated as distinct agencies and the suit in regard to the first period should be held to be barred :

Held that though, as the principal was in possession of the accounts relating to the agent's conduct of the agency, the principal had not to pray for a general accounting and only took exception to particular matter appearing in the accounts and alleged that in certain transactions the agent had acted in excess of his authority, yet the suit was one for accounts governed by Art. 89 and not by Art. 90, and that as the object of the salary chit was only to fix the salary of the agent and as there was a continuous course of management by the agent and no new accounts were opened or no new power of attorney was executed in regard to the second period, the period from 1919 up to 1925 must be considered as one single agency : *A I R 1918 Mad 31 and A I R 1917 Mad 455, Rel. on.* [P 39 C 1, 2]

* (b) Principal and Agent — Suit for accounts—Agent entitled to share of profits — Interest on capital is not to be charged in taking accounts unless there is agreement to that effect.

The ordinary rule of law as between partners or as between the principal and an agent who is paid for his services by a share of the profits of the business is that interest on capital is not to be charged in taking accounts unless there is some agreement to that effect. [P 40 C 1]

The agreement between a principal and agent provided that 'interest expenditure' was to be allowed before profit was ascertained :

Held that the provision in the agreement meant that payments actually made by way of interest to strangers and not interest on the capital invested by the principal were to be allowed before ascertainment of profit : *(1868) 5 Eq 326, Disting.* [P 40 C 1]

* (c) Principal and Agent — Suit for accounts—Certain realisable assets at date of termination of agency not realized due to laches on part of principal or subsequent agent — Agent is entitled to have credit for such assets in calculation of profits between them.

Where on the date the agent left the business, particular outstandings arising out of credit transactions during the period of the agency were realizable assets, the mere fact that by reason of subsequent events, i. e. on account of change in the situation of the debtors or because of laches or negligence on the part of the principal or his agent in making the collection some of these outstandings have not been realized, should not be insisted on to the prejudice of the agent in calculating the profits in the taking of accounts between the principal and agent. [P 40 C 2; P 41 C 1]

K. V. Krishnaswamy Iyer and R. Ramasubbu Iyer — *for Appellant.*

T. M. Krishnaswamy Iyer and T. S. Krishnamurthy Iyer — *for Respondents.*

Judgment.—This appeal arises out of a suit between a principal and his agent. The plaintiff had a cloth shop in Kumbakonam and he was also doing some money lending business there. The defendant became his agent at Kumbakonam under a salary chit (Ex. A) dated 28th April 1919. As usual it was for a period of three years and provided that the defendant should receive a salary of Rs. 50 per mensem. On 18th of May however, the plaintiff gave a letter (Ex. 1) to the defendant which records a previous understanding to the effect that in addition to salary, the defendant was to be paid 5 per cent. of the profits after deducting "interest charges" and other charges. To facilitate the conduct of business, a power of attorney (Ex. B) was executed by the plaintiff in favour of the defendant on 12th November 1920; this was not in terms limited to any specified period. When approaching the expiry of the three years term under Ex. A, the defendant was apparently pressing the principal for increased remuneration and in Ex. 1-a, dated 15th May 1922, the principal wrote to the defendant to say that from 28th April 1922 (when the stipulated term of

Ex. A ends) the salary might be fixed according to the scale that might be settled hereafter. Ultimately, on 24th August 1922, a new salary chit (Ex. C) was executed by the defendant and accepted by the principal, under which the defendant was to be paid a salary of Rs. 90 per mensem and the share of profits was fixed at 7 per cent, both to take effect from 13th April 1922. The defendant continued in the business of agency up to 29th January 1925 when he started a new business of his own and left the plaintiff's shop.

A number of allegations were made against the defendant in the plaint, in respect of the manner in which he had conducted the business and in respect of the alleged omissions on his part to render proper accounts and to prepare stock list, outstandings list and so on. On most matters the lower Court has found in the defendant's favour. But as it was of opinion that there had not been a complete rendering of accounts, in the sense contemplated by law as between principal and agent, it passed a preliminary decree for accounts being taken. It is in respect of some of the directions given in that preliminary decree that questions have been raised in the appeal as well as in the memorandum of objections. A general question was also raised in the appeal to the effect that the suit was barred by limitation.

The question of limitation may be disposed of at the outset. On behalf of the appellant (defendant) Mr. K. V. Krishnaswami Ayyar contended that the suit must be held to be governed by Art. 90 and not by Art. 89 and, in the alternative, that even under Art. 89, the two agencies under Exs. A and C must be treated as distinct agencies and the suit must be held to be barred so far as the accounts of the first agency are concerned, because the present suit was instituted only on 25th January 1928. We do not think that either of these contentions is well founded. The present suit is undoubtedly a suit for account, though, as the plaintiff was in possession of the accounts relating to the defendant's conduct of the agency, the plaintiff had not to pray for a general accounting but only took exception to particular matters appearing in the accounts. The mere fact that the plaint also contained allegations that in certain transactions the defendant had acted in excess of his authority will not make the suit any the less one governed by Art. 89 : *see* 41 Mad 1.[1] The argument founded upon the existence of two salary chits is equally untenable. As has been observed in 31 M L J 685[2] and the connected cases, the principal purpose of the salary chit is to fix the remuneration of the agent. Whether on the termination of the period fixed in the salary chit the agency also terminated or not is a question of fact and not a question of law. The defendant himself in his deposition admits that the object of the salary chit was only to fix his salary ; he adds "the period of business was not fixed, i. e. of the business to be done by me". When it is remembered that there was a a continuous course of management by the defendant and no new accounts were opened for the so-called second period of agency and no new power of attorney was executed in respect of the second period of agency and the increased remuneration provided for under Ex. C is made to take effect not from the date of Ex. C but even from 13th April 1922, which covers part of the period covered by Ex. A, we do not think there is any justification for artificially splitting up the defendant's conduct of the plaintiff's business into two separate agencies. We therefore overrule the plea of limitation.

The main objection taken on the merits in the memorandum of appeal relates to the way in which the lower Court has directed the profits to be calculated for the purpose of determining the five per cent. or seven per cent. payable to the defendant under Ex. 1, as part of his remuneration. The plaintiff had invested some money as capital in the Kumbakonam business. In the deposition he states it was Rs. 21,000. He claims that before the profits of the business can be ascertained for the purpose of calculating the defendant's share therein, interest at reasonable rate on the capital thus invested by him should be deducted. The lower Court has acceded to this contention apparently on the ground that the plaintiff spoke in favour of it in his evidence. The matter is however one of construction of Ex. 1 and not one to be decided on oral evidence.

1. Muthiah Chetty v. Alagappa, A I R 1918 Mad 31=45 I C 430=41 Mad 1.
2. Ramanathan Chetty v. Kasi, A I R 1917 Mad 455=36 I C 804=31 M L J 685.

The ordinary rule of law, as stated in Lindlay on Partnership, Edn. 10, page 465, is that as between partners or between the principal and an agent who is paid for his services by a share of the profits of the business, interest on capital is not to be charged in taking accounts unless there is some agreement to that effect. The decision in (1868) 5 Eq 326[3] carried this rule so far as to disallow interest even in a case where the principal had invested borrowed money in the business. The present case is no doubt distinguishable as one in which there is an agreement between the parties regulating the matter. But in determining the scope of that agreement, one has to remember that such is the rule of law and except to the extent to which the agreement has clearly indicated a different arrangement between the parties, the defendant will be entitled to the benefit of the general rule. There can be little doubt that the present case differs from (1868) 5 Eq 326,[3] so far as any portion of the money invested in the business had been borrowed. Ex. 1 expressly provides that the profits are to be ascertained after allowing for "interest expenditure" but the collocation of the words "interest expenditure" (vatti chilavu) clearly suggests that all that was meant was "charges or outgoings" to be debited to the business on the ground that they had to be paid to outsiders. It seems to us too much to say that the parties intended that the profits realized in the business should be notionally divided into two portions, one to be regarded as interest on the capital invested in the business and the other to represent profits. It is noteworthy that the document does not provide any standard or rate with reference to which the interest is to be so calculated. The use of the expression "vatti chilavu" is more consistent with the view that the parties meant to exclude only the payments actually made by way of interest to strangers. The direction in the lower Court's decree must therefore be varied to the extent that it allows even interest on the plaintiff's capital to be conducted before ascertaining the profits.

The other objection raised by Mr. K. V. Krishnaswamy Iyer in his appeal is against the direction in the lower Court's decree that the profits should be ascertained on the basis of the amount 'actually realised' by the sales or other kind of business done by the defendant after deducting the shop expenses ignoring all bad and irrecoverable debts. This matter assumes importance in the case because the defendant had in accordance with the course of business made sales in credit to a large extent and a considerable portion of these outstandings had not been realised by the time the defendant left the plaintiff's business. The implication of the direction above quoted from the lower Court's decree is that except to the extent to which the amounts due from customers to whom goods had been sold on credit had actually been realised in cash, the business should be deemed to have made no profits at all for the purpose of ascertaining the defendant's share of the profits. This implication is not altogether justified. Mr. Krishnaswami Iyer went to the extreme length of contending that as the debts due from the customers were taken over into the new accounts which the plaintiff opened when the defendant left the shop, all the debts so taken into the new account must be deemed to have been actually realised or at any rate to have been accepted as good assets and the profits should therefore have been calculated on the basis that they all have been realised. We do not think this extreme contention is warranted. The process of a succeeding agent taking over at a valuation the outstandings due during the conduct of a business by a prior agent is no doubt well-known amongst Chetties; but the evidence does not show that any such process was gone through in the present case. The business was a single business and when the defendant left the business the plaintiff had no alternative but to accept all the outstandings as they stood at the time the defendant left the business and make his best efforts to realise them. The mere fact of the entries having been carried into the new books does not justify the inference that all the outstandings were accepted by the plaintiff as good assets.

On the other hand, Mr. K. V. Krishnaswami Ayyar is justified in his contention that where particular outstandings arising out of credit transactions were really realisable assets on the date when the defendant left the business, the mere fact that by reason of subsequent events, i. e. either on account of change in the situation of the debtors or because of laches or negligence on the part of the plaintiff or

3. Riston v. Griesell, (1868) 5 Eq 326.

his agents in making the collections, some of these outstandings have not been realised should not be insisted on to the prejudice of the defendant, even in calculating profits. It is also true that the outstandings need not be classified under these two heads as though they are exhaustive ; it is possible that some outstandings still remain unrealised or have merged in later accounts, without having actually become bad and irrecoverable. This possibility must be ascertained with reference to the facts in each case. The direction in clause (d) of the lower Court's preliminary decree must therefore be varied so as to make it clear that in ascertaining profits for the purpose of calculating the defendant's share therein, the Commissioner and the Court will have due regard to the state of the debtors at the time that the defendant left the business and while the plaintiff will be entitled to exclude the debts which may be actually found to be or to have become bad or irrecoverable through no fault of his or his agent, the defendant will be entitled to have taken into account not merely the outstandings actually realised but the outstandings which might in due course have been realised except for the laches or negligence or undue delay on the part of the plaintiff or his later agents. It was suggested by Mr. K. V. Krishnaswami Iyer that the question as to what outstandings must be treated as bad and irrecoverable must be decided by the Court. This is of course so. But normally the matter will be dealt with in the first instance by the Commissioner and both parties will be at liberty to raise objections before the Court to any opinion pronounced by the Commissioner on this point. Subject to the modifications above indicated, the decree of the lower Court is confirmed and the appeal is otherwise dismissed. As the appellant has succeeded in part and failed in part, there will be no order as to costs in the appeal.

In the memorandum of objections the plaintiff attempts to raise two points : (1) one against the finding of the lower Court as to the defendant's authority to sell goods on credit and (2) the other against the lower Court's finding disallowing the plaintiff's claim in respect of the lace business carried on by him in partnership with one Chellam Iyer. As regards the first point, we see little force in the objection ; not merely has it been the course of business to sell on credit but the evidence also shows that the plaintiff was all along aware of this course having been followed by the defendant and never took any exception. As regards the lace business, the lower Court was right in its view that it had nothing to do with the particular contract of agency to which the suit relates. The memorandum of objections is accordingly dismissed with costs.

C.R.K./K.B. *Appeal partly allowed.*

---

* A. I. R. 1938 Madras 41

BURN J.

Etasseri Munootta Mangalath Illath Kesavan Nambudri and another— Appellants.

v.

Puthusseri Theva Amma and others — Respondents.

Second Appeal No. 1047 of 1932, Decided on 26th November 1936, against decree of Dist. Court, North Malabar, in A. S. No. 64 of 1930.

*** Limitation Act (1908), S. 14 (2)—Order of executing Court on claim under O. 21, R. 58, Civil P. C.—Appeals against, firstly in sub-Court and then to High Court as per law then prevailing—On High Court holding that claimant's remedy was by separate suit, claimant filing suit under O. 21, R. 63—Period covered by appeals held could be excluded in computing period of limitation.**

A person preferred appeals to the sub-Court and from the decision therein to the High Court against an order of the executing Court on a claim preferred under O. 21, R. 58, Civil P. C., and on the High Court in appeal [A I R 1927 Mad 1043 (FB)] holding that the claimant's remedy was by a suit, filed a suit under O. 21, R. 63 for setting aside the order of the executing Court and sought to exclude the time taken by him in prosecuting these two appeals in computing the period of limitation of one year :

Held that in view of the decision in 30 Mad 315, holding that claimant's remedy was by an application under S. 47 and not by a separate suit, which was the ruling then prevailing, the person was prosecuting the appeals bona fide in 'good faith' and the failure of the appeals was 'due to a cause of like nature' with want of jurisdiction within the meaning of S. 14, Limitation Act, and that therefore the matter was one falling under S. 14 and the time taken in prosecuting the appeals ought to be exoluded under that section : *A I R 1922 Mad 417 and A I R 1935 Mad 731, Disting.* [P 42 C 2]

P. Govinda Menon—*for Appellants.*

K. Kuttikrishna Menon — *for Respondents.*

Judgment.— The only point that has been pressed before me in this appeal is the question of limitation. The plaintiffs

filed this suit on 7th August 1928 to set aside an order passed upon their claim petition on 10th November 1923. Under R. 63 of O. 21, Civil P. C., the suit must be filed within one year from the date of the order and prima facie the suit is long out of time. The plaintiffs claimed that they were entitled to exclude from the period of one year all the time which was taken by them in preferring appeals (A. S. No. 174 of 1925 on the file of the sub.Court and A. S. No. 28 of 1924 on the file of the District Court) from the order of the executing Court dated 10th November 1923. The learned Subordinate Judge reversed the decision of the executing Court by his decree dated 17th July 1925. A second appeal was preferred to the High Court, which was disposed of by the High Court on 11th November 1927. The High Court held that the claim was one preferred under R. 58, O. 21, Civil P. C., and that it was not a matter coming under S. 47 and consequently no appeal lay to the District Court from the order of the executing Court. The learned Subordinate Judge's decree was set aside. This suit was filed, as already stated, on 7th August 1928, and there is no dispute that if the whole period occupied from the date of the preferring of the appeal to the District Court to the date of the disposal by the High Court of the second appeal is excluded, the suit will be in time. The learned District Munsif and the learned Subordinate Judge have held that this is a matter falling under S. 14, Limitation Act, and that the period can be excluded under that section. S. 14, sub-s. 2, Limitation Act, provides that :

> In computing the period of limitation, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

Mr. Govinda Menon on behalf of the appellant contends that this period cannot be exoluded because the reason, which rendered the plaintiffs' appeal to the District Court infructuous, was not a defect of jurisdiction or other cause of like nature. As to this it must be noted that a Bench decision of this Court reported in 30 Mad 215[1] in a precisely parallel case, had held that the claimant's remedy was by an application under S. 244, Civil P. C., and not by a separate suit. It was only when this case itself was referred to a Full Bench, whose decision is reported in 51 Mad 46,[2] that the decision in 30 Mad 215[1] was overruled and it was held that the proper remedy of the claimant was by means of a suit and not by an application under S. 47. The learned District Munsif and the learned Subordinate Judge are therefore undoubtedly right in saying that the plaintiffs preferred the appeal bona fide and it is not in fact too much to say that if the plaintiffs had attempted to file a suit, their suit would have been rejected at once upon the view of the law expounded in 30 Mad 215[1] and they would have been referred to an appeal. The only other question is whether this is a cause of a like nature with defect of jurisdiction within the meaning of S. 14, Limitation Act. Mr. Govinda Menon relies upon the case reported in 43 M L J 184[3] where it was held that :

> Where a person misconceived his remedy and instead of proceeding by an application to set aside an execution sale brought a suit which was eventually dismissed, the time taken in prosecuting the suit and an appeal therefrom cannot be deducted under S. 14, Limitation Act.

Their Lordships there held that the failure of the appellant in the prosecution of his claim could not be attributed to anything connected with the jurisdiction of the Court. The reasoning appears to be that the plaintiff's suit in that case failed because the plaintiff had no right of suit and not on account of any defect in the jurisdiction of the Court supposing that a suit lay. That reasoning is obviously not applicable to this case. Under the interpretation of the law in 30 Mad 215[1] the plaintiff had no right of suit. He had a right of appeal to the District Court and it was only after the Full Bench decision in 51 Mad 46[2] that it was discovered that no appeal lay to the District Court. On these facts, I am prepared to hold that the failure of the plaintiff in his appeal to the District Court was due to a cause of a like nature with want of jurisdiction. I have been referred to the decision in 68

1. Marivittil Mathu Amma v. Pathram Kunnot Cherukot, (1907) 30 Mad 215=17 M L J 377.

2. Narayanan Nambudri v. Theva Amma, (1927) 14 A I R Mad 1043=106 I C 230=51 Mad 46 =53 M L J 824 (F B).

3. Ganapathi Mudaliar v. Krishnamachari, (1922) 9 A I R Mad 417=70 I C 743=43 M L J 184.

M L J 487,[4] to which I was a party, but the facts of that case are quite different. That was a question of restitution under S. 144, Civil P. C., in which we saw reason to hold that the proceedings for restitution were not conducted in good faith. It was not possible in that case for the plaintiffs to point to any decision of this Court which would have justified their application by way of restitution.

The only other question in the appeal is whether the properties belong to Krishnan Nair and Ramunni Nair or to the tavazhi to which the plaintiffs Krishnan Nair and Ramunni Nair belong. Mr. Govinda Menon recognizes that this is a question of fact, the decision of which cannot be contested in second appeal. For these reasons, this second appeal is dismissed with costs of respondents 2, 4, and 5. Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

4. Siddalingana Gowd v. Bhimana, (1935) 22 A I R Mad 731=156 I C 640=68 M L J 487.

* A. I. R. 1938 Madras 43

PANDRANG ROW AND VENKATARAMANA RAO JJ.

E. Su. Na. Sheikh Davood Rowther and others — Appellants.

v.

N. R. M. N. Ramanathan Chettiar and others — Respondents.

Appeals Nos. 304 and 305 of 1934, Decided on 4th August 1937, against decree of Dist. Court, Trichinopoly, in O. S. No. 2 of 1932.

(a) Pardanashin Lady—Execution of deed —Not only execution, but understanding of contents and free and independent will must be proved.

If a person seeks to enforce a deed executed by a pardanashin lady, it is incumbent upon him not only to prove that the bond was executed by her but also that it was explained to her and she perfectly understood its contents and that she executed the document of her own free and independent will. [P 44 C 1]

(b) Evidence Act (1872), S. 70—Execution means not merely signing but due execution according to law—Attestation means due attestation—Question of attestation put in issue — Attestation must be proved before S. 70 can be applied.

The execution contemplated by S. 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. What S. 70 says is that there must be an admission of a party to the attested document. 'Attested' in that section means duly attested. So, if a question of attestation is put in issue, it is incumbent upon the party wanting to prove the document that the document has been duly attested before S. 70 can be relied on: *A I R 1925 P C 203*; *A I R 1923 Cal 149 and A I R 1924 Cal 415, Rel. on*; *A I R 1929 Mad 881, Not foll.* [P 44 C 2; P 45 C 1]

*** (c) Evidence Act (1872), S. 70—Admissions for dispensing with proof and admissions for evidentiary purposes — Difference between, explained.**

The admission contemplated under S. 70 is an admission made for the purpose of or having reference to the suit made either in the pleadings or during the course of the trial. From the scheme of the Evidence Act it is clear that the Legislature contemplates a distinction between admission made for the purpose of dispensing with proof at the trial and evidentiary admission. The scope and purpose of the two classes of admissions are distinct. The one relates to relevancy and the other relates solely to proof at the trial: *(1853) 8 Ex 803*; *27 Cal 190 and A I R 1915 All 383, Rel. on*; *A I R 1919 Pat 411 and A I R 1924 Rang 139, Dissent.* [P 45 C 1, 2; P 46 C 1]

S. Ramaswamy Aiyar — *for Appellants.*

M. S. Vaidyanatha Iyer — *for Respondents.*

Venkataramana Rao J. — These two appeals arise out of a suit to enforce a security bond dated 3rd August 1924 alleged to have been executed by defendants 1 to 5. The learned District Judge of Trichinopoly passed a decree for the amount claimed against all the defendants. Defendant 2 has not preferred an appeal and the decree against him has become final. Defendant 1 and defendants 3 to 5 have preferred appeals; Appeal No. 304/34 is by defendants 3 to 5 and Appeal No. 305/34 is by defendant 1. Defendants 1 to 4 are brothers and defendant 5 is their sister. The case of the plaintiff is that a security bond was taken by him for the purpose of securing advances made by him to defendant 1 for carrying on business wherein all the defendants were interested, and that all the defendants agreed to hypothecate the immovable properties specified in the schedule to the security bond as security for the said advances. Various defences are raised by the defendants. Defendant 1 admitted the execution of the bond, but stated that he had made two payments of Rs. 10,000 and Rs. 5,000 and endorsed the same on the last but one sheet of the bond and the plaintiff remitted the balance and there was therefore a discharge of the suit bond, that the plaintiff had torn away that sheet, substituted another for it and sued upon it, and therefore the bond sued on was not duly exe-

cuted and not validly attested and not enforceable against him. Defendants 3 and 4 stated that when they signed the bond purporting to be dated 3rd August 1924 there were no alterations or erasions and there were no attesting witnesses to the bond and therefore it was not a validly attested document. Defendant 5 denied execution of the bond and stated that she knew nothing about it. Save in regard to defendant 5, there was no specific issue as to the execution of the bond and there was a general issue raised in the case, issue 4:

Is the suit document invalid in part or in whole for all or any of the reasons mentioned in the defendants' written statement?

At an early stage of the case an application was made for raising a specific issue, "(1) whether the security bond was duly attested as required by law", but the application was not granted on the ground that issue 4 would cover it. It may be noticed that no attesting witness has been called to prove the document, but nevertheless the learned District Judge held that the bond was duly executed by all the defendants and the bond is not invalid for all or any of the reasons mentioned in the written statements. It is contended on behalf of defendants 3 to 5 that the document has not been validly proved according to law and no decree can be passed against them; at any rate, so far as defendant 5 is concerned, the validity of the bond has not been established. The case of defendant 5 can be easily disposed of. It is admitted that she is a pardanashin lady. It is settled by more than one decision of the Judicial Committee that if a person seeks to enforce a deed executed by a pardanashin lady, it is incumbent upon him not only to prove that the bond was executed by her but also that it was explained to her and she perfectly understood its contents and that she executed the document of her own free and independent will. The only evidence relating to the validity of the document is the evidence of the plaintiff himself who says that when it was agreed that the bond should be executed by all, he went to defendant 5 who told him that she will execute the bond. Beyond this there is not a scintilla of evidence to show that the bond which is sought to be enforced was the original bond to which she affixed her signature, and that the bond which is alleged to have been executed by her was explained to her and she understood the contents of it. So far as the evidence of the plaintiff is concerned, we think the evidence is such that we cannot act on it; and very rightly the learned District Judge would not base his conclusion in regard to the execution of the document on his evidence. In our opinion the plaintiff has failed to discharge the onus which is incumbent on him to establish the validity of the document against her. We therefore must hold that the bond has not been established to be valid so far as she is concerned. We accordingly allow the appeal with costs so far as defendant 5 is concerned.

So far as defendants 3 and 4 are concerned, it is contended on behalf of the plaintiff that he is relieved of the obligation of calling any attesting witnesses to prove the document by reason of two facts, namely (1) an alleged admission of execution in the written statement, and (2) the admission of the execution of the bond in the power of attorney which was executed by them in favour of defendant 1 for the purpose of registering the bond. Taking the first point, on a perusal of the written statement it will be seen that what defendants 3 and 4 stated is this: they say that they signed the document, but at the date when they signed it there were neither alterations nor the signatures of attesting witnesses; therefore the document now sued on was not the document which they executed and it was not a duly attested document. In our opinion, in substance, the plea is a denial of execution and not an admission of execution. Reliance is placed on S. 70, Evidence Act. S. 70 runs thus :

The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

The execution contemplated by S. 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. S. 59, T. P. Act says :

Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

For a mortgage of the description contemplated by S. 59—and the suit security bond comes under the description—there cannot be a due execution unless there has been a signing by the mortgagor in the presence of two witnesses contemplated by

the said section, and the execution can never be said to be complete unless the deed is duly attested by two witnesses. What S. 70 says is that there must be an admission of a party to the attested document. 'Attested' in that section means duly attested. So if a question of attestation is put in issue, it is incumbent upon the plaintiff to prove that the document has been duly attested before S. 70 can be relied on. It is clear from the pronouncement of the Judicial Committee in 5 Pat 58,[1] that where the attestation is disputed, the plaintiff is not relieved of the obligation of calling an attesting witness under S. 68, Evidence Act. Under S. 68, in the case of a document which is required by law to be attested, unless an attesting witness is called it shall not be received as evidence. Therefore he must call an attesting witness. It may be that on the strength of the evidence given by him he may invoke the aid of S. 70. We find that the view which we have taken was adopted in two decisions of the Calcutta High Court, one in 36 C L J 373,[2] which has been followed by another Division Bench of which Sir Asutosh Mookerjee was a member, in 38 C L J 114.[3] The observations of a Division Bench of this High Court in 57 M L J 588[4] indicating a contrary view have been relied on. But we find on a reference to the case that there is no discussion of the question and no reasons are given. We therefore are not inclined to follow this decision in preference to the aforesaid decisions of the Calcutta High Court with which we agree.

The next point relates to the admission in the power of attorney. It is an admission antecedent to the suit. In our opinion, the admission contemplated under S. 70 is an admission made for the purpose of or having reference to the suit made either in the pleadings or during the course of the trial. From the scheme of the Evidence Act, it is clear that the Legislature contemplates a distinction between admissions made for the purpose of dispensing with proof at the trial and evidentiary admissions. The scope and purpose of the two classes of admissions are distinct. The one relates to relevancy and the other relates solely to proof at the trial. Ss. 68 to 71 are based upon the English rules of evidence. According to the strict English rule in the case of documents required by law to be attested, it is incumbent upon the plaintiff to call the attesting witness even though execution is admitted by the party to the deed. Later, the rigour of this rule has been relaxed in certain cases, one of such cases being in the case of admissions made for the purpose of a case. The necessity for calling the attesting witnesses and the reasons for the exception have been very clearly stated in (1853) 8 Ex 803[5] at page 807 by Pollock C. B. in the following terms :

> The attesting witness must be called to prove the execution of a deed, for this reason that by an imperative rule of law the parties are supposed to have agreed inter se that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution. If therefore the attesting witness is not called, the deed cannot be read, because this agreement cannot be broken but any agreement may be waived by the parties to it. If then in the course of the proceedings in the cause the party to the deed admits the execution, or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the agreement, and the other party, accepting the waiver, does not call the attesting witness.

Thus, as stated by Phipson in his book on Evidence :

> The reason is not that proof by the attesting witness is the best evidence, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, and agreement which may be waived for the purposes of dispensing with proof at the trial.

The agreement is therefore with reference to a contemplated litigation and waiver of such an agreement can only arise after the suit is filed. It is thus clear that the English rule is that the admission must be for the purpose of and with reference to a cause, and we do not think that it was the intention of the author of the Evidence Act to depart from the English rule; there is also clear indication that he did not want to depart from it. Sir James Fitzjames Stephen, who it is well known drafted the Evidence Act, prepared the Digest of the Law of Evidence some years later and in his introduction

1. Hira Bibi v. Ram Hari Lall, (1925) 12 A I R P C 208=89 I C 659=52 I A 362=5 Pat 58 (P C).
2. Arjun Chandra v. Kailas Chandra, (1923) 10 A I R Cal 149=70 I C 532=36 C L J 373=27 C W N 268.
3. Benoy Bhushan v. Dhirendra, (1924) 11 A I R Cal 415=74 I C 178=38 C L J 114.
4. Thayammal v. Muthukumaraswami Chettiar, (1929) 16 A I R Mad 881=121 I C 858=58 Mad 119=57 M L J 588.
5. Whyman v. Garth, (1853) 8 Ex 803=22 L J Ex 316=91 R R 771.

to it he stated that he framed the Digest on the Evidence Act, and in Art. 66 of his book he clearly states that the attesting witness can be dispensed with only in cases where the admission has been made for the purpose of or having reference to the cause. In 27 Cal 190[6] this view had been taken and the same interpretation was adopted by a Bench of the Allahabad High Court in 38 All 1.[7] Two decisions which have taken a contrary view have been brought to our notice, one 4 Pat L J 511[8] and another 1 Rang 557.[9] On a reference to those cases we find that they state that there is nothing in S. 70, Evidence Act, to limit the admissions only to admissions for the purpose of the case; but there is no discussion of the question at all.

In the circumstances, we decline with respect to follow the said decisions, and we hold that an admission within S. 70 must be an admission made for the purpose of or having reference to the cause either in the pleadings or during the course of the trial. On this interpretation, the admission of execution in the power of attorney cannot be availed of for the purpose of dispensing with the citation of the attesting witness. In the view we have taken, the document must be held not to have been validly received in evidence as against defendants 3 and 4. The question is, what is the relief we should grant having regard to the circumstances of this case? Should we dismiss this suit or give the plaintiff an opportunity of examining witnesses for the purpose of proving that the document has been validly attested? As already indicated by us, except the general issue, no specific issue has been raised in the case. It would have been better if the learned Subordinate Judge before whom the application was made had raised the issue. Probably if the Subordinate Judge had himself tried the case he would have had this fact in view, but as the trial was before another Judge, the importance of this aspect of the matter has not been sufficiently kept in view. And we also think that the observations of the Division Bench of this High Court in 57 M L J 588[4] may have induced the plaintiff's counsel to adopt the attitude that he has taken of not calling the attesting witness. In the interests of justice we think, having regard to the amount of the claim, we should give the plaintiff an opportunity of adducing further evidence in regard to this matter. We therefore frame the following issue:

"Whether the security bond dated 3rd August 1924 has been duly executed by defendants 3 and 4 and validly attested as required by law".

We give both parties an opportunity to adduce evidence in regard to this issue. The learned District Judge is hereby required to submit his finding within two months from the date of receipt of this order and the parties will have 10 days for filing objections after receipt of the finding. We allow 1/3 of the costs of this appeal and 1/5 of the costs in the lower Court so far as defendant 5 is concerned. We allow 2/3 of the costs of appeal to defendants 3 and 4 and the costs in the Court below will be dealt with later.

The other appeal (Nos. 3/50, 305/34) is by defendant 1. The only substantial plea is one of discharge. The lower Court has disbelieved his evidence and found that he has not made out the case set up by him. The plaintiff is a respectable man and carries on a very large business in several places. He has produced his account books, the accuracy of which has not been impeached and no entries of payments are found therein. The learned Judge has acted on these account books and believed the testimony of the plaintiff and his witnesses. On the other hand defendant 1 has chosen to produce only the ledger and has failed to produce the day-book; and the explanation given by him is that the day-book is missing. The lower Court has rightly disbelieved his testimony and declined to act on it. The learned counsel for defendant 1 has not been able seriously to challenge the finding of the learned District Judge. We therefore accept the finding of the learned District Judge and dismiss the appeal with costs.

C.R.K./B.D. *Order accordingly.*

---

6. Abdul Karim v. Salimun, (1900) 27 Cal 190.
7. Raj Mangal Missir v. Mathura Dubain, (1915) 2 A I R All 389=30 I C 576=38 All 1=13 A L J 881.
8. Nageshwar Prasad v. Bachu Singh, (1919) 6 A I R Pat 411=53 I C 79=4 Pat L J 511.
9. Aung Rhi v. Ma Aung Krwa Pru, (1924) 11 A I R Rang 139=77 I C 362=1 Rang 557.

A. I. R. 1938 Madras 47

VARADACHARIAR AND PANDRANG ROW JJ.

Cherukur Krishniah — Appellant.

v.

Sowcar Lodd Govinda Doss Krishna Doss — Respondent.

Appeals Nos. 160 of 1931, 100 and 101 of 1934, 40 of 1935 and Second Appeal No. 544 of 1933, Decided on 19th February 1937, against decree of Sub-Judge, Chittoor, in O. S. No. 29 of 1928, etc.

(a) Practice—Witness—Credibility—Inconsistent answers by witness from hearsay — Adverse inference not correct.

The mere fact that speaking from hearsay a witness gave inconsistent answers to certain questions put to him in cross-examination does not justify an adverse contention based upon the alleged inconsistencies. [P 49 C 1]

(b) Limitation—"Kavimera" cess — Person in possession of village liable to pay mera out of his collection of melwaram — Nature of liability, whether personal — Liability is in nature of charge on immovable property — Claim for arrears of mera is governed by Art. 131, Limitation Act.

As long as any person is in possession of the village out of whose income the mera is payable, he is subject to the liability and the liability is not one arising out of his having wrongly made a collection of what he was not entitled to collect but one arising from the fact that out of the collections which as a zamindar he is entitled to make, he is bound to make the disbursement and appropriate only the balance. In that sense, and to that extent, it is a personal liability. It is not one resting on covenant but is in the nature of a charge, because the payment is one which has to be made out of the profits of immovable property. From the mere fact of its being a charge, it will not follow that it cannot fall under Art. 181. As long as any person continues to be in possession of a village out of whose melwaram the mera is payable, he is liable to pay it as a condition of his tenure as a zamindar or other person entitled to possession of the melwaram interest; the liability is virtue tenure. In respect of a claim of this kind, even the suit for payment of arrears due will be governed by Art. 131: *A I R 1920 Mad 447, Disting.*; *I I A 34 (P C)*; *A I R 1915 Mad 664 and A I R 1918 P C 156, Ref.*; *A I R 1914 Mad 377 (F B) and A I R 1936 Mad 704, Rel. on.* [P 50 C 1, 2]

B. Somayya — *for Appellant.*

V. V. Srinivasa Iyengar, T. R. Srinivasathathachariar, B. C. Seshachala Iyer and R. Venkatasubba Rao — *for Respondent.*

Varadachariar J.—These appeals and the connected second appeal raise more or less the same questions and may be conveniently dealt with together. The suits out of which they arise were instituted by the same plaintiff against persons in possession of different portions of the former Karvetnagar zamindari and the plaintiff claims to recover from them a certain sum of money representing arrears of what is described in the plaint as kavimera on the allegation that more than 200 years ago, there was a grant by the then Rajah of Karvetnagar to the plaintiff's predecessor-in-title of certain inams in the Karvetnagar zamindari and also of a hereditary right to receive a small fraction of the zamindar's melvaram in each village in the zamindari. The arrears were claimed in the various suits for a varying number of years, according as the plaintiff had not received satisfaction in respect of his claims from the various persons in possession for prior periods.

The defences to the plaintiff's claim may be briefly grouped under four heads. It was contended that the right claimed was not one which can be enforced in a Court of law. The alleged payments, if true, must, it was said, have been only in the nature of voluntary payments, if not also in the nature of illegal collections from the ryots. It was next said that the plaintiff had not made out his right as heir of the alleged original grantee. Thirdly, a plea of limitation was raised and lastly, questions were raised as to the form of the decree that the plaintiff was entitled to. It is some consolation to find that all the Courts which had to deal with this litigation have uniformly found in favour of the plaintiff so far as the merits of his claim go. After examining the records of the case, we cannot help expressing our regret that the defendants should have thought fit to re-agitate the merits of a claim which has been put forward successfully in various litigations, at least from 1894.

The first two points above indicated may be briefly disposed of. We are unable to accept the suggestion that the payments, if any, made to the plaintiff or to his predecessor-in-title, were only in the nature of voluntary payments or illegal exactions. As shown by the learned Subordinate Judge who has dealt with the case at considerable length, it is clear that as early as 1810, plaintiff's predecessor-in-title claimed that there had been a grant by a previous Rajah to his predecessor-in-title somewhere about 1690 and that the same had been lost during Hyder's invasion. It is obvious that the then officers

to whom that representation was made were satisfied with that explanation for the non-production of the grant. The accounts of the zamindari which have been produced in respect of a period going back to 1832 clearly show that the practice has been for the village officers, in preparing the village accounts, to make a deduction in respect of this kavimera before ascertaining the amounts which they were to remit to the zamindar as his net income from the village. In several mortgage documents executed by previous zamindars, reference has been made not only to meras generally but specifically to this kavimera and it has been directed that the usufructuary mortgagees should appropriate in satisfaction of their claim for interest or of principal only the balance of the village income that may remain after the various meras including the kavimera had been paid. There are also letters of which two may be treated as typical; the first (Ex. G) was written when a widow Venkatarajamma succeeded the previous holder and the other (Ex. G-10) was sent by the zamindar when the plaintiff's guardian made a claim on the plaintiff's behalf; in both the letters reference was made to the obtaining of a succession certificate or to the appointment of the plaintiff's guardian by a Court of law, and directions were given that on the strength of the title thus established, the mera amounts would be disbursed to them in future as before. It is also in evidence that from 1894 plaintiff's title has been asserted and established in various litigations. In the face of this evidence, it is impossible to come to any other conclusion than that it was in recognition of a hereditary right under a pre-existing but subsequently lost grant that this mera was being paid to the plaintiff's predecessor-in-title and afterwards to the plaintiff.

Before us, Mr. V. V. Srinivasa Ayyangar, on behalf of the Tirupathi Devasthanam, raised a point that if the case was to be treated as one of payment in return for service to be rendered, plaintiff was not merely not rendering service but was incompetent to render such service. We do not think it is necessary to deal with that question, because there is nothing to indicate that this is a service grant. Some reference was made to the possibility of successive grants to each individual and it was argued that as no grant had been made to the plaintiff, he was not entitled to claim payment merely on the ground that his predecessors had been paid the mera; but the evidence to which we have already referred, particularly Exs. G and G-10 establish that it was in recognition of a hereditary right that the payments were being made. The argument about resumption and re-grant seems to rest merely upon a misconception arising from the use of the word 'japti' in some of the documents. It is obvious from the context that reference was made to 'japti' merely because on account of some defect in the claimant's title, as for instance the non-production of succession certificate or the absence of any appointment of a guardian, there was a temporary break in the payments. The use of the term 'jari' which we find was ordered as soon as the defect was cured, is itself a clear indication that it was merely a recognition of a right for the continuance of the payments and not a fresh grant as an act of grace.

It was next said that the payment has been so indefinite as not to suffice to be the basis for a claim on the ground of a lost grant. The answer to this is that the indefiniteness is not in the right to which the plaintiff is entitled but merely arises from the fact that the practice has been to calculate the mera at different rates for different villages, there being no lack of uniformity so far as the rate for each village is concerned. Differences in the rates adopted in different villages might have originated from various causes, but as the same rate had been shown to have been adopted in respect of any particular village throughout the time in respect of which any information is available, we do not think there is any force in the argument based on indefiniteness.

As regards the argument against the proof of the plaintiff's title, the learned counsel laid stress upon the inconsistent statements made by the plaintiff in the witness box as to how he derived his title. At one stage he referred to a will executed by his grandfather's mother; at another stage he described himself only as heir of his grandfather and in the third stage he stated that his maternal uncle had survived his grandfather; but the context in which these statements appear makes it clear that the plaintiff had no personal knowledge in respect of events which happened either during his infancy or before his birth. He stated positively that

he had no personal knowledge in respect of the above matters ; that being so, the mere fact that speaking from hearsay he gave inconsistent answers to certain questions put to him in cross-examination does not we think justify a contention based upon their alleged inconsistencies. As we have already pointed out, the plaintiff's right is established by the documentary evidence in the case and so far as his personal claim is concerned, there is the undisputed fact that from 1894 he alone has been putting forward the claims successfully and no other claimant has either come forward or has even been alleged to have a right. We accordingly think that the decision of the Courts below on the first two points is correct.

The third question has been argued before us more fully than the first and the second. In some of the plaints, the claim has been made for a 'money' decree though incidentally reference has also been made to the plaintiff's claim being a charge on the villages. In a few of the plaints, relief has been prayed for by way of enforcement of a charge as well. The question of limitation is material in two of the suits, because in these two suits the claim includes arrears alleged to be due in respect of a period anterior to six years before suit. In A. S. No. 160 of 1931, plaintiff has appealed against so much of the lower Court's decree as disallowed his claim for the period anterior to six years before suit, that is for Fasli 1331. The learned Judge who decided that case purported to follow the decision in 39 M L J 492,[1] and held that the plaintiff's claim cannot be said to relate to a periodically recurring right within the meaning of Art. 131; and as he was also of opinion that the plaintiff was not entitled to a charge, he held that the case was not governed by Art. 132. He therefore allowed the claim only for six years prior to suit, i. e. to the extent permitted by Art. 120. On the other hand, the District Munsif, who decided the case out of which S. A. No. 544 of 1933 arises, was of opinion that the plaintiff was entitled to a decree for enforcement of a charge and he accordingly allowed the claim for the whole period, i. e. within 12 years before suit.

In the arguments before us, various suggestions have been made as to the proper Article of the Limitation Act applicable to the plaintiff's claim. On behalf of the defendants, it has been contended that the claim is really one 'for money had and received' and that the plaintiff could only claim the collections made by the defendants within three years of suit. At best, it was said, Art. 120 might apply as the residuary Article and that would justify the award of six years' claim. Reliance was in this connexion placed on the decision in 39 M L J 492.[1] On behalf of the plaintiff, it was contended that the plaintiff was entitled to a charge, that his claim was in any event governed by Art. 131 and that the suit was not analogous to a claim for 'money had and received' but it was against a person who stood in the position of a grantor and was therefore liable to pay.

We are unable to accept the defendant's contention as to the nature of their liability. It is true that the liability is not one descending upon the defendants as heirs-at-law of the grantor nor is it a personal liability in the sense that it will continue to inhere in them even after they had ceased to be in possession of the villages out of which the meras are claimed. This is all that their Lordships of the Privy Council meant when they said that a liability of this kind is not a personal liability but one *virtue tenuræ* : 1 I A 34.[2] But as long as any person is in possession of the village, out of whose income the mera is payable, he is subject to the liability and the liability is not one arising out of his having wrongly made a collection of what he was not entitled to collect but one arising from the fact that out of the collections which as a zamindar he is entitled to make, he is bound to make the disbursement and appropriate only the balance. In that sense and to that extent it is a personal liability. It is not one resting on covenant but in the nature of a charge, because the payment is one which has to be made out of the profits of immovable property : *see* 27 M L J 694[3] and 42 Mad 581.[4] *See also* the Explanation to Art. 132, Lim. Act. We

1. Ghulam Ghouse v. Jannia, A I R 1920 Mad 447=58 I C 788=39 M L J 492.

2. Maharana Fattehsangji Jaswatsingji v. Desai Kallianraiji Hekmutraiji, (1873) 1 I A 34=21 W R 178=13 Beng L R 254=3 Sar 306 (P C).

3. Rajarajeswara Dorai v. Sundara Pandiaswami Tevar, A I R 1915 Mad 664=27 I C 283=27 M L J 694.

4. Rajah of Ramnad v. Sundara Pandiaswami Tevar, A I R 1918 P C 156=49 I C 704=42 Mad 581=46 I A 64 (P C).

may add that from the mere fact of its being a charge, it will not follow that it cannot fall under Art. 131. As long as any person continues to be in possession of a village out of whose melwaram the mera is payable, he is liable to pay it as a condition of his tenure as a zamindar, or other person entitled to possession of the melwaram interest. It was decided by a Full Bench in 38 Mad 916[5] that in respect of a claim of this kind, even the suit for payment of arrears due will be governed by Art. 131 : *see also* 1936 M W N 742.[6] It is true that on the question of the applicability of this Article to a suit for money, there has been a difference of opinion in other Courts. But, so far as this Court is concerned, the matter must be taken to be concluded by the decision of the Full Bench. It may be, as pointed out in 39 M L J 492,[1] the learned Judges who decided the Full Bench case assumed that the claim is one in the nature of a periodically recurring right; and for the present we are willing to treat that question as open to argument. But if it is a periodically recurring right, a claim for arrears in respect of such right (as much as a mere suit for declaration) is undoubtedly governed by Art. 131, according to the opinion of the Full Bench.

The decision in 39 M L J 492[1] was strongly pressed on us and we were asked to hold that a claim like the present is not one in the nature of a periodically recurring right. We do not think that that judgment is an authority for that position; the case is clearly distinguishable because the suit was not one between the person entitled to the periodical payment and the person bound to make the periodical payment but one between a person who claimed to be so entitled and another person who, he alleged, had wrongly received the payment from the person liable to pay. So viewed, the suit was really in the nature of an action for "money had and received". An examination of the records of that case also shows that the point argued there related not so much to the period of limitation applicable to the recovery of the money but to the period of limitation governing the right to the office itself as between rival claimants. The plaintiff claimed to be entitled to be the muttawalli of a mosque and the defendant likewise claimed to be entitled to the office of muttawalli; and on the evidence it appeared that the defendant had been in possession of the office for more than six years prior to suit. What the Court decided was that as the defendant had been in possession of the office for more than six years, the plaintiff's right to the office itself had been extinguished and the mere fact that the Yeomiah allowance might have been an annual payment, would not bring the case under Art. 131. This line of reasoning is quite in accord with the decision in 26 Mad 113,[7] where it was held that if the office is not a hereditary one, six years' possession by a rival office-holder would suffice to extinguish the plaintiff's right thereto and with the right to the office he would also lose the right to receive all payments attached to the office.

That payments like the present will be governed by Art. 131 is now placed beyond doubt by the decision of the Judicial Committee in 58 Bom 306.[8] The facts of that case are very similar to the facts of the present with this difference that the grant relied on there was made by the British Government—no doubt in confirmation of a prior grant which had been made by the Maharaja of Satara—whereas here the grant was made by a former Rajah of Karvetnagar ; the nature of the payment is very similar to the present. Their Lordships have put it as a matter beyond doubt that a claim to a payment of that kind would fall under Art. 131. Our attention was drawn to the decision in 57 M L J 160,[9] where dealing with a claim to a malikana, the Privy Council applied Art. 120. That case is clearly distinguishable, because the question did not arise there between the person entitled to the payment and the person bound to make the payment, but between rival claimants. The nature of the payment in that case was not one which will satisfy the definition of 'immovable property' and there-

5. Manavikrama Zamorin Raja Avergal of Calicut v. Achutha Menon, A I R 1914 Mad 377=23 I C 806=38 Mad 916=26 M L J 377 (F B).
6. Pandia Chinna Thambiar v. Rama Aiyar, A I R 1936 Mad 704=164 I C 794=1936 M W N 742.
7. Kidambi Raghavachariar v. Tirumalai Asari Nallur Raghavachariar, (1903) 26 Mad 113.
8. Secretary of State v. Parashram Madhavrao, A I R 1934 P C 108=148 I C 796=58 Bom 306=61 I A 190 (P C).
9. Mt. Jaggo Bai v. Utsava Lal, A I R 1929 P C 166=117 I C 498=51 All 439=56 I A 267=57 M L J 160 (P C).

fore Arts. 141 and 144 were excluded; their Lordships accordingly held that a claim of that kind between two rival claimants would be governed by Art. 120.

As bearing upon the question of limitation, we must refer to one other argument advanced by Mr. Srinivasa Ayyangar on behalf of Tirupathi Devasthanam, i. e. that the proper remedy of the plaintiff was to proceed against the ryots and collect his percentage from them and that the persons in possession of the melwaram interest were under no legal obligation to make the collections and pay the plaintiff. If this position were correct, it would no doubt follow that any liability of the zamindars or persons in their position would only be as for 'money had and received'. But we do not think that that is the true nature of the right. The whole course of conduct of the parties and the information available from the accounts negative that description of the plaintiff's right; the matter is put beyond doubt by the positive direction given in Ex. G that the person entitled to the mera should only receive it from the village officers of the zamindar and should not make any attempt to collect the money from the ryots. Indeed, this is the only proper course, when it is remembered that the mera was a deduction from the melwaram interest of the zamindar and was not part of the rent which the ryots had to pay or any liability cast by custom on the ryots. The lower Courts were therefore right in holding that the liability is one cast upon the person in possession of the melwaram interest to make this disbursement before he can appropriate for his own use the rest of the melwaram income. In that sense, it will also be a charge; but in the view that Art. 131 applies to the money claim, it is unnecessary for the purpose of the present case to decide whether the suit will not be governed by Art. 132. We will only point out that Art. 132 will apply only so far as the plaintiff might seek to recover the money by sale of the particular property charged and will not govern his right to a decree against the persons who had made the collection of the melwaram. Having regard to the usage established by the evidence, we think that in this case the charge must be treated not as one available generally against all the villages of the zamindari or even against all the villages in the possession of any particular defendant but as one on each village in respect of the portion of the mera due from that village.

It only remains to deal with the objections raised to the form of the decree. A money decree against any of the defendants in respect of arrears that had fallen due for a period of 12 years or less, provided that the defendant has been in possession of the village for the period of the claim, will be perfectly right. Similarly, a charge decree against the melwaram interest in any village in respect of the amount of mera due from that village will be equally right; but in one or two instances, in the appeals before us, the decrees cannot be said to be limited in that form. We do not however think it necessary to go so far as formally to amend the decree except to the extent to which any greater liability has been cast on the defendants by these decrees having been so framed. As regards the rights of parties in the future, the declaration we have above given will be sufficient to avoid any inconvenience.

We accordingly think it necessary to deal particularly with the decree only in S. A. No. 544 of 1933. Even in A. S. No. 40 of 1935, it has been contended that a liability has been cast upon the defendant in respect of a Fasli prior to his getting into possession, but we think the amount involved is so small that it is hardly worthwhile pursuing that question or modifying the decree. In S. A. No. 544 of 1933, the amount involved is larger. It appears that in respect of some 15 villages in the Pallipat Taluk, the mahant became a purchaser of the equity of redemption prior to the date from which the claim is made in this suit, but the property was nevertheless in the possession of a usufructuary mortgagee who was redeemed many years later. It may be a question whether during the time that the usufructuary mortgagee was in possession, the plaintiff would not nevertheless be entitled to his claim because the usufructuary mortgagee was entitled only to what remained after the meras had been paid. But the usufructuary mortgagee is not a party to this appeal.

It also appears that during the pendency of the redemption suit, instituted by the mahant against the usufructuary mortgagee, the mahant was in de facto possession as receiver; but we are not prepared to hold that the mahant will be liable merely on the ground of his possession as receiver

and it will be necessary to consider how the accounts were taken in respect of his receivership and whether the amount which would legitimately have been deducted in respect of the plaintiff's mera was taken into account or not at the time of the passing of the receiver's accounts. Though the point was in a way raised before the District Munsif (who overruled it in the view he took as to the nature of the plaintiff's charge), the matter was not adjudicated on by the lower Appellate Court and the result is that we have very little information on which we can come to a definite conclusion as to the amount which the mahant might be entitled to claim deduction of as representing the period of his possession as receiver. It does not seem to us worthwhile to send the case back for further investigation on this point and the learned counsel on both sides fairly agreed to our suggestion that as the main point was to define the legal basis of the plaintiff's right and of the defendant's liability, it will be sufficient for us to fix a rough and ready figure as the deduction which ought to be allowed in respect of the period prior to the mahant's getting into possession in his own right. We suggested a figure of Rs. 500 and counsel on both sides have agreed to it. The decree of the District Munsif will accordingly be modified by substituting Rs. 838.4.9 for Rs. 1,338.4.9. Interest will also be correspondingly reduced. In the result, A. S. No. 160 of 1931 will be allowed and the plaintiff will be given a decree even in respect of the amount claimed for Fasli 1331. Appeal No. 101 of 1934 also will be allowed in the sense that there will be a finding on Issue No. 14 to the effect that the mera due to the plaintiff is a charge of the kind that we have explained above. We do not think it necessary to make any separate order as to costs in A. S. No. 101 of 1934 or in A. S. No. 40 of 1935 or S. A. No. 544 of 1933; but in A. S. No. 160 of 1931, the appellant will be entitled to his costs and in A. S. No. 100 of 1934, the respondent will be entitled to his costs. Appeal No. 100 of 1934 is dismissed. Appeal No. 40 of 1935 is also dismissed.

C.R.K./B.D. *Order accordingly.*

---

* A. I. R. 1938 Madras 52

SPECIAL BENCH

BEASLEY C. J., KING AND GENTLE JJ.

Commissioner of Income-tax, Madras—Petitioner.

v.

AR. PL. SP. Manickam Chettiar, Karaikudi — Respondent.

O. P. No. 286 of 1935, Decided on 7th April 1936.

*** Income-tax—Receipts in British India—Debts due to foreign business of assessee—Debtor assigning British Indian decree in British India in discharge of his debt—Decree assigned not realized — Held that there was receipt of money or money's worth in British India.**

The assignment in British India of a British Indian decree in discharge of a debt due to the assessee's foreign business will amount to an actual receipt in British India at the time of the assignment of money's worth from the foreign debtor even though no money has been realized by the assessee from the judgment-debtor under the decree assigned: *(1905-10) 5 Tax Cas 159, Rel. on; A I R 1933 P C 101 and (1924) A C 508, Ref.* [P 53 C 1, 2]

M. Patanjali Sastri — *for Petitioner.*

K. S. Rajagopalachari and K. Rajah Ayyar — *for Respondent.*

Order.—In this reference the facts are shortly as follows: The assessee is the manager of an undivided Hindu family and inter alia owns a money lending business in Penang, which is outside British India. This business had dealings in current account with M. RM. VL. Penang, the proprietor of which was resident in British India. On 13th August 1931, it was found on a settlement of this account that there was a sum of Rs. 11,700 owing to the assessee. In discharge of this amount, M. RM. VL. executed a promissory note in favour of the assessee. Later, the assessee obtained a decree against the debtor in the Devakottah Sub-Court for the sum due on this promissory note. In the year of account, this decree was satisfied by the debtor selling to the assessee in British India jewels valued at Rs. 7,842.12.0 and agreeing to pay Rs. 15,962.12.0 to A. M. A. Kallal in consideration of which A. M. A. Kallal assigned in favour of the assessee a decree obtained by him in British India against RM. M. RM. who is in fact the brother-in-law of the assessee. These amounts of Rs. 7,842.12.0 and Rupees 15,962.12.0, a total of Rs. 23,805-8.0, were credited in the assessee's headquarters accounts at Karaikudi by the year of

account towards the decree debt due by M. RM. VL. and corresponding debits were made against (1) jewel purchase account and (2) RM. M. RM., the judgment-debtor in the decree assigned in favour of the assessee. No amount was collected by the assessee in respect of the assigned decree in the year of account, but the assessee admitted before the Commissioner of Income-tax that a receipt in kind may amount to receipt of money provided what is received is equivalent to money or is money's worth. He did not contend that the assigned decree was unrealizable or was not worth the amount for which it was assigned to the assessee. The Income-tax Officer held that the above transactions amounted to a receipt by the assessee in British India of Rs. 23,805-8-0 out of funds in his Penang business. Out of this sum, the Income-tax Officer computed the taxable profits to be the sum of Rs. 10,900 and accordingly this amount was included in the assessment made upon the assessee for the tax-year 1934-35. The assessee appealed to the Assistant Commissioner and contended that no moneys had so far been realized in respect of the assigned decree, and that the mere assignment of the decree cannot amount to a remittance of the amount covered by the decree within the meaning of S. 4 (2) of the Act. The Assistant Commissioner dismissed the appeal. The Commissioner has now referred to us for our decision the following question:

> Whether the assignment in British India of a British Indian decree in discharge of a debt of Rs. 15,962-12-0 due to the petitioner's foreign business will amount to an actual receipt in British India at the time of the assignment of money's worth from the foreign debtor even though no money has been realized by the petitioner from the judgment-debtor under the decree assigned.

Money can be received in more ways than one, and when the assessee accepted the jewels and took the assigned decree, the debt due to the Penang business was completely discharged and the assets of that business were diminished by, and there was an increase in, the assessee's assets in British India of the sum of Rs. 23,805-8-0. It was argued before us that as the amount of the assigned decree had not been received from the judgment-debtor, the amount of the decree should not be taken into consideration when arriving at a sum for assessment. Assuming that no such moneys had been received, even then, the assessee had by the transactions mentioned transferred into British India assets which he could and in respect of the jewels in fact did realize and he could have realized the assigned decree at any time. In our view, these transactions amount to remittances in British India of moneys or money's worth. Several cases were cited to us by the assessee's counsel amongst them 5 Tax Cas 159,[1] 12 Pat 305[2] and (1924) A C 508.[3] None of these authorities in any way assist the assessee's contention. On the contrary, in the first of the above cases, Lord Trayner at p. 167 says:

> A profit is realized when the seller gets the price he has bargained for. No doubt here the price took the form of fully paid shares in another Company, but, if there can be no realized profit, except when that is paid in cash, the shares were realizable and could have been turned into cash if the appellants had been pleased to do so. I cannot think that income-tax is due or not according to the manner in which the person making the profit pleases to deal with it.

This directly is opposed to the assessee's contention; and our answer to the question referred is "Yes". The Income-tax Commissioner will get Rs. 250 costs.

C.R.K./B.D. *Answer in affirmative.*

1. Californian Copper Syndicate v. Harris, (1905-1910) 5 Tax Cas 159=6 F 894.
2. Raghunandan Prasad Singh v. Commissioner of Income-tax, Bihar and Orissa, (1933) 20 A I R P C 101=142 I C 446=60 I A 133=12 Pat 305 (P C).
3. St. Lucia Usines and Estates Co. Ltd. v. St. Lucia (Colonial Treasurer), (1924) A C 508=93 L J P C 212=131 L T 267=68 S J 456.

---

* A. I. R. 1938 Madras 53

ABDUR RAHMAN J.

P. L. S. P. L. Palaniappa Chettiar — Petitioner.

v.

Y. P. R. Y. N. Y. Chidambaram Chettiar and others — Respondents.

Civil Revn. Petn. No. 1350 of 1936, Decided on 2nd September 1937, from order of Dist. Court, Ramnad at Madura, D/. 3rd October 1936.

*** Insolvency—Amendment of pleadings—Acts of insolvency—Petition by creditor—Acts alleged beyond three months of date of petition—Amendment seeking to substitute new acts of insolvency within three months—Amendment held introduced new cause of action and could not be allowed.**

A petitioning creditor in his petition for his debtor's adjudication as insolvent, relied on cer-

tain acts of insolvency which were committed within three months of the commencement of Court vacation. The petition was filed on the day when the Courts reopened and finding that the alleged acts of insolvency were not within three months of the date of filing, the period of vacation being of no avail to him, he filed another petition for amendment of the former by alleging new acts of insolvency within three months of the date of filing as required :

Held that although Court could liberally allow amendments of insolvency pleadings just as in case of Civil Procedure Code, yet it had its own limitations and an amendment which substituted a new cause of action would not be allowed. Hence the amendment alleging new acts to the prejudice of the debtor could not be allowed : *A I R 1935 Mad 857 (F B), Ref.; A I R 1922 P C 249, Rel. on.* [P 55 C 2]

R. Krishnaswamy Iyengar —

for Petitioner.

T. L. Venkatarama Iyer —

for Respondents.

Order.—The petitioner seeks in this case to revise the orders passed by the District Judge of Ramnad at Madura on 3rd October 1936 confirming those of the Additional Sub-Judge of Devakottah who had permitted respondent 1 to amend his petition which he had presented to the Court on 3rd July 1934 praying that the petitioner and other respondents to these proceedings be adjudged as insolvents. The petition has been very ably argued on behalf of the parties, and I have been called upon to satisfy myself whether the orders passed by both these Courts were according to law. Respondent 1 had in his petition for the adjudication of the petitioner and the remaining respondents, relied on certain acts of insolvency which were stated by him in para. 6 of his petition. I have examined para. 6 of the petition generally and para. 6 (c) of the petition particularly, and am of the opinion that the transfers referred to in that clause were only those which were alleged to have been effected by the respondents to the petition during the three months prior to the closing of the Court for summer recess on 1st May 1934, and did not cover the acts which might have been committed by them subsequently, i. e. within three months before the actual presentation of the petition.

There is no doubt that the petition for amendment was presented on account of a Full Bench decision of this Court in 58 Mad 794[1] in which, while overruling 39 M L W 449[2] it was held that the period of three months fixed in S. 9 (1) (c), Provincial Insolvency Act, is not a period of limitation but is a condition precedent during which the alleged acts of insolvency must have been committed by the person or persons who is, or are, proposed to be adjudicated. It was accordingly held that the period of vacation would be of no avail to the petitioner in increasing the period within which the alleged acts of insolvency must be proved to have been committed by the respondents, and the provisions of the Limitation Act would not be able to help the petitioner in extending that period on account of the fact that the period of three months expired at a time when the Civil Courts were closed for long vacations.

As the petition for insolvency was in this case presented on 3rd July 1934 and the alleged acts of insolvency were stated to have been committed on 20th February 1934 and 23rd February 1934, an application for amendment was considered to be necessary. This was made on his behalf on 23rd July 1935 with the object of including other acts of insolvency committed by the respondents in April, May and July 1934. These were not mentioned either specifically or generally and were proposed to be brought, as the acts committed before 3rd of April, could not, according to the Full Bench decision, form a basis or ground for adjudicating respondents on the petition presented to the Court on 3rd July 1934. It might be stated in passing that the Full Bench decision gave effect to the rulings in (1879) 12 Ch D 314[3] and (1895) 1 Q B 194.[4]

I have tried to show that this was not, as stated by the District Judge in his judgment dated 3rd October 1936, merely a case of specifying the acts in detail which had already been alleged. The application for amendment was put in with the object of saving it from being dismissed by pleading further acts of insolvency, which according to the Full Bench authority were no longer so and had ceased to be impeachable under the Insolvency Act.

1. Chenchuramana v. Arunachalam, (1935) 22 A I R Mad 857=158 I C 1=58 Mad 794=69 M L J 282 (F B).

2. Narayana Ayyar v. Official Receiver, South Malabar, (1934) 21 A I R Mad 294=150 I C 339=39 M L W 449.

3. Ex parte Games; In re Bamford, (1879) 12 Ch D 314=40 L T 789=27 W R 744.

4. In re Maund; Ex parte Maund, (1895) 1 Q B 194=64 L J Q B 183=15 R 159=72 L T 58 =43 W R 207.

It must be stated at the outset that under the provisions of the Insolvency Act the provisions relating to amendment of pleadings contained in the Code of Civil Procedure would be applicable to the petitions made under the Act. I am also fully aware of the established rules and practice of the Courts, both in England and in India, which act with considerable liberality in the matter of granting amendments and "which should be allowed" as remarked by Lopes L J. in (1887) 19 Q B D 394,[5]

however negligent or careless the first omission and however late the amendment, if it can be allowed without injustice to the other side.

But the limitations of this rule have been, on account of a series of authorities, also well defined. As pointed out by Lord Buckmaster in 48 Cal 832[6] at p. 835:

All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full power of amendment must be enjoyed, and should always be liberally exercised.

The noble Lord, however, adds the following qualification which should not be lost sight of:

None the less, no power has yet been given to enable one distinct cause of action to be substituted for another.

If I found that respondent 1 was in this case relying on the same cause of action which he had pleaded in the petition or that he was merely asking for further relief or an appropriate remedy which he had on account of some slip or mistake forgotten to ask in his petition, it would not have been necessary for me to examine the orders passed by the lower Courts minutely and revise them if necessary. But when I find that by this device, respondent 1 wishes the Courts to help him in alleging new acts of insolvency, which according to the Full Bench authority had become unimpeachable and ceased to be acts of insolvency in fact under S. 9 of the Act, and on which he neither relied nor did he intend to rely when presenting his petition, the matter assumes a different complexion. If the amendment were allowed to remain, the petitioning creditor would be enabled to substitute new grounds for those which he had set up originally but which are of no avail to him now. This is bound to cause serious injury and grave injustice to the other party which cannot be compensated by costs. It is true that the Courts have wide powers in this matter but they have to be exercised judicially and with care. The effect of granting this amendment would be to clothe the petitioning creditor with rights which he would not have had, if a new petition for insolvency was presented by him on the date on which he applied for leave to amend. In these circumstances I hold that an amendment of this nature prayed could not be granted. The amendment is therefore cancelled and the petition allowed with costs throughout.

C.R.K./B.D. *Petition allowed.*

5. Weldon v. Neal, (1887) 19 Q B D 394=56 L J Q B 621=35 W R 820.
6. Ma Shwa Mya v. Maung Mo Hnaung, (1922) 9 A I R P C 249=63 I C 914=48 I A 214=48 Cal 832=4 U B R 30 (P C).

A. I. R. 1938 Madras 55

LEACH C. J.

Varisaimuthu Chettiar and others — Petitioners.

v.

Samimuthu Chettiar and others — Respondents.

Civil Revn. Petn. No. 1416 of 1935, Decided on 24th September 1937, from order of Sub-Judge, Ramnad at Madura, D/- 19th July 1935.

(a) Registration Act (1908), S. 17 (1)—"Declare" implies declaration of will and not mere statement of fact — Deed of partition causing change of legal relation is declaration, but not letter containing admission of partition.

The word "declare" in S. 17 (1) implies a declaration of will, not a mere statement of fact. A deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it is a declaration in the intended sense, but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. The distinction is between a mere recital of fact and something which in itself creates a title: *5 Bom 232 and A I R 1932 P C 55, Applied.* [P 56 C 2]

(b) Registration Act (1908), S. 17 — Award declaring rights of parties to certain property — Award should be registered — Unregistered award is inadmissible in evidence.

In an arbitration proceeding, the arbitrator was asked to settle disputes between the parties relating to the ownership of the three plots of land. The arbitrator gave his decision that two of the three plots belonged to one party and the remaining one plot to the other party:

Held that the arbitrator's decision in the award operated as a declaration of the rights of the respective parties in these pieces of land, that the award was an instrument which in itself created a title, that therefore under S. 17

registration of such an award was compulsory and that if it was not registered, it was inadmissible in evidence under S. 49 : *A I R 1934 Cal 815, Foll.; A I R 1933 All 59 and A I R 1937 Pat 183, Ref.* [P 57 C 1]

K. Bhashyam Ayyangar and R. Kesava Iyengar—*for Petitioners.*

K. Rajah Ayyar, A. S. Srinivasa Iyer and S. Seshadri — *for Respondents.*

Order.—This petition raises the question whether an award in arbitration proceedings without the intervention of the Court requires registration before it can be filed in Court. In O. S. No. 19 of 1927 of the Court of the District Munsif, Paramakudi, the respondents sued to recover possession of certain immovable property. During the pendency of the suit, the parties agreed to refer their differences to arbitration, and did so. When they came before the arbitrator it was agreed that he should also settle disputes between them relating to three other pieces of land. The arbitrator in due course gave his award which decided the questions of ownership of the four parcels of land. The award was then filed in Court with a view to its being made a decree. Objections were however raised by the respondents who took advantage of the fact that the award dealt with matters outside the scope of the suit. District Munsif decided that the award could be made a decree of the Court, but only so far as it affected the piece of property in suit. He refused to recognize its validity so far as the other three parcels of land were concerned. This decision was upheld by this Court in an application for revision. The petitioners then attempted to file the award in Court under the provisions of Cl. 20 of Sch. 2, Civil P. C. The respondents objected on the ground that the award had not been registered in accordance with the provisions of S. 17, Registration Act. The District Munsif upheld the objection, and refused to file it. An appeal followed to the Subordinate Judge, Ramnad, but was dismissed. This Court is now asked to exercise its powers under S. 115, Civil P. C., and to direct the District Munsif to file the award.

The only question for consideration is whether the award is a document within the purview of S. 17, Registration Act. Sub.s. (1) sets out what documents shall be registered and they include non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property. Sub.s. (2) gives a list of instruments which do not require registration. Cl. (vi) of this sub-section exempts any decree or order of a Court, except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceeding. Before the passing of the Transfer of Property (Amendment) Supplementary Act, 1929, this clause also excepted awards, but the words "and any award" which appeared in the Clause were deleted by that Act. Although the reference to awards has been deleted from the Clause, it is argued by the learned advocate for the petitioners that an award of the nature of the one in suit does not come within the purview of sub.s. (1).

The sub-section says that a non-testamentary document which " declares" any right, title or interest in immovable property of the value of one hundred rupees and upwards does require registration and the question resolves itself into whether the award does " declare " a right of this nature. The word "declare" has been the subject of much legal argument in the Courts of this country, but it has now been defined by the Privy Council. In the case in 11 Pat 272=62 M L J 296,[1] their Lordships accepted the definition given by West J. in 5 Bom 232.[2] West J. pointed out that the word ' declare ' " implies a declaration of will, not a mere statement of fact," and went on to say :

> A deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense ; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section.

Viscount Dunedin in delivering the judgment of their Lordships observed :

> Though the word 'declare' might be given a wider meaning, they are satisfied that the view originally taken by West J. is right. The distinction is between a mere recital of a fact and something which in itself creates a title.

1. Bageshwari Charn Singh v. Jagarnath Kuari, (1932) 19 A I R P C 55 = 136 I C 798 = 59 I A 130=11 Pat 272=6 M L J 296 (P C).
2. Sakharam Krishnaji v. Madan Krishnaji, (1880) 5 Bom 232.

The judgment of West J. had been approved of by this Court in an earlier case, 45 M L J 100.[3] The award under discussion declares that the petitioners are entitled to two plots of property and the respondent to the third plot. The relevant portion of the award is as follows:

> On perusing the entire document produced by both the parties, and other witnesses, and also on hearing the oral representations made by both parties, and also on inspecting the locality as desired by both parties, my findings are as follows: (a) that the plots A and C in the sketch submitted herewith, belong to the Mangaputhur Chettis of this place and form part of the Nandavanam attached to Minakshi Sundareswaral temple at Paramakudi, to which defendants 6, 7, 8 and 10 are trustees; (b) that neither the plaintiff nor any other defendants have any right or interest in them (plots A and C); (c) that the plot B in the sketch belongs to the plaintiff, and that the defendants have no manner of right or interest in them.

There can be no doubt that the arbitrator is here declaring who are the owners of these particular plots. He was asked to decide the question of ownership and after hearing the evidence he gave his decision. His award therefore operates to declare the rights of the respective parties in these pieces of land. The award cannot be classified as a mere recital, but as something which in itself creates a title. In 62 Cal 201[4] a Bench of the Calcutta High Court held that registration of such an award is compulsory and that if it is not registered it is inadmissible in evidence under S. 49, Registration Act. Similar decisions have been given by the Allahabad High Court and the Patna High Court: A I R 1933 All 59[5] and 15 Pat 579.[6] There is therefore abundant authority in support of the decision challenged in this petition. The petition therefore fails and must be dismissed with costs.

C.R.K./B.D. *Petition dismissed.*

---

8. Ranganayaki Ammal v. Virupakshee Rao Naidu, (1923) 10 A I R Mad 621 = 72 I C 456=45 M L J 100.

4. Jitendranath De v. Nagendranath De, (1934) 21 A I R Cal 815=153 I C 778 = 39 C W N 54=60 C L J 259=62 Cal 201.

5. Ch. Bachchan Lal v. Narotham Datt, (1933) 20 A I R All 59=143 I C 423 = 1932 A L J 1030.

6. Badri Chowdhri v. Mt. Champa Chaudharain, (1937) 24 A I R Pat 183 = 168 I C 115 = 15 Pat 579=18 P L T 41.

A. I. R. 1938 Madras 57

SPECIAL BENCH

MADHAVAN NAIR, STONE AND KING JJ.

Commissioner of Income-tax, Madras— Petitioner.

v.

Tanjore Permanent Fund Ltd. — Respondent.

O. P. No. 146 of 1935, Decided on 26th September 1935.

Income-tax — 'Fund' floated with capital subscribed by shares—Chief income, interest, derived from loans to share-holders — Such income held not assessable because fund was Mutual Benefit Fund Society.

A company was floated with members subscribing its capital by way of share. The main source of income was the interest on the loans advanced to the share-holder members. It also derived interest on its securities etc. In giving the return, the fund did not show the interest derived from the loans to the share-holders as its income. Question was if that income was assessable:

Held the fund though a registered company was in fact a Mutual Benefit Fund Society and that income was not assessable: *A I R 1923 Mad 684 (S B), Foll.; A I R 1933 Mad 347. Expl.; 8 I T C 83, Ref.* [P 59 C 1]

M. Patanjali Sastri — *for Petitioner.*

S. Srinivasa Iyengar for K. Rajah Iyer and V. Ramaswamy Iyer — *for Respondent.*

Order.—The Commissioner of Income-tax has referred to the opinion of the High Court the question "whether the sum of Rs. 61,304 being the income or the profits of the Fund derived from the transactions with the share-holders is liable to assessment." The petitioner is the Tanjore Permanent Fund Limited. It is a company incorporated in 1901 under the Indian Companies Act 6 of 1882, now Act 7 of 1913. The Company started with 2,222 shares of Rs. 45 each share and a nominal capital of Rs. 99,990. The amount of each share is payable in monthly instalments of Re. 1. The share account of each share-holder is closed on the expiry of 45 months from the last date of the month in which he was admitted by his being paid Rs. 50 and then he ceases to be a share-holder. The difference between the amount subscribed by him and the amount paid to him at the end of the 45th month, viz. Rs. 5, is called "guaranteed interest". The Fund accepts deposits from its share-holders on which interest is allowed to them. The Directors are authorized temporarily to borrow from time to time, if necessary, sums to

carry on its transactions. The collections of the Fund are used to be lent to the share-holders at specified rates of interest on the security of the shares held by them and also on their other properties. The moneys belonging to the Fund may be invested by the Directors with banks or Co-operative Societies or in Government securities, Treasury Bills or Post Office Cash Certificates. The Fund does not accept deposits from other persons than its share-holders nor does it give loans to outsiders.

The Fund's main source of income is the interest on the loans advanced to the share-holders. It also derives income from interest on the deposits with banks, interest on securities, house rent and other minor items. The excess of interest earned by the Fund over the expenses of the institution and the interest earned by the share-holders is regarded as profits of the Fund out of which 70 per cent. is divided among the share-holders and the balance after paying the legal adviser, remuneration and bonus to the establishment, is carried to the reserve fund. The number of share-holders of the Fund and the amount of shares fluctuate from time to time. On 15th August 1931, as mentioned by the Commissioner, there were on the register of the Fund 9,984 share-holders with 110,740 shares and the subscribed capital of Rs. 49,83,300. For the assessment of the year 1932-33, the Fund returned an income amounting to Rupees 14,178. In submitting this account, it did not include as assessable income a sum of Rs. 61,304, the profits derived from the share-holders. The question referred to us is whether the income-tax can be levied on this amount.

A case exactly like the present one was decided in 47 Mad 1,[1] in which it was held that a fund like this was a Mutual Benefit Society and therefore the receipts from share-holders were not income liable to assessment under the Act. The Income-tax Officer did not follow this decision, as before he completed the assessment, this Court decided the case in 56 Mad 415.[2] That decision was interpreted by him to mean that profits earned by the Fund by lending money may be taxed. He therefore held that the decision in 47 Mad 1[1] was no longer applicable and assessed the fund on the total income including the profits of Rs. 61,304. The Assistant Commissioner confirmed the order of the Income tax Officer. The Commissioner in referring the case to us says that the combined effect of these two decisions and of the decision of this Court in 8 I T C 83[3] is not very clear to him. He also argues that the petitioner Fund is a company carrying on a trade and as such the fact that it carries on the trade with its own customers does not make it any the lesser trader and that the profits resulting from the trade are liable to tax unless specially exempted and as there is no question of any such exemption here, the amount of profits earned, viz. Rupees 61,304, is assessable to tax.

At the outset, we may observe that so far as the decisions of this Court are concerned, there is no conflict amongst them. The decision in 56 Mad 415,[2] followed by the Income-tax Officer, does not touch the question of the liability to assessment of the profits earned by the Fund from its share-holders nor does it in our opinion shake the authority of the decision in 47 Mad 1.[1] In that case, (56 Mad 415)[2], the question was whether the "guaranteed interest" may be deducted from the total income of the Fund during the year of account. This Court held that the guaranteed interest was interest on capital borrowed for the purpose of the fund's business within the meaning of S. 10 (2) (3), Income-tax Act, that its payment was not in any way dependent on the earning of the profits and that the fund was entitled to claim deduction in respect of that sum distributed by it as guaranteed interest. The question now referred to us did not arise for decision in that case. In 8 I T C 83[3] this Court pointed out that that case was one like 47 Mad 1.[1]

It is conceded by the learned counsel for the Commissioner that on the facts this case would fall exactly within the scope of the decision in 47 Mad 1.[1] What he wants to argue is that that case was wrongly decided and that he should be

1. Secretary, Board of Revenue v. Mylapore Hindu Permanent Fund Ltd., (1923) 10 A I R Mad 684=76 I C 833=47 Mad 1=45 M L J 124 (S B).

2. Commissioner of Income-tax v. The Madura Hindu Permanent Fund Ltd., (1933) 20 A I R Mad 347=143 I C 894=56 Mad 415=64 M L J 260 (F B).

3. Sivaganga Sri Meenakshi Nidhi v. Commissioner of Income-tax, Madras, (1934) 8 I T C 83.

allowed to re-open the question. So far as this Court is concerned, the question has been considered and decided by the Full Bench in 47 Mad 1.[1] As pointed out in 56 Mad 415,[2] the Fund though registered under the Indian Companies Act and subject to its provisions is not really a company but a Mutual Benefit Society with a fluctuating capital. The subscriptions though called share capital are not really so, nor are they capital borrowed for the purpose of the business as that capital is ordinarily understood. In enacting the Explanation to S. 10 (2) (3), Income-tax Act, it would seem that the Legislature has shown its intention to recognize the existence of such Mutual Benefit Societies like the one in question.

As the law on the point has been clearly laid down in 47 Mad 1[1] and as this case falls exactly within its scope, we are not inclined now to re-open the question and to disturb the practice which has been followed since 47 Mad 1,[1] whatever view we may be inclined to take if the point was res integra. Though the term "shareholder" has been here used, we do not wish to be understood as deciding that these subscribers are share-holders properly so called within the meaning of the Companies Act. The matter is not before us. Our answer to the question accordingly is that the sum of Rs. 61,304 is, in the circumstances of the case, not liable to assessment. The assessee is entitled to Rs. 250 for costs and will get a refund of the Rs. 100 deposit.

C.R.K./B.D. *Answered in negative.*

---

* A. I. R. 1938 Madras 59

SPECIAL BENCH

BEASLEY C. J., KING AND GENTLE JJ.

Commissioner of Income-tax, Madras — Petitioner.

v.

M. A. L. A. R. Aryan Chettiar, Kilaseval Patti, Karaikudi — Respondent.

O. P. No. 246 of 1935, Decided on 31st March 1936.

*** Income-tax — Partnership—Partnership either not assessable or escaping assessment —Partners are liable—Allocation of shares is not essential.**

If the partnership itself is not assessable or if it escapes assessment, then its partners are liable to assessment, although there is no allocation of shares in profits between the partners : *A I R 1931 Cal 686, Rel. on ; A I R 1930 Mad 119 and 4 I T C 478, Ref.* [P 60 C 1, 2]

M. Patanjali Sastri — *for Petitioner.*

K. S. Krishnaswami Aiyengar for P. R. Sivarama Aiyar — *for Respondent.*

Beasley C. J.—The question propounded is :

Whether the sum of Rs. 59,968 remitted in 1931-32 by the Saigon partnership out of its profits to the Rangoon partnership amounted to a receipt of profits pro tanto by the partners in 1931-32 so as to be assessable in their hands.

The assessee was and is a partner in a money-lending business carried on in Rangoon consisting of three partners under the vilasam of M. A. L. The same three partners are the sole partners in a similar business carried on in Saigon under the same vilasam. During the period commencing with 21st May 1931 and ending on 24th March 1932, by means of three remittances made by telegraphic transfers and by bank-drafts a sum of Rs. 59,967.8.0 was remitted by Saigon to Rangoon. It has been found as a fact that those remittances came out of profits made by the Saigon partnership. Under these circumstances, the shares of the assessee in that sum was assessed under S. 34, Income-tax Act. The contention put before the Income-tax Officer was that the partnership itself ought not to be assessed and it appears also that the Advocate who appeared before the Income-tax Officer, Rangoon, who had charge of this matter admitted that the individual partners should instead be assessed. In any case, quite apart from the admission made, the Income-tax Officer, Rangoon held, following the decision in 4 I T C 478,[1] that the contention of the assessee was correct and that the partnership was not liable to be assessed to Income-tax. The Income-tax Officer here then proceeded to assess the partners individually. The contention raised before us is that they are not liable to be so assessed; and it was strenuously argued that upon the authority of the case already referred to, this being a remittance from a separate entity, namely the Saigon partnership to another entity, namely the Rangoon partnership, the partnership was not liable to be assessed. From this Mr. K. S. Krishnaswamy Aiyengar who appeared on behalf of the assessee contended that the partners also could not be assessed though he conceded that this sum could not escape

1. Martin & Co. v. Commr. of Income-tax, Bengal, (1930) 4 I T C 478.

assessment but was quite unable to state upon whom the assessment was to be made other than the individual partners or the partnership. His argument was this, that this was a remittance of a lump sum of profits and until there had been an allocation amongst the partners of their shares in those profits, the individual partners could not be held to have received those profits and that until there was such an allocation, it could not be said that there was any receipt by them of the profits. He relied upon the decision of this High Court in 4 I T C 188.[2]

The answer to this contention seems to me to be this, that there was admittedly a receipt in British India of profits gained abroad. By whom were those profits received? If the contention of the assessee before the Income-tax Officer was correct, then those profits were not received by the partnership in such a way as to render the partnership itself assessable. But as those profits had been received, they must have been received by somebody. The only other alternative is, that they were received by the partners individually and there does not seem to be any other possible alternative. If the partnership itself is not assessable, clearly, in my view, the individual partners are. Although it may be true that they have not received the money into their own hands, the receipt of this money by the partnership was a receipt on behalf of the partners and if, as is contended by the assessee, the decision in 4 I T C 188[2] goes to the length of saying that until there is an allocation amongst the partners of the profits there can be no receipt, with great respect, I feel myself unable to agree with it. The deed of partnership of the Rangoon business sets out the shares to which each of the three partners is entitled and the money having been received by the partnership on behalf of the partners, it is merely a matter of arithmetic to ascertain what the share in those profits of each of the individual partners is. There is nothing in the Income-tax Act which says that a partnership or a firm is to be assessed first. Either the firm itself is liable to be assessed or its individual partners. In this case an attempt was made to assess the firm and yielding to the contention raised by the assessee, the firm was absolved from assessment and the individual partners were sought to be assessed.

I think that the Income-tax Officer was mistaken in holding that the partnership was not liable to assessment in respect of these profits as in my opinion *Martin's case*[1] already referred to does not touch this point at all. These profits therefore escaped assessment in the hands of the firm and it was open to the Income-tax authorities to assess the partners individually. It seems to me that if any authority for such a procedure is needed, it is to be found in the decision in 5 I T C 206.[3] In my view, the assessee was clearly assessable to Income-tax in respect of his share in the sum of Rs. 59,968. The question must therefore be answered in the affirmative. The Commissioner of Income-tax will get Rs. 250 costs.

King J.—I agree.

Gentle J.—I agree.

C.R.K./B.D. *Answered in affirmative.*

2. S. L. S. Chettiappa Chettiar v. Commr. of Income-tax, Madras, (1930) 17 A I R Mad 119=122 I C 349=4 I T C 188.

3. Neemchanda Daga v Commr of Income-tax, Bengal, (1931) 18 A I R Cal 686=134 I C 991 =58 Cal 1204=35 C W N 534=5 I T C 206 (F B).

---

* A. I. R. 1938 Madras 60

RAMESAM AND STONE JJ.

S. K. Venkatasubramania Ayyar and others — Appellants.

v.

S. Sivagurunatha Chettiar and others — Respondents.

Appeal No. 156 of 1926, Decided on 27th February 1935, against decree of Sub-Judge, Kumbakonam, D/- 30th September 1925.

*** (a) Adverse Possession — Dates from which adverse possession of alienee starts in cases of void and voidable transfers, stated.**

Adverse possession of an alienee dates from the moment the alienee is without lawful title. That time is, in the case of a void transfer, the date of the transfer; in the case of a voidable transfer, the date of the avoidance and in the case of the transfer effective for a period (whether because of estoppel or otherwise), the date of the termination of the period. [P 63 C 1]

(b) Will—Executor—Position of—Executor held trustee.

The persons named executors in a will were not merely executors but were charged with the duty of managing the property and paying the income to charity. Only the income was disposed of under the will:

Held that as only income was disposed of, and some one must have the legal estate in the corpus, and taking into consideration the duties cast upon the executors and also the possibility of having

successive legal estates, the executors were in all but name trustees. [P 64 C 1]

(c) Adverse Possession—Trustee of choultry alienating choultry property as his own and not as manager—Alienation is void ab initio—Alienee's possession becomes adverse from date of alienation.

A trustee of a choultry alienated property belonging to the choultry as his own. He did not purport to pass title as manager of the choultry :

***Held* that the alienation was void ab initio and possession of the alienee became adverse from the date of the alienation and not from the death of the trustee.** [P 64 C 1]

*** (d) Limitation — Trustee alienating property honestly believing it to be his own—Property on true construction of trust deed found to belong to cestui que trust—Time allowed by trustee to pass owing to this mistake cannot be excluded in computing limitation for suit against alienee.**

If a person could extend the time for suing by alleging that he had mistaken the meaning of an instrument, a most serious inroad would be made into the law of limitation and that quieting of title which is the reason for and the policy behind the statutes of limitation would be gravely disturbed. Hence, if a trustee alienates property which he honestly believes to be his own but which on a true construction of the deed of trust belongs to the *cestui que trust*, time, which the trustee allows to pass owing to this mistake, counts when computing limitation for suit against alienee for possession : *Case law discussed.* [P 65 C 1; P 66 C 2]

S. Srinivasa Ayyangar, K. Narasimha Ayyangar and K. S. Viswanatha Sastri — *for Appellants.*

T. Rangachari, S. Muthiah Mudaliar, P. S. Narayanaswami Ayyar, K. P. Panchapagesa Ayyar, T. R. Srinivasa Ayyangar and T. V. Ramanatha Ayyar — *for Respondents.*

Ramesam J.—The facts on which the suit (out of which this appeal arises) is based are as follows : One Kalayana Rama Ayyar of Kumbakonam established a choultry as a rest house and for feeding Brahmins and endowed certain properties for its maintenance and upkeep. It became known as Kalyana Rama Ayyar Chatram. He died in about 1855 leaving five sons. On 22nd August 1864, there was a partition between the sons by Ex. A which provided that the eldest son Sivasubramania Ayyar should conduct the charity during his lifetime and after him the other brothers in order of seniority. In the year 1871 Sivasubramania Ayyar surrendered the management of the choultry in favour of the next two brothers Venkataranga Ayyar and Suri Ayyar. The fourth son Swaminatha Ayyar died in 1881 after disposing of his property by his will dated 7th November 1881 (Ex. B). Under this will two thirds of the income of his properties were devised to his wife Chellathammal for her life, and the remaining one third was to be utilised for the purpose of feeding Brahmins in the family choultry. After the death of his widow, two thirds of the two third share given to the wife, should be utilised 'for (the) charity' and the remaining one third was to be taken by his brothers Venkataranga Ayyar and Suri Ayyar who were also appointed executors under the will. On 30th July 1882 Sivasubramania Ayyar executed a formal deed of surrender in favour of Venkataranga Ayyar. Venkataranga Ayyar managed the charity until his death in 1884. Afterwards Chellathammal died about July or August 1892. Sivasubramania Ayyar died in 1910 and the fifth brother died before 1884. Suri Ayyar was conducting the charity and carrying out the directions of Swaminatha Ayyar's will till his death on 29th December 1913. Prior to his death he executed a will on 29th June 1913. Some of the descendants of Suri Ayyar took possession of the charities. Thereupon, certain daughter's sons of Kalayana Rama Ayyar, the founder of the Chatram, instituted O. S. No. 90 of 1916 of the Sub-Court, Kumbakonam for the settlement of a scheme in respect of the Chatram. The Subordinate Judge of Kumbakonam by his judgment directed the framing of a scheme (Exs. H and H.1). There was an appeal to the High Court. The appeal was dismissed subject to some slight modification (Exs. H.2, H.3 and H.4). There was a further appeal to the Privy Council. This was disposed of in June 1924 (Ex. H.5). The decision of the Judicial Committee is reported in 47 Mad 884.[1] One of the points raised in the course of that litigation was that the gift of two thirds of two third under the will of Swaminatha Ayyar after the death of Chellathammal 'for (the) charity' was void for uncertainty. All the three Courts held in the course of that litigation that these words plainly referred to the Chatram charity which had immediately before been indicated and the gift was not void for uncertainty.

The present suit was filed on 26th April 1920 by the trustees appointed under the scheme to recover the properties which,

1. Vaidyanatha Ayyar v. Swaminatha Ayyar, (1924) 11 A I R P C 221=82 I C 804=51 I A 282=47 Mad 884 (P C).

according to the decision in the former litigation, belonged to the trust but which were in the unlawful possession of the various defendants under alienations made by Suri Ayyar. Under Ex. 1 dated 9th May 1898 Suri Ayyar sold the items described in Sch. C of the plaint to the father of defendant 5. The properties in Sch. C have been acquired by Government under the Land Acquisition Act and are now represented by a sum of Rs. 48,122-14-7 deposited in the Treasury by the receiver appointed by the Court pending litigation between defendants 5 to 13 inter se in O. S. No. 67 of 1919 on the file of the Kumbakonam Sub-Court. This alienation recognized that one third of the income of the properties was to be devoted for the Chatram, but proceeded on the footing that the whole of the remaining two third was the property of Suri Ayyar, i. e. Suri Ayyar acted on the footing that the gift under the will of Swaminatha Ayyar of two thirds of two third 'for (the) charity' was void and therefore instead of being content to claim only two-ninth of the property he claimed two third of the property. He recognized the right of the trust only to the extent of one third instead of recognizing it to the extent of seven-ninth. Defendants 5 to 13 now represent the alienees under Ex. 1. In 1910 Suri Ayyar executed another sale deed (Ex. F) in favour of defendant 4 of the properties in Sch. B. The dispute regarding these properties has been compromised in the Court below and is not before us in this appeal. By Ex. 3 dated 2nd June 1912 there was another alienation by Suri Ayyar of the properties in Sch. A in favour of defendant 1 who is an Advocate of Kumbakonam. These alienees were not parties to the former litigation and they accordingly raised the plea that the gift under Swaminatha Ayyar's will of two thirds of two third of the property was void for uncertainty and contended naturally that the judgments in the former litigation did not bind them. This was one of the points to be decided in the case. There was also a question of limitation raised by the contesting defendants. This is the other point arising in the case and is the subject of issue 11.

The Subordinate Judge found the first point in favour of the defendants. On the question of limitation he found that so far as defendant 1's alienation under Ex. 3 is concerned, it was not barred, but as to defendants 5 to 13 he held that the suit was barred by limitation even as to the one third share recognized to belong to the charity. The plaintiffs have filed this appeal. (On the question of construction of the will, his Lordship found that the construction put upon it by the Judicial Committee in the previous litigation was the proper one and held accordingly differing from the Subordinate Judge). The next question is that of limitation. On this matter I agree with my learned brother in thinking that the suit is barred by limitation so far as the property in Sch. C is concerned. (His Lordship then discussed the evidence regarding the points covered by the memorandum of objections and found in favour of the defendants-respondents.)

Stone J.—I agree. As regards the 1898 alienations (Sch. C), the question of limitation has been very strenuously argued, but I do not consider it necessary to traverse all the grounds covered. Two Articles scheduled to the Limitation Act are relied upon, the old Art. 134 and Art. 144. Art. 134 (before its recent amendment) is said not to apply because here there is no express trust. Art. 144 is said not to operate as a defence here because 1912 is the critical date for a reason that cannot be shortly stated but can be expressed as follows. It is urged that in India a variety of objects have been held to be capable of owning property. These objects, not being human, must, of necessity, have their property managed for them. Such managers are not in the position of trustees. The legal estate merely (leaving the equitable estate in the object) is not vested in the managers. The legal estate is vested in the object and the conception of an equitable estate does not arise at all. Such objects are juridical persons, as capable of holding property as a public company duly empowered. As in the case of the directors of a public company, its managers are not trustees though the relationship may well be fiduciary. Examples of such persons are idols, some temples and some mutts.

In such cases, it is further said, the manager though having no estate, legal or equitable, has power to alienate on behalf of the object. That power goes so far as to confer title upon the alienee. In some cases that title is voidable. But even where voidable, it may be good during the lifetime or period of office of the

manager. If that is the position in any given case, then the alienee is not in adverse possession until the title is avoided. Until then, the title transferred is good and the alienee must be deemed to be holding under it. It follows therefore that cases may arise where, say, the alienation is in 1900; the manager alienating continues in office until 1920 and then a new manager comes on the scene and the question will arise whether the period of limitation dates from 1900 or 1920. If Art. 144 applies, then, in the case put, the adverse possession starts in 1920. Art. 134 does not apply because there is no trust.

On the other hand, if the original transfer was void, then the alienee would have been in adverse possession since the date of transfer i. e. 1900 in the case above put. The above is the effect of 44 Mad 831,[2] 12 Pat 251[3] and 46 Mad 751[4] and the cases there cited and later cases such as A I R 1935 P C 44[5] which follow the above. The 12 Pat 251[3] group is dealing with the case of a transfer that is effective up to a time; the 46 Mad 751[4] group with cases void ab initio. Both groups date the adverse possession from the moment the alienee is without lawful title. That time is, in the case of a void transfer, the date of the transfer; in the case of a voidable transfer, the date of the avoidance; in the case of a transfer effective for a period (whether because of estoppel or otherwise), the date of the termination of the period.

It will be observed that cases within the 12 Pat 251[3] group are cases where the manager or mahant is purporting to transfer on behalf of the object (mutt, temple, etc.), i. e. the juridical person. And this must be so. For the legal estate is in that person. Obviously therefore a good title could not be conveyed by the manager if the manager was not purporting to sell the land of the juridical person (owner) as manager but was purporting to sell his own land as owner. For, such a case would be a case where a man was selling what did not belong to him, and at the suit of the real owner the transaction would obviously be void. This is the kind of case considered in 46 Mad 751[4] where the transfer took the form of an execution sale under a decree obtained against the manager (or trustee) personally. It was held by the Privy Council that the alienation was void ab initio against the charity and the adverse possession accordingly dated from the transfer.

Now, despite the above manifest differences between the facts of those cases and the facts here, it is sought to apply those decisions and those principles to this case in the following way: (I). There being, it is said, no express trust contained in this will and no trustees appointed, there is here no trust. Executors as such are not express trustees: (1891) 3 Ch 119[6] at p. 124, (1899) 2 Ch 149[7] at p. 150, (1878) 3 A C 974[8] and (1905) 1 Ch 25[9] at p. 31. (II). We are therefore, it is urged, not concerned with the conception of trusts, equitable and legal estates, trustees, and *cestui que trust*. We are dealing with a charitable institution which under the law of India can hold as a legal *personæ* the legal estate. The legal institution here, it is said, is not the choultry; it is not the poor that are to be fed; it is the idea of feeding the poor at this choultry. Freed from the clinging folds of matter, form realizes the idea. One's mind goes back in imagination once more to the Academia. (III). This idea being clothed with legal personality and vested with the legal estate operates by means of human agency. The human agency is the surviving executor. (IV). The surviving executor having transferred the property not on behalf of the legal owner (the above-mentioned idea) but purporting to be the legal owner, transfers, it is said, a good title for his lifetime in the same way as a mahant of a mutt purporting to sell the mutt's property for the mutt's necessities, when in fact there is no necessity, conveys avoidable title. (V). There-

2. Vidya Varuthi v. Baluswami Iyer, (1922) 9 A I R P C 128=65 I C 161=48 I A 302 = 44 Mad 831 (P C).
3. Ram Charan Das v. Naurangi Lal, (1933) 20 A I R P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).
4. Subbaiya Pandaram v. Mahammad Mustapha Maracayar, (1928) 10 A I R P C 175=74 I C 492=50 I A 295=46 Mad 751 (P C).
5. Mahadeo Prasad Singh v. Karia Bharthi, (1935) 22 A I R P C 44=153 I C 1100=62 I A 47=57 All 159 (P C).
6. In re Davis; Evans v. Moore, (1891) 3 Ch 119 =61 L J Ch 85=65 L T 128=39 W R 627.
7. In re Lacy; Royal General Theatrical Fund Association v. Kydd, (1899) 2 Ch 149=68 L J Ch 488=80 L T 706=47 W R 664.
8. John William Cunningham v. George Octavius Foot, (1878) 3 A C 974=38 L T 889=26 W R 858.
9. In re Mackay; Mackay v. Gould, (1905) 1 Ch 25.

fore, it is urged, possession only became adverse in 1912 when the executor died and not in 1898 when the transfer took place.

My observations on the above are that, as to (I) under the terms of this will the persons named executors were not merely executors, but were charged with the duty of managing the property and paying 1/3rd of the income to the charity and 2/3rd of the remaining 2/3rd of the income to the charity after a certain event. Bearing in mind that only income was being disposed of, and some one must have the legal estate in the corpus, bearing also in mind the duties cast upon the executors and also bearing in mind the possibility of having successive legal estates, I am of the opinion that here the executors were in all but name trustees. This is really enough to dispose of the matter, for it brings in Art. 134 (which contests both the 4/9th and 1/3rd). But assuming that I am wrong as to this, I pass to (II). I find it a little difficult to treat (II) seriously. My reason for this is not the inherent impossibility of the conception. On the contrary, there is no particular difficulty about vesting, by a fiction, some purpose or object with the qualities of a legal person. But I ask myself, how is it that in a country where the feeding of the poor has been made the object of tens of thousands of gifts inter vivos and by will, where it is widespread and benevolent idea that to feed the stranger and those in want is a pious and worthy thing to do, how is it that it has never been decided that in such cases the idea of feeding the poor, or the stranger or the place where the poor are fed are legal *personæ* capable, without the intervention of any trustee or any scheme of owning property? But assume that this idea is a legal person capable (III) of operating through a human agent and that agent (for no apparent reason) is the executor, still (IV) raises a fatal difficulty. This executor acting as manager of this juridical person did not alienate as manager the legal estate of the juridical person. He purported to sell (as to 4/9th) the property as being his own. It was not his own. He never purported to pass title as manager of a juridical person clothed with the legal estate. I accordingly reject the conclusion arrived at in (V) and conclude that the alienation was void ab initio, the possession was adverse in 1898 and the suit is barred.

There is, however, another point that must be mentioned. It is said that while the executor was alive there was nobody competent to sue. The answer is: The executor could have sued. Then it is said: But as the executor was the alienor he was not likely to sue even assuming he was a thoroughly honest man. He believed he had title and that belief was derived from a possible reading of an ambiguous will. If he was dishonest, he is all the less likely to sue. That of course is not really a legal but a practical objection. Even that, I think, is answered by saying that the testator's heirs (or next of kin) could and would have sued or at least would have sought the aid or permission of the Advocate-General and thereby set on foot proceedings either to remove the trustee or to set aside the transfer.

Cases such as 42 Cal 244[10] have in my opinion no bearing on this case. That case turned on the fact that where a man of low caste purports to carry on an office only capable of being conducted by a man of high caste and wrongfully receives offerings and appropriates them, then (1) he has not taken possession of the office and (2) on every occasion on which he wrongfully takes offerings he commits a new actionable wrong. 20 C W N 833[11] shows that where there is a will and an executor, though no probate, the executor's title and authority being derived from the will, the testator's rights of action vest in him and time begins to run from the death. That largely turns on S. 17 which does not apply here. We are here concerned not with the rights of the settlor but with the rights of *cestui que trust*.

4 M L W 369[12] was a case where *X* was trustee of temple A and trustee of temple B. In 1894 *X* died and *Y* was appointed trustee of temple B. No one was appointed trustee of temple A. During *X*'s lifetime he had been in possession of the lands of temple A and temple B. When *Y* succeeded he in fact took possession not only of the lands of temple B but also of the lands of temple A. Trustees were eventually appointed for temple A in 1900 and in 1911 these trustees sued for posses-

10. Jalandhar Thakur v. Jharula Das, (1914) 1 A I R P C 72=24 I C 501=41 I A 267=42 Cal 244 (P C).
11. Meyyappa Chetty v. Subramanian Chetty, (1916) 3 A I R P C 202=35 I C 328=43 I A 113=20 C W N 833 (P C).
12. Manikkam v. Thanikachalam, (1917) 4 A I R Mad 706=34 I C 945=4 M L W 369.

sion. It was held by a Bench of this High Court that the action was not time-barred because until 1900 there was no one competent to sue and consequently possession was only adverse from 1900, i. e. adverseness of possession was made dependent upon there being a possible plaintiff This proposition is in turn founded upon 38 Mad 903.[13] That was a case involving a mortgagor, mortgagee in possession and *A*. *A* dispossessed the mortgagee in possession. The question was when did that possession become adverse to the mortgagor and it was held that it dated not from the dispossession, but from the date the mortgagor knew that the possession was adverse to his interest, for, up to that moment he would have no reason to think his rights were being invaded or that he had any cause of action to litigate.

The proposition laid down in 4 M L W 369[11] is also based on 32 Cal 129.[14] It is a little difficult to see what bearing that case has. There *A*, as shebait of an idol, sued. He sued after the normal period of limitation had expired, but he brought the case within the rule which relates to actions by minors for at the time the cause of action arose, he, the then shebait, was a minor and he sued within 3 years after attaining majority. It was held that even though the property be in the idol, the possession and management is in the shebait. Consequently the shebait alone has the right to sue for invasions of possessory rights and the fact that the appropriate plaintiff is a shebait does not affect the application of the section relating to minors. 4 M L W 369[12] is a very short judgment delivered in second appeal and purports to be based on the two decisions above cited. It would appear that the line of reasoning underlying that judgment is this : a temple can own but not possess. Possession is in the temple trustee : 32 Cal 129.[14] Therefore, if there is no trustee there is no one possessed of possession, no one to defend possession, no one against whom possession can be adversely held. Therefore the possession by a stranger is not adverse until trustees for the temple are appointed, for until then there is no one possessed on behalf of the temple.

However that may be, it does not touch this case where the right to sue was in the executor who at all material times was the person entitled to possession and was able to sue and knew all about the right of action, once one assumes he was aware of the true construction of the will. 2 M L W 723[15] was a case of a claim to a hereditary office and the question was whether Art. 120 or Art. 124 applied. It is discussing what is the starting point for limitation. It considers that it is "when the defendant takes possession of the office adversely to the plaintiff". Therefore if there is no "plaintiff", i. e. no one in existence capable of claiming, i. e. no trustee of the temple, there is no taking possession adversely to the plaintiff, for there is no plaintiff. That is all that case decides. At page 725 however is the following sentence :

> It is a recognized principle of law that the statute of limitation would not run when there is no person competent to sue. This is the principle underlying S. 17, Limitation Act .... This principle was acted on in England .... it being held that the cause of action could not be said to arise before "there is anybody in whom it vests".

In support of this proposition, as one depending not upon any particular section of a statute but upon a principle of procedure, there is then quoted (1821) 5 B & Ald 204=106 E R 1167.[16] In that case at p. 1171 Abbott C. J. observes :

> Now independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing.

Then turning to authority, the Lord Chief Justice refers to (1689-1712) 2 Salk 421[17], *Stanford's case*[18] and *Fairclaim v. Little* unreported but noted at p. 1171 of 106 E. R. The law of limitation is of course purely the creation of statute.

Here however there is a person capable of suing. I consider that here the real question is : If *A*, a trustee, alienates property he honestly believes to be his own, but which on a true construction of the deed of trust belongs to the *cestui que trust*, does time which the trustee allows

18. Peria Aiya Ambalam v. Shunmuga Sundaram, (1914) 1 A I R Mad 884=22 I C 615=38 Mad 903=26 M L J 140 (F B).

14. Jagadindranath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129=31 I A 203=8 C W N 809 =8 Sar 698 (P C).

15. Palaniyandi Malavarayan v. Vadamalai Odayar, (1916) 3 A I R Mad 1001=28 I C 956=2 M L W 723.

16. Murray v. The East India Co., (1821) 5 B & Ald 204=106 E R 1167.

17. Cary v. Stephenson, (1689-1712) 2 Salk 421= 91 E R 366.

18. *Referred in* Saffyn v. Adams, (1603-25) Cro Jac 60=79 E R 50.

to pass owing to this mistake, count when computing limitation ? So posed, the question appears to me to answer itself. If a person could extend the time for suing by alleging that he had mistaken the meaning of an instrument, a most serious inroad would be made into the law of limitation and that quieting of title which is the reason for and the policy behind the statutes of limitation would be gravely disturbed. But here indeed the matter hardly goes so far as that. Who is there now to say that the executor who alienated had misconstrued the will ? He may have been mistaken; he may have known all along the truth.

In any event a charity being the beneficiary, the Advocate-General could take steps and those of the family of the testator anxious to see his wishes carried out even if they could not directly sue, and as above indicated I incline to the view that they could, they could have informed the Advocate-General of the position or, what is quite clear, they could have, by appropriate proceedings with the leave of the Advocate-General, removed the executor-trustee from his trusteeship, replaced him by a new trustee which trustee could have sued. I am accordingly of the opinion that as to the 1898 alienation the defence of limitation succeeds.

C.R.K./D.S. *Decree modified.*

---

* A. I. R. 1938 Madras 66

NEWSAM J.

A. T. Lakshmi Ambalam — Petitioner.

v.

Andiammal — Respondent.

Criminal Revn. Case No. 65 and Petn. No. 61 of 1937, Decided on 6th October 1937, from order of Sub-Divisional Magistrate, Devakottah, D/- 30th November 1936.

(a) Criminal P. C. (1898), Ss. 488 and 439—High Court is loath to interfere with finding of fact in cases under S. 488—But it must interfere where awarding of maintenance to woman is not justified by definite finding that woman was legal wife.

The High Court will be very loath to interfere with a finding of fact as to whether there was a valid marriage between the parties, for the party aggrieved by the finding may always file a suit. But the High Court must interfere, if the Magistrate awards maintenance to a woman and does not justify his action by a definite finding that she is the wife of the person ordered to pay her maintenance. For, only legally married women are entitled to maintenance. [P 66 C 2; P 67 C 1]

*** (b) Criminal P. C. (1898), S. 488 (5)—'Living in adultery' means having de facto protector with whom wife lives and is being maintained by him as his wife—But man cannot desert his wife, thus tempt her to unchastity and then resist her claim to maintenance on that ground.**

The phrase 'living in adultery' means something quite different from living an unchaste life. The principle is that a husband is absolved from the obligation to maintain his wife when his wife has a de facto protector with whom she lives and by whom she is being maintained as if she were his wife. No woman can fairly claim a right to be kept by two men. But it obviously is not the law that a man may desert and neglect his wife and thus tempt her to unchastity and then resist her claim to be maintained by him on the ground that she is unchaste : *A I R 1936 Rang 446, Rel. on.* [P 67 C 1]

K. S. Jayarama Ayyar and R. Ramasubbier — *for Petitioner.*

S. Ramachandra Ayyar — *for Respondent.*

Public Prosecutor — *for the Crown.*

Order.—This is a petition praying that an order of the Sub-Divisional Magistrate, Devakottai, awarding Rs. 15 as maintenance to a woman and Rs. 5 as maintenance to her daughter, be revised. The petitioner resisted the respondent's claim for maintenance on two important grounds. The chief ground was that the woman seeking to be maintained was not his lawful wife. The pleadings are not exactly explicit on the point but their meaning is quite clear. Thus, petitioner said in his statement "she was taken as wife by me 12 years ago, though there was no actual marriage." There was a great deal of evidence on both sides on this question, but the Magistrate declined to give a definite finding. He seems to have been under the impression that a woman is entitled to maintenance if she has lived with a man as his wife for 12 years and has also borne him a child. That however is certainly not the law. Only legally married women are entitled to maintenance. I must therefore send this case back to the lower Court for a definite finding after hearing both sides on the evidence already on record on the question whether there was a valid marriage between the parties. I may perhaps add that this Court will be very loath to interfere with such a finding of fact, for the party aggrieved by the finding may always file a suit. But this Court must interfere if the Magistrate awards maintenance to a woman and does not

justify his action by a definite finding that she is the wife of the person ordered to pay her maintenance. For, only wives are entitled to maintenance.

The petitioner also pleaded that even if it be found that the woman is his wife, she is not entitled to maintenance because she is 'living in adultery'. The only evidence of that offered was that she was expecting a baby which could not be his and had more than one lover. Now, I understand the phrase, 'living in adultery' to mean something quite different from living an unchaste life. The principle, it seems to me, is that a husband is absolved from the obligation to maintain his wife when his wife has a de facto protector with whom she lives and by whom she is being maintained as if she were his wife. The obligation of a husband to maintain his wife arises from the anxiety of the Legislature to protect deserted wives from the bitter necessity of earning a living by trading on their sex. That obligation however ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men. But it obviously is not the law that a man may desert and neglect his wife and thus tempt her to unchastity and then resist her claim to be maintained by him on the ground that she is unchaste. This view of the meaning of the words 'living in adultery' receives support from A I R 1936 Rang 446.[1] The lower Court's order is set aside and the case remitted for disposal afresh on the evidence already on record in the light of the above remarks, i. e. after recording a finding on the validity of the marriage.

C.R.K./S.C. *Case remanded.*

1. Ma Mya Khin v. N. L. Godenho, (1936) 23 A I R Rang 446=1936 Cr C 864=165 I C 205 =37 Cr L J 1115=1937 R L R 86.

A. I. R. 1938 Madras 67

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

In re B. Kappini Gowder and others

Appellants.

Appeal No. 235 of 1935, Decided on 12th October 1937, against decree of Sub-Judge, Nilgiris, Ootacamund, in O. S. No. 53 of 1933.

Court-fees—Refund of—Appeal settled out of Court—Court-fee cannot be refunded — Inherent powers are not to be used for doing what is prohibited by statute.

The withdrawal of an appeal as having been settled out of Court does not come within the purview of S. 13, Court-fees Act. A court-fee properly paid on such appeal cannot be refunded, even in its inherent power, because no Court has inherent power to do that which is expressly prohibited by statute: *A I R 1934 Mad 566, Foll.*; *Case law referred.* [P 67 C 2]

V. T. Rangaswami Aiyangar — *for Appellants.*

K. S. Champagesa Aiyangar for Govt. Pleader — *for the Government.*

Venkatasubba Rao J.—The appeal has been withdrawn as having been settled out of Court and the appellant makes a somewhat unusual request that he should be allowed a refund of the court-fee paid on the memorandum of appeal. If we should have regard to what is taken to be the settled practice of this Court, this request should be summarily rejected; however, as a point of principle has been raised, we have gone into the matter carefully. Ss. 13, 14 and 15, Court-fees Act, deal with refunds of court-fee and of these, S. 13 provides for return of the fee paid on memorandum of appeal. The present case obviously does not come within the purview of that section. Then the question arises, has the Court power to direct a refund of a court-fee, independent of the express provisions of the Court-fees Act? The Courts have gone to the extent of holding that they can order a refund under their inherent powers, where an excess court-fee has been paid (i) by mistake of party and (ii) in obedience to a wrong order of Court. The principle underlying these decisions, if we may say so with respect, is both good law and sound sense. But to go further and hold that a court-fee, properly paid, can be refunded, would be to render nugatory the express provisions of the Court-fees Act, for, what difference does it make in principle between permitting a document to be filed originally without a court-fee and refunding the court-fee already paid in respect of it? It is elementary that no Court has inherent power to do that which is expressly prohibited by statute.

Then turning to authority, 57 Mad 1028[1] is directly in point and supports our view. There are two cases on which the applicant relies, namely 7 Luck 588[2] and

1. In re Chidambaram Chettiar, (1934) 21 A I R Mad 566 = 152 I C 778 = 57 Mad 1028=67 M L J 821.
2. Mahammad Saliq Ali Khan v. Ali Abbas, (1933) 20 A I R Oudh 170=146 I C 789 = 7 Luck 588=10 O W N 292.

A I R 1934 Cal 615.[3] These cases have, in our opinion, been rightly dissented from in the Madras case already referred to. Dissent has been expressed from those cases in other decisions also: *see* A I R 1935 Cal 707[4] and 14 Rang 173.[5] In the result the application is rejected with costs. The applicant will pay the fees payable to the Government Pleader, which we fix at Rs. 30.

C.R.K./B.D. *Petition rejected.*

3. J. C. Galstaun v. Janaki Nath, (1934) 21 A I R Cal 615=152 I C 215=38 C W N 185.
4. Indu Bushan v. Secretary of State, (1935) 22 A I R Cal 707=159 I C 443=62 C L J 298=40 C W N 309.
5. Chockalingam Ambalam v. Maung Tin, (1936) 23 A I R Rang 208=163 I C 340=14 Rang 173 (F B).

A. I. R. 1938 Madras 68

VENKATARAMANA RAO J.

Vadrevu Venkataratnam Garu — Appellant.

v.

Maharajah of Pittapur and others — Respondents.

Second Appeal No. 1207 of 1934 and Civil Revn. Petn. No. 2059 of 1934, Decided on 8th March 1937, against decree of Sub.Judge, Cocanada, in A. S. No. 16 of 1933.

Madras Irrigation Cess Act (7 of 1865), S. 1 (1)—Riparian land—Pre-settlement inam land situated on bank of stream—Channel from stream, origin of which was unknown, irrigating portion of land—Small portion only noted as wet in inam register—Land held riparian tenement—Riparian owner held entitled to irrigate whole land without liability to pay cess.

A single block of 11 acres of a pre-settlement inam land was situated on the bank of a stream. There was a channel which took water from the stream to irrigate a portion of land. The origin of the channel was unknown, equally so the origin of the inam. It was cultivated part as wet and part as dry. The inam register mentioned a part as wet. The zamindar claimed to levy water cess on the part of the land cultivated wet in excess of the extent noted in the inam register :

Held that the grant of the land carried with it the right of a riparian owner to utilise the water of the stream for purpose of irrigation. The fact that a small extent only was noted in the inam register as entitled to free irrigation did not restrict the rights of the inamdar as the riparian owner to irrigate the whole extent as wet without liability to pay for the water used. [P 68 C 2; P 69 C 1]

G. Lakshmanna and G. Chandrasekhara Sastri — *for Appellant.*

Ch. Raghava Rao — *for Respondents.*

Judgment.—The question in this case is whether the suit land is a riparian land abutting the river Yeleru and whether the plaintiff is not entitled to levy water cess for the utilisation of the water for the irrigation of the suit land. The question whether a particular land is a riparian tenement is always a question of fact depending on the circumstances of the case and upon several factors. I am satisfied upon the circumstances of this case that the suit land is a riparian tenement. The suit land is a pre settlement inam within the geographical limits of the Zamindari of Pittapur. It is a single block of land about 11 acres in extent bordered by the stream Yeleru; part of the land is dry and part of the land is wet. There is a channel, which takes water from the Yeleru river to irrigate a portion of the defendants' lands. The origin of the channel is unknown, equally so the origin of the inam. Having regard to the geographical situation of this plot, one can fairly presume that the grant of this land carried with it the right to utilise the water from the stream Yeleru and the fact that in an inam statement only 2 acres 87 cents is mentioned as wet is no criterion for restricting the user to the said extent. Reliance was placed by Mr. Raghava Rao on two English cases and on a passage in Coulson on 'Waters' and a decision of Sadasiva Ayyar J. in 34 M L J 223[1] as regards the extent of a riparian estate. It will be seen from those cases themselves that the learned Judges did not attempt to give a precise definition of what the extent of a riparian estate is. As Lawrence J. pointed out in (1926) 1 Ch 444[2] at p. 459 it depends upon a number of circumstances and all that is required is reasonable proximity to the river bank. One test laid down in Farnham and referred to by Sadasiva Ayyar J. in 34 M L J 223[1] at p. 226 is this :

> Under ordinary circumstances the individual acquires title to such an amount of land only as he can reasonably care for and cultivate by his own efforts with such paid assistants as his business ability makes it profitable for him to employ.

There is no question in this case that the suit land forms part of a single plot and also is in a single ownership. Taking this in conjunction with its geographical

1. Lakshminarasu v. Secy. of State, A I R 1919 Mad 1152=48 I C 113=34 M L J 228.
2. Attwood v. Llay Main Collieries, (1926) 1 Ch 444=95 L J Ch 221=134 L T 268=70 S J 265.

situation and its physical configuration, one can fairly presume on the facts of this particular case that the suit land is a riparian tenement. I therefore reverse the decision of the learned Subordinate Judge and restore that of the District Munsif with costs. No orders are necessary on the civil revision petition. (Leave to appeal asked for is refused).

C.R.K./S.C. *Appeal allowed.*

A. I. R. 1938 Madras 69

NEWSAM J.

Adiraju Mallikarjana Rao—Petitioner.

v.

Somavaram Co-operative Society and another—Respondents.

Civil Miso. Petn. No. 2899 of 1936, for issue of a writ of certiorari, Decided on 7th September 1937.

Madras Co-operative Societies Act (6 of 1932), S. 51 — Dispute between Society and ex-officer — Registrar has no jurisdiction to decide it — Submitting to jurisdiction without protest and acquiescing in decision for long time — Writ of certiorari cannot be obtained ex debito justitiae.

Though a Registrar of Co-operative Societies has no jurisdiction under S. 51 to decide a dispute between a Co-operative Society and its ex-officer, yet where a person submits to jurisdiction apparently without any protest and by his subsequent conduct acquiesces in the decision of the Deputy Registrar for a considerable period of time, the conduct of such person is such as to preclude the High Court from exercising its discretionary power in his favour. In such circumstaces, the person cannot obtain a writ of certiorari *ex debito justitiae* : *A I R 1927 Mad 130 (F B), Applied*; *(1921) 1 K B 248, Ref.* [P 69 C 2; P 70 C 1]

M. Appa Rao—*for Petitioner.*

V. Govindarajachari and S. Srinivasachari — *for Respondents.*

K. S. Champakesa Iyengar — *for the Government.*

Order. — This is an application for a writ of certiorari directed to the Somavaram Co.operative Society and the Deputy Registrar of Co.operative Societies. I am invited to quash the award of the Deputy Registrar to whom a dispute between petitioner (ex.President of the Society) and the Co.operative Society had been referred on the ground that the Deputy Registrar has no jurisdiction under S. 51, Co.operative Societies Act, to decide such a dispute. The facts are briefly as follows : The petitioner as President of the Society had made loans to four persons, which were irrecoverable. Petitioner ceased to be president on 17th July 1931. Over two years later (viz. on 25th November 1933) the Co.operative Society resolved to refer the matter to the arbitration of the Registrar and claim No. 2 of 1934 was filed very early in 1934 against petitioner. For a year, this claim was pending before the Deputy Registrar, being eventually decided only on 13th March 1935 in a long judgment which dealt with the merits fully, from which it does not appear that any objection was ever taken by petitioner to the jurisdiction of the Deputy Registrar under S. 51. It is on the other hand clear that petitioner resisted the claim and fought it on the merits. After the claim had been decided in March 1935, there was more than a year's delay on petitioner's part in applying to this Court for a writ of certiorari. An ill-advised revision petition was filed in September and dismissed in November. During this interval of a year, petitioner's property was sold in execution of the Deputy Registrar's decree, the sale was confirmed and the property delivered to the auction-purchasers. The present petition was filed only on 5th May 1936.

Now it has been held in 69 M L J 726[1] that a Registrar has no jurisdiction under S. 51 of the Act to decide a dispute between a Co.operative Society and an ex-officer. This decision, if I may say so with respect, seems to me to be correct and I therefore propose to deal with this petition on the assumption that the Deputy Registrar had in fact no jurisdiction to pass a decree. It still remains to consider whether I should interfere to quash his proceedings. The facts set out above show that petitioner has not only submitted to jurisdiction, apparently without any protest, but has by his subsequent conduct acquiesced in the decision for a considerable period of time. There is no foundation for his present statement that he challenged the Deputy Registrar's jurisdiction beyond the fact that a statement to that effect occurs in his affidavit filed in support of this petition, and I do not think it would be proper to accept that as a proved fact merely because the respondents in their counter-affidavits omitted to challenge the statement. Petitioner argues that being a person aggrieved by

1. Narayana Ayyar v. Co-operative Urban Bank Ltd. Tiruvellore, (1936) 23 A I R Mad 81= 159 I C 578=69 M L J 726.

the unwarranted usurpation of jurisdiction, he is entitled *ex debito justitiae* — as a matter of right—to a writ, and he relies for this proposition on (1921) 1 K B 248,[2] where a distinction is drawn between writs applied for by persons interested and writs demanded by persons aggrieved. But in that case the effect of gross delay, as in this case, by a person aggrieved in applying for a writ was not decided. The learned Lord Chief Justice concluded the judgment in that case in these words :

> On the facts there is nothing sufficiently shown to raise the point of law argued by Sir John Simon (viz. the effect of delay when the writ goes *ex debito justitiae*) and it is not desirable to give a decision in express terms where the point does not really arise.

But in the present case the conduct of petitioner is such as to leave no room for any doubt that for over two years after the case had been referred under S. 51 to the Deputy Registrar it never even occurred to him that this officer had no jurisdiction. He took his chance of success before that tribunal and it was not until he had failed and until the adverse decree had been executed that he elected to move this Court for a writ. My attention has been drawn to the case reported in 50 Mad 130[3] It was there pointed out by a Bench of three Judges that prima facie the English decisions establish the proposition that in such circumstances the applicant cannot obtain a writ of certiorari *ex debito justitiae*, but that the Court exercises a purely discretionary power. The test, it was held, is whether the applicant armed with a point either of law or of fact, which would oust the jurisdiction of the lower Court, has elected to argue the case on its merits before the Court. Judged by that test, I have no hesitation in finding that the petitioner has so conducted himself as to preclude this Court from exercising its discretionary power in his favour. The petition is therefore dismissed with costs (two sets, advocate's fee Rs. 35 each).

C.R.K./B.D. *Petition dismissed.*

2. Rex v. Richmond Confirming Authority; Ex parte Howitt, (1921) 1 K B 248=90 L J K B 413=124 L T 345=85 J P 84=37 T L R 62.

3. Latchmanan Chettiar v. Corporation of Madras, (1927) 14 A I R Mad 130=99 I C 152 =50 Mad 120=51 M L J 742 (F B).

A. I. R. 1938 Madras 70

BURN AND LAKSHMANA RAO JJ.

Canteen Contractors Syndicate Ltd., Madras — Appellants.

v.

Corporation of Madras—Respondent.

Referred Case No. 1 of 1935, Decided on 16th September 1937, referred by the Chief Judge, Small Cause Court, Madras.

Madras City Municipalities Act (4 of 1919), S. 110 and Sch 4, Part 2, R. 7 — Company with head office at Karachi — Warehouse in Madras under manager — Manager having no discretion in fixing prices and banking all moneys received — At times sales made to public and purchases made locally — Company held transacting business within city and it could be taxed only under Proviso to R. 7.

A syndicate which was a limited liability company with head office at Karachi, had a warehouse in Madras. The depot in Madras was under the control of a manager who had no discretion with regard to prices, which were fixed by the general manager at Karachi from time to time. The money realised by the manager by sale was banked by him to the credit of the head office. But it was admitted by the manager that on occasions sales were made to the public and purchases were made locally for supply to the contractors by him and that income-tax report in respect of the costs of the business in Madras was also submitted to the head office :

Held that under these circumstances the said company was transacting business within the city for profit within the meaning of S. 110. [P 71 C 1, 2]

Held further that the warehouse in Madras could not be deemed to be a branch of the Syndicate and therefore the Company should be assessed only under the Proviso to R. 7 of Part 2 of Sch. 4. [P 71 C 2]

S. V. B. Rao — *for Appellants.*

A. Suryanarayaniah — *for Respondent.*

Burn J.—This is a reference by the learned Chief Judge of the Small Cause Court, Madras, under R. 17 of the Taxation Rules in Sch. 4, Madras City Municipal Act. The points submitted for decision are : (1) Whether the appellant Company's depot at Madras is liable to be assessed to pay companies tax under R. 7, Part 2, Sch. 4, Madras City Municipal Act; and (2) if such a tax can be levied, whether the assessment should be made under the Proviso to the above-mentioned Rule?

The appellant company is entitled "The Canteen Contractors Syndicate Ltd." It is a limited liability company registered under the Companies Act. The members of the Company are Canteen Contractors approved by the Army Department and the object with which the Company was formed was mainly the

purchase overseas of all kinds of supplies required for the troops in India and the distribution of those supplies to the contractors (who also have to be approved by the Army Department). The head office of the Canteen Contractors Syndicate Ltd. is at Karachi. In Madras the Syndicate maintains a warehouse. In charge of the warehouse, there is a manager on Rs. 200 a month and he keeps six clerks who keep records of the articles received and the articles distributed. It is clear from the evidence of the manager that the members get their supplies from the warehouse, on indents which they fill in in the prescribed form. The manager of the warehouse has no discretion with regard to the prices, which are fixed by the general manager at Karachi from time to time. But the members when they take delivery of the goods from the warehouse pay for them by drawing cheques in favour of the Canteen Contractors Syndicate Ltd. and handing them to the manager of the warehouse. This, it is quite clear, is a series of transactions of sale. All the goods in the warehouse in one sense belong to the Canteen Contractors Syndicate Ltd.; but that is not of course the same thing as saying that the goods belong to the several members of the Syndicate. The members purchase the goods from the Syndicate and pay for them in the ordinary way. The advantages they get are of course derived from the purchase on a large scale by and through the head office in Karachi. The manager of the warehouse stated in his evidence that the money realised by him was banked by him to the credit of the head office. But he admitted in cross-examination that he had submitted income-tax reports to the head office in respect of the costs of the business done in Madras. He stated also that although practically the whole of the Syndicate's business is done with its own members, there are occasions on which sales are made to the public and on which purchases are made locally in the bazaar. These, according to the manager, are a very small proportion —he said 1/10th per cent.— of the whole; but nevertheless such transactions are made from time to time when there is a surplus stock or when there is a temporary deficiency. On these facts, we have no hesitation in holding that the Canteen Contractors Syndicate Ltd. is transacting business within the city for profit within the meaning of S. 110, Madras City Municipal Act. We answer the first question accordingly.

The second question is whether the Company is to be assessed to tax under the Proviso to R. 7 of the Taxation Rules in Sch. 4. As we have already observed, the head office of this Syndicate is at Karachi. It is not suggested that there is a principal office of the Syndicate in the City of Madras. The only suggestion that has been made is that there is a branch office Syndicate in Madras. From the description of his duties given by the manager of the warehouse, we are clearly of opinion that there is no branch of the Canteen Contractors Syndicate Ltd. in Madras. There is a warehouse and in the warehouse business is done for and on behalf of the Syndicate but the warehouse is not a branch of the Syndicate. The manager, as already mentioned, is under the strictest control from Karachi. He has no discretion with regard to the prices; and he has no power of disposal of the money received from the members for goods supplied to them. He is obliged to pay all such moneys immediately into the Imperial Bank to the credit of the head office. The warehouse in Madras clearly cannot be described as a branch of the Syndicate. That being so the assessment of tax on the Company must be made under the Proviso to R. 7. The second question referred to us is answered accordingly. Since the Canteen Contractors Syndicate Ltd. the assessees have failed on the first point and the Corporation has failed on the second point, we think it right to direct that each of the parties shall bear its own costs.

C.R.K./B.D. *Answer accordingly.*

A. I. R. 1938 Madras 71

HORWILL J.

Sri Venkataramanaswami Temple, Kanampalli — Appellant.

v.

Ramaswami and others — Respondents.

Second Appeal No. 35 of 1936, Decided on 6th September 1937, against decree of Sub-Judge, Salem, in A.S. No. 141 of 1934.

Hindu Law —Religious endowment—Practice of archaka taking hundi collections for his own maintenance and for expenses of pooja — Legal origin of practice not known but practice long in existence and no evidence to contrary—Legal origin to practice held could be presumed.

The presumption of a legal origin is a rule of convenience, for, if there were no such presump-

tion, it would be impossible in many cases to decide what the rights of the parties were. It is proper to apply this rule provided that the presumption of legal origin is practicable and reasonably capable of being presumed without doing violence to the probabilities of the case: *A I R 1922 P C 163 and A I R 1930 P C 103, Foll.*

[P 72 C 2]

Where nothing was known as to the legal origin of the practice, the archaka of a certain temple claimed that he should take the whole of the hundi collections for his own maintenance expenses and for the expenses of the pooja and there was no evidence of any agreement entered into between the trustees and the archakas permitting the archakas to appropriate that money, and all that was known was that the practice was in existence as long as witnesses were able to remember and no evidence to the contrary had been produced :

Held that to presume a legal origin to the practice was not unreasonable or against the probabilities arising from the evidence produced in the case: *A I R 1935 Mad 220, Foll.*; *A I R 1917 Mad 112, Disting.* [P 72 C 2]

B. Somayya — *for Appellant.*

C. S. Venkatachariar and D. Ramaswami Ayyangar — *for Respondents.*

Judgment. — The question argued in this appeal is whether the practice that the archaka should take the whole of the hundi collections for his own maintenance expenses and for the expenses of the pooja is an illegal practice opposed to public policy. The first Court, on the authority in 40 Mad 212,[1] thought it was; but the Appellate Court has thought that the more recent case, 68 M L J 295,[2] shows that appropriation by archakas of a fixed portion of the hundi collections is not necessarily an illegal practice.

Mr. Somayya has taken me through 40 Mad 212[1] at some length to try to satisfy me that the facts of that case fully resemble those in the present case; but it would appear that in 40 Mad 212[1] the archakas at no time claimed a right to appropriate the hundi collections except on the ground that such an appropriation was necessary for the maintenance and proper performance of the ceremonies connected with the temple. It also appears in that case that the Government, apparently then representing the temple, interfered from time to time with the appropriation of the collections by the archakas and only allowed them to enjoy it because they were satisfied that it was necessary in the interests of the proper performance of the ceremonies of the temple. The agreement which subsequently came up for consideration in that case was one entered into between the trustees and the archakas, whereby the archakas were to appropriate the collections and give to the temple the sum of Rs. 300. It was held that the trustees had no authority to make a permanent arrangement of this kind and that it was a breach of trust to do so. In 68 M L J 295[2] there was also a practice whereby the archakas appropriated a fraction of the hundi collections, and out of that sum they had to maintain themselves and perform certain poojas and other ceremonies. Varadachariar J. held that such a practice was not repugnant to Hindu ideas and that when the origin of the practice was unknown, it must be assumed to be a legal one. The presumption of a legal origin is a rule of convenience ; for, if there were no such presumption, it would be impossible in many cases to decide what the rights of parties were. Their Lordships of the Privy Council, in considering this matter in 46 Bom 481[3] and 57 Cal 1293,[4] recognized the propriety of applying this rule, provided that the presumption of legal origin was practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. In the case before us, nothing is known of the origin of this practice, and no evidence exists of any agreement entered into between the trustees and the archakas permitting the archakas to appropriate this money. All that we know is that the practice has been in existence as long as witnesses can remember—and no instance has been given of any occasion on which the archakas have not appropriated this money. It cannot be said that the presumption of a legal origin to the practice is unreasonable and against the probabilities arising from the evidence. The lower Appellate Court was therefore justified in presuming a legal origin.

It may be mentioned, although the matter is not of any great importance, that the archaka does not claim everything that is put in the hundi ; but only

1. Venkataramana v. Kasturiranga, (1917) 4 A I R Mad 112=38 I C 73=40 Mad 212=31 M L J 777 (F B).
2. Prayag Dossjee Varu v. Govindacharulu, (1935) 22 A I R Mad 220=157 I C 647=68 M L J 295.
3. Magniram Sitaram v. Kasturbhai Manibhai, (1922) 9 A I R P C 163=66 I C 162=49 I A 54=46 Bom 491 (P C).
4. Mahammad Mozaffar Musavi v. Jabeda Khatun, (1930) 17 A I R P C 103 = 128 I C 722=57 I A 125=57 Cal 1293 (P C).

the cash. Certain saffron coloured pieces of cloth with coins tied in them, etc., and gold and silver articles are also placed in the hundi ; and the archaka does not deny that this property belongs to the temple. There is only one exhibit in the case that has any bearing on the case, and that is Ex. K. It bears the date 10th December 1909 and purports to be a patti signed by one Balaji Rao, presumably the manager of the temple for that year, setting out the expenses incurred for the payment of servants for the necessary services of the temple. In accordance with that patti, the Government made a grant of Rs. 81.11.2; but it does not appear that it was expected that the money should be spent in precisely the manner set out in Ex. K. Ex. K purports to be rather an estimate of the expenses that had been met by the state before the British Government assumed power or, at any rate, the expenses of the temple which the present Government felt it their duty to meet. Ex. K shows that the maintenance of the archaka was estimated at Rs. 17.12.5, and certain other sums were allowed for the performance of the daily pooja and so on. Presumably, the claim of the archaka is that he should be entitled to whatever sum is placed in the hundi, subject to the minimum of this sum granted by the Government in accordance with this patti. I do not think there is anything in this patti which would limit the right of the archaka to Rs. 17.12.5 remuneration; and in fact Mr. Somayya has fairly conceded that if the archaka is not entitled to the hundi collections, further relief would have to be granted to him. I therefore agree with the lower Appellate Court and dismiss this appeal with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 73

HORWILL J.

Sanapathi Sitharamiah — Appellant.

v.

Nandarapu Ramaswamy and others — Respondents.

Second Appeal No. 349 of 1933, Decided on 9th September 1937, against decree of Sub-Judge, Vizagapatam, in A. S. No. 6 of 1931.

Limitation Act (1908), Art. 139—Suit by landlord to recover possession from tenant—Tenant proving determination of tenancy—Landlord alleging continuation of tenancy must prove it.

Article 139 bars a suit by the landlord to recover possession of the leased property from the tenant after the expiration of 12 years from the date when the tenancy was terminated. Where the question of limitation is involved, the burden is on the tenant to prove when the tenancy was determined. [P 74 C 1, 2]

Where the defendant continued in possession of the leased property for more than 12 years even after the expiry of the tenancy and it was not proved that he paid rent or that the plaintiff, the landlord, assented to the possession of the defendant after the period of the lease or that the defendant had accepted the title of the landlord :

Held that the suit was barred under Art. 139 : *A I R 1925 Mad 446, Rel. on.* [P 74 C 1]

V. Govindarajachari — *for Appellant.*

C. Rama Rao — *for Respondents.*

Judgment.—It has been proved to the satisfaction of the Courts below that the contesting defendants 3 to 5 executed a lease deed Ex. A in favour of the plaintiff's father in 1906 for a period of three years. There is also abundant evidence that the defendants have been in possession since then up to the date of suit; and there is no evidence to suggest that the defendants were ever out of possession. There is also no evidence that the defendants ever paid any rent either to the appellant or to the plaintiff's father and his brothers. The trial Court found on these facts that as it must be presumed that defendants 3 to 5 continued in possession as tenants of the plaintiff, the possession remained with the plaintiff, at any rate until 1923, when the plaintiff brought a suit on a lease deed which was found to be not genuine. It therefore decreed the suit in the plaintiff's favour. In appeal it was held that the plaintiff had not been in possession within twelve years and that the suit had therefore to fail. Unfortunately the question whether the possession of the defendants was a possession by virtue of the relationship of landlord and tenant existing between them was not properly discussed by the lower Appellate Court and so this second appeal has been filed against the decree of the lower Appellate Court dismissing the plaintiff's suit. The plaintiff has brought this suit on his title, and ordinarily he would have to prove possession within twelve years of suit. Admittedly he has not proved physical possession and the only question that arises here is whether he was in possession within twelve years of suit by virtue of the relationship of landlord and tenant existing between the plaintiff and defendants 3 to 5. It is argued that the fact that the

defendants continued in possession of the property after the expiry of the lease Ex. A shows that they must have continued as tenants holding over, that the burden is upon the defendants to show when that tenancy was determined, and that a suit brought within twelve years of the determination of the tenancy would have to be decreed.

It is contended that the defendants are estopped from denying the title of the plaintiff as they have never given up possession to the plaintiff. S. 116, Evidence Act, does not go so far as to require that. That section only estops a tenant from disputing his landlord's title during the continuance of the tenancy. It has however been held in two cases, 32 C W N 367[1] and 24 C L J 103,[2] that estoppel continues even after the expiration of the period of the lease, unless the tenant has openly surrendered possession or has at least given notice to his landlord that he claims under his own title. There is no evidence in this case either to show that the tenant did deny the landlord's title soon after 1909 or that he did not; but Art. 139, Lim. Act, bars any suit to recover possession from the tenant after the expiration of twelve years from the date when the tenancy is determined. This has been laid down by Venkatasubba Rao J. in 48 M L J 185,[3] following older cases; but the argument of the learned counsel for the appellant is that it must be presumed that defendants 3 to 5 continued as tenants even after 1909. I can find no reason why I should presume this. There is no evidence that the defendants paid rent, nor is there any evidence that the plaintiff assented to the possession of the defendants after 1909 or that the defendants accepted the title of the landlord. Undoubtedly, if there had been any evidence at all that at any time after 1909 the defendants 3 to 5 had paid rent to the plaintiff's father or to the plaintiff or to defendants 1 and 2, then there would be positive evidence that in the year in which that rent was paid the relationship of landlord and tenant existed, and then the burden would be on defendants 3 to 5 to prove when that relationship ceased; but where there is no evidence at all that rent was at any time paid, there is no reason at all to believe that there was any relationship of landlord and tenant after 1909. Where a question of limitation is involved, the burden is on the defendants to prove when the tenancy was determined; but they have done so in this case by reference to Ex. A itself, which shows that the tenancy that the plaintiff relied on ceased in 1909. If any tenancy arose after 1909, the plaintiff would have to prove it. If they could do so, then the defendants will have to prove when that tenancy was determined.

The learned Advocate for the appellant, while conceding that the plaintiff has to prove a tenancy, either by evidence or by implication of law, complains that the plaintiff was not afforded an opportunity of letting in the necessary evidence, as no issue was framed in the trial Court regarding the date on which the tenancy was determined; and the Appellate Court gave that matter no consideration at all. This is due to the fact that the plaintiff's case in the trial Court differed from the case argued here in second appeal. The plaintiff did not say in his plaint that the defendants, after the expiry of the lease in 1909, were holding over from year to year; but on the contrary that the defendants had executed leases from time to time in favour of the plaintiff's father and his successors and were paying rent on those leases. That case the plaintiff failed to prove; and he did not assert in his plaint that the relationship between the plaintiff's father and the defendants was that of landlord and tenant holding over after the expiration of the lease. I cannot see therefore that the plaintiff has any cause for complaint with regard to the issues framed in the trial Court. The second appeal is accordingly dismissed with costs. Leave to appeal is refused.

C.R.K./B.D. *Appeal dismissed.*

1. Mujibar Rahman v. Isuh Surati, (1928) 15 A I R Cal 546=114 I C 409=56 Cal 15=49 C L J 1=32 C W N 867.
2. Bhaiganti Bewa v. Himmat Bidyakar, (1917) 4 A I R Cal 498=35 I C 7=24 C L J 103=20 C W N 1335.
3. Sudalaimuthu Thevan v. Sappani Thevar, (1925) 12 A I R Mad 446=86 I C 933=48 M L J 185.

---

* A. I. R. 1938 Madras 74

NEWSAM J.

In re Unna Muhammad Sahib

Petitioner.

Criminal Revn. Case No. 108 and Petn. No. 100 of 1937, Decided on 24th September 1937, from judgment of Sub-Divisional Magistrate, Ranipet, D/. 3rd November 1936.

*** Madras Gaming Act (3 of 1930), S. 12 — Gambling to be offence must be in public place—Such place means place regularly and necessarily used by people.**

Gambling is not a criminal offence in itself. Gambling in public street, place or thoroughfare is an offence. It is not an offence to gamble in every public place. Word "place" in S. 12, Madras Gaming Act, means from its context a place akin to a street or thoroughfare used regularly and necessarily by people going from one place to another. The real offence dealt with in S. 12 is obstruction or annoyance to wayfarers and pedestrians : *30 Bom 348, Rel. on.* [P 75 C 1]

V. T. Rangaswamy Aiyangar and K. Ramaswami Aiyangar — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order. — Gambling is not a criminal offence in itself. Gambling in a public street, place or thoroughfare is an offence. The facts are that petitioner (appellant 4 and accused 5 in the case) and others were caught playing cards for money in a tank-bed at 3.30 P. M. I do not think that this amounts to an offence. I agree with the conclusion in 30 Bom 348[1] that it is not an offence to gamble in every public place. The word "place" in S. 12, Madras Gaming Act, means from its context a place akin to a street or thoroughfare, used regularly and necessarily by people going from one place to another. The real offence dealt with in S. 12 is obstruction or annoyance to wayfarers and pedestrians. I allow this petition and set aside the conviction and sentence on petitioner.

C.R.K./B.D. *Petition allowed.*

1. Emperor v. Hussain Noor Mahomed, (1906) 30 Bom 348=8 Cr L J 216=8 Bom L R 22.

---

*A. I. R. 1938 Madras 75

LEACH C. J. AND VARADACHARIAR J.

Penatapati Nageswara Rao — Petitioner.

v.

Moka Narayanamurthi and another — Respondents.

Civil Revn. Petn. No. 945 of 1936, Decided on 30th August 1937, from decree of Sub.Judge, Amalapuram, in S. C. S. No. 338 of 1935.

*** Stamp Act (1899), S. 35 — Improperly stamped pro-note — Inadmissible to prove acknowledgment of prior instruments : *A I R 1930 Mad 485=124 I C 53 and A I R 1933 Mad 251=141 I C 169, Overruled.***

An improperly stamped promissory note cannot be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed : *A I R 1930 Mad 485=124 I C 53 and A I R 1933 Mad 251=141 I C 169*, Overruled ; *A I R 1937 Mad 364 and Mad. S. A. No. 124 of 1930, Rel. on.* [P 77 C 1]

V. Viyanna — *for Petitioner.*

Leach C. J.—The question raised by this petition is whether an improperly stamped promissory note can be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed. The petition arises out of a suit filed in the Court of the Subordinate Judge of Amalapuram. The promissory note was in the following terms :

On account of my necessity this day, that is, the amount due for principal and interest on the promissory note executed and delivered on 23rd June 1929 is Rs. 93-3-0 ; the amount due on the promissory note executed and delivered on 6th July 1929 is Rs. 92-13-0 and the amount due for principal and interest on the promissory note executed and delivered on 14th February 1931 is Rs. 101. The total is Rs. 287. On demand I promise to pay you or order in one lump sum the (said) principal together with interest thereon at Re. 1-9-0 (one rupee and nine annas) per cent. per mensem, shall get the payment endorsed on this note and take it back. The consideration hereof has been received as aforesaid. This promissory note is executed with consent.

On a stamp of the value of one anna was appended the signature of the executant. The learned Judge before whom the case came refused to admit this document on the ground that its admission was prohibited by S. 35, Stamp Act 1899. The learned advocate for the petitioner contends that this decision is wrong. He says that the learned Judge should have admitted that portion of the document which recited the previous promissory notes, and that this would have saved limitation in respect of the earlier instruments. The relevant portion of S. 35 reads as follows :

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped.

It will be observed that the instrument shall not be admitted in evidence for any purpose, nor shall it be acted upon, unless it bears the stamp prescribed by law. I should have thought that on the wording of this section it was clear that the promissory note in suit could not be admitted in evidence for the purpose sought by the petitioner or for any other purpose. But the petitioner's counsel has quoted two

cases decided by Pandalai J. which support his contention. He also relies on a passage from the work of the late Sir Dinshah Mulla on the Indian Stamp Act. Before referring to these authorities, I would point out that the words 'for any purpose' did not appear in the General Stamp Act 1869, but were inserted for the first time in the Indian Stamp Act 1879, and that they were not introduced into the English Act until the year 1891 (54 and 55 Vict., Ch. 39). In 1849 the question of the admissibility of an improperly stamped document for collateral purposes was discussed by the House of Lords in (1849) 2 H L 286.[1] It was there held that where a paper purported to be a receipt, and, as such, required a stamp, but also purported to be an agreed statement of accounts, which did not require a stamp, it might be given in evidence to show the agreed state of accounts only, though it had not been previously stamped. But it has since been accepted that the amendment in the English Act in 1891 has worked a change.

In A I R 1930 Mad 485,[2] Pandalai J. held that where a promissory note contained, in addition to the promise, a statement that the amount for which it was given was due in settlement of a previous account, the instrument, although inadmissible as a promissory note for want of sufficient stamp, was admissible to prove an acknowledgment under S. 19, Lim. Act. The reason given was that S. 35, Stamp Act, merely shuts out the portion of the document which constitutes the promissory note and does not affect other statements in the document. The learned Judge expressed the same opinion in a later case, A I R 1933 Mad 251,[3] but it did not find acceptance by Beasley C. J. in the recent case in (1937) 1 M L J 163.[4] The learned Chief Justice there held that an insufficiently stamped promissory note could not be used for the purpose of proving an acknowledgment by the maker of it of his indebtedness. This was also a case in which it was sought to save limitation by the admission of the instrument in evidence. In the course of his judgment, Beasley C. J. referred to the unreported case in S. A. No. 124 of 1930,[5] where he and King J. sitting as a Bench, dissented from the opinion of Pandalai J. The learned advocate for the petitioner has not referred us to any other decided cases which support the proposition which he has advanced, but has laid stress on a passage to be found at p. 122 of Edn. 3 of Sir Dinshah Mulla's work. The conclusion arrived at by the author of that work is to the effect that an instrument not duly stamped may be admissible as proof of a collateral matter, but is not admissible as proof for a collateral purpose. By 'collateral matter' is meant any matter the proof of which does not depend upon proof of the transaction, and by 'collateral purpose' any matter the proof of which depends upon proof of the transaction. With great respect I consider that this statement conflicts with the wording of the section, which is very precise. Sir Dinshah Mulla would appear to go back to the case in (1849) 2 H L 286,[1] which was decided before the words 'for any purpose' were introduced into the statute. That the English law since the passing of the Act of 1891 is not the same as it was when (1849) 2 H L 286[1] was decided is to be gathered from the decision of President of the Probate, Divorce and Admiralty Division (Sir Samuel Evans) and Bargrave Deane J. in (1914) P 274,[6] where it was held that the effect of the Stamp Act of 1891 is that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose. Sir Samuel Evans in his judgment remarked that whatever the law was before 1891, he was of opinion that the instrument with which the Court was then concerned was not admissible. As I have already pointed out, the English Stamp Act of 1891 is the same as the present Indian Stamp Act in this respect.

The Bombay High Court in 21 Bom 201[7] held that an acknowledgment of a debt coming under Art. 1, Sch. 1, Stamp Act 1 of 1879, could not if unstamped be given in evidence for any purpose including the purpose of saving limitation.

1. K. Matheson v. A. Ross, (1849) 2 H L 286=9 E R 1101.
2. Rakkappan Ambalam v. Suppiah Ambalam, (1930) 17 A I R Mad 485=124 I C 53.
3. Vencheswara Sastri v. Narayana Iyer, (1933) 20 A I R Mad 251=141 I C 169.
4. Ramanatha Ayyar v. Narayanaswamy Iyer, (1937) 24 A I R Mad 364 = 169 I C 692 = (1937) 1 M L J 163.
5. K. M. Subbayyar & Sons v. P. M. Lakshmana Iyer, Second Appeal No. 124 of 1930.
6. Fengl v. Fengl, (1914) P 274 = 84 L J P 29 = 112 L T 173=59 S J 42=31 T L R 45.
7. Mulji Lala v. Lingu Makaji, (1897) 21 Bom 201 (FB).

There have been similar decisions by other High Courts, but it is not necessary to examine them in detail. The section itself, in my opinion, provides a complete answer to the petitioner's case. If an unstamped document cannot be admitted for any purpose, it must mean, if the words are to be given their ordinary and plain meaning, that it cannot be admitted under any circumstances in a civil suit. If the Legislature in placing this provision of law on the statute book had intended to allow unstamped instruments to be admitted for collateral purposes, it would surely have said so. It did not say so, but on the other hand it provided that a negotiable instrument which is insufficiently stamped at the time of execution cannot be properly stamped afterwards, even on payment of a penalty which is allowed in the case of other documents. For these reasons the petition must be dismissed.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1938 Madras 77

LEACH C. J. AND VARADACHARIAR J.

Champion Automobiles Ltd., Madras— Appellants.

v.

Travancore National Bank Ltd. — Respondents.

Appeal No. 1 of 1936, Decided on 19th August 1937, against decree of City Civil Court, Madras, D/-22nd November 1935.

Banker and customer—Bank rule providing closure of depositor's account without reference—Rule held legal and valid.

A rule of a Bank that it could close the account of any depositor without any reference to him, in case it thought undesirable to keep such account open for any reason whatsoever, is not prohibited by law nor is it immoral nor against public policy ; it is merely one of the terms of a contract between the depositor and the Bank. [P 77 C 2 ; P 78 C 1]

M. Chelva Iyengar and P. G. Raghavendra Rao — *for Appellants.*

Dr. V. K. John and C. M. Kuruvilla — *for Respondents.*

Leach C. J. — The appellant was the plaintiff in a suit filed in the City Civil Court for the recovery of damages for the dishonouring of a cheque. The respondent is a Bank carrying on business in Mount Road, Madras. In September 1932 the appellant opened an account with the Bank. The Bank had rules regarding the keeping of accounts and one of the rules reads as follows :

> The Bank reserves to itself the right to close any account without reference to the depositor if in the opinion of the Bank it is not desirable to keep such account for any reason whatsoever.

This was one of the conditions on which the plaintiff's account was opened and it formed part of the contract between him and the Bank with reference to his account. There was a further rule to the effect that a depositor should always have a minimum credit balance of Rs. 100. On 1st August 1934 when his account was standing in credit to the extent of Rupees 15.4.7, the appellant drew a cheque in favour of one C. R. Parthasarathi Mudaliar for Rs. 12, but the Bank closed the account that day. The cheque was presented for payment on 3rd August when payment was refused on the ground that the account had been closed since the cheque had been drawn, the cheque being returned with an endorsement on a separate slip bearing the words "account since closed". When closing the account on 1st August, the Bank wrote to the plaintiff informing him of the fact and sent him pay warrants for Rs. 15.4.7 and Rs. 3.11.1, the latter sum representing interest which the Bank admitted had accrued due to the plaintiff in respect of his account. This letter was received by the plaintiff on 3rd August, and on that date he wrote to the Bank stating that he had drawn a cheque for Rs. 12 on 1st August. He accordingly returned the warrant for Rs. 15.4.7 to meet this cheque. He kept the warrant for Rs. 3.11.1 against a larger claim for interest. He alleged that the Bank was indebted to him for interest in the sum of Rs. 10 and had in fact already filed a suit to recover this amount. The relations between the parties therefore were not on an amicable basis when the account was closed by the Bank, but this does not affect the question at issue. The learned Judge found that there was no cause of action and in disposing of the claim observed :

> It is argued that such a rule (that is the rule giving the Bank the right to close an account without reference to the depositor) is invalid because it is opposed to the ordinary code of banking business. But so long as it is not in violation of a statutory obligation, I do not see why parties should not contract themselves in the manner they have chosen to do. The rule is in the nature of a contract entered into between the parties. It cannot be said that there is a statutory prohibition. Neither can it be said that it is immoral or that it is opposed to public policy. Under the circumstances I am of opinion

that plaintiffs were not entitled to be given notice before the account was closed.

We are in entire agreement with these remarks. The rule is worded without any ambiguity. It gives the Bank the right to close the account at any time without giving the plaintiff notice of the fact. I might add that in returning the cheque the Bank was careful to point out that the account had been closed after the drawing of the cheque. Therefore there was no reflection on the plaintiff, not that this would make any difference to the plaintiff's position, but it does provide another ground for holding that the plaintiff has brought this action without any justification. The appeal will be dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1938 Madras 78

VENKATARAMANA RAO J.

Chintalapudi Venkataramayya —
Appellant.

v.

Potula Venkataramayya and another—
Respondents.

Second Appeal No. 569 of 1933, Decided on 6th August 1937, against decree of Sub-Judge, Amalapuram, in A. S. No. 55 of 1931.

Civil P. C. (1908), O 21, R. 16 and S. 47 — Application for execution by transferee of decree—Opposition by judgment-debtor that transfer was sham — Court must decide validity of transfer before making order—Order of Court thereafter is decree under S. 47—Separate suit to declare transfer invalid is barred by S. 47.

Where a transferee of a decree applies for its execution and the judgment-debtor opposes it on the ground that the transfer was sham and collusive and without consideration, the Court is bound to determine the validity of the transfer under O. 21, R. 16 before making an order and where such question has been determined by the Court and the order for execution has been made, it is a decree within the meaning of S. 47. A separate suit by the judgment-debtor for declaration that the transfer of the decree is invalid is barred by S. 47 : *26 Mad 264 and A I R 1929 Lah 51, Disting.*; *Case law referred.* [P 79 C 1]

K. Bhimasankaram—*for Appellant.*

Ch. Raghava Rao, S. Rajaraman and M. Balakrishnamurthi —
for Respondents.

Judgment.—The question in this second appeal is whether S. 47, Civil P. C., operates as a bar to the maintenance of the suit instituted by the plaintiff for a declaration that the transfer of a decree obtained by defendant 1 against him in favour of defendant 2 is invalid. Both the lower Courts took the view that it does not. This view is canvassed in second appeal. The question is whether it is sound. The material facts bearing on the question are these : Defendant 1, Rednam Sitaramiah obtained a decree in S. C. S. No. 208 of 1926 on the file of the District Munsif's Court of Amalapuram on 9th August 1926 against the plaintiff Potula Venkataramayya and another. Defendant 2 obtained a transfer of the said decree on 17th February 1927, under Ex. 3-A, and as the transfer deed was defective, a later transfer was effected on 12th March 1927, under Ex. C. In pursuance of that transfer defendant 2 applied on 22nd March 1927 for leave to execute the decree under O. 21, R. 16, Civil P. C. The judgment-debtors oppose the application for execution. Their grounds of objection are these. On 22nd July 1926, one Pundareekashadu obtained a decree in S. C. S. No. 29 of 1926 on the file of the Sub-Court, Bezwada, against Rednam Sitaramayya, the decree-holder in S. C. S. No. 208 of 1926, the assignor of defendant 2. On 3rd February 1927, the said Pundareekashadu assigned the decree to Potula Venkataramayya, the present plaintiff, i. e. one of the judgment-debtors in S. C. S. No. 208 of 1926. In pursuance of the transfer he applied for leave to execute the said decree in S. C. S. No. 29 of 1926, got a transfer of the said decree to the District Munsif's Court of Amalapuram and attached the decree in S. C. S. No. 208 of 1926. Both the judgment-debtors in S. C. S. No. 208 of 1926 alleged that the transfer of the said decree in favour of defendant 2 was nominal and collusive and without consideration and was brought about to defraud the rights of Potula Venkataramayya under the decree in S. C. S. No. 29 of 1926.

Two questions were raised, namely whether the transfer in favour of defendant 2 was collusive and bears no consideration and whether he was only a name lender for the decree-holder Sitaramayya. The learned Subordinate Judge of Amalapuram overruled the objections of the judgment-debtors and upheld the transfer by his order dated 14th March 1928. Thereupon Potula Venkataramayya instituted the present suit against Rednam Sitaramayya, the decree-holder in S. C. S. No. 208 of 1926 and Chintalapudi Venkata-

ramayya, defendant 2, in whose favour the assignment of the said decree has been effected, for a declaration that the transfer was a sham and collusive transaction brought about in fraud of his rights and therefore invalid. The question therefore on these facts is whether such a suit is maintainable. The grounds on which the lower Court decided the case are two, namely: (1) that the objection raised by the plaintiff to the transfer before the Sub-Court, Amalapuram, in proceedings under O. 21, R. 16, Civil P. C., was not in the capacity of the judgment-debtor and therefore S. 47, Civil P. C., would not apply; and (2) the matter decided by the executing Court was not one relating to execution because it relates to the factum and the validity of the assignment. The relevant provisions of the Civil Procedure Code bearing on the matter are O. 21, R. 16 and S. 47 (3). O. 21, R. 16 provides that "Where a decree has been transferred by assignment in writing", which is the case here,

> the transferee may apply for execution of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application was made by the decree-holder.

Where therefore such an application for execution is made by a transferee, it is open to the judgment-debtor to say that he is not a representative of the decree-holder on the ground that there is no valid transfer and no vesting of the decree in him by virtue thereof. Under S. 47, sub-r. (3), where a question arises as to whether any person is or is not the representative of a party, such a question which involves the validity of the transfer shall be determined by the Court. Unless that is done, the Court could not pass an order for execution. The validity of the transfer may be questioned on various grounds. Prima facie therefore the objections raised by the judgment-debtors to the application for execution of the decree made by defendant 2 under O. 21, R. 16 are questions which it was obligatory upon the Court before which such an application was made to decide. The objections having been determined, and the order for execution having been made by recognizing the transfer, it is a decree within the meaning of S. 47, Civil P. C. A separate suit will not lie and S. 47 appears to be a bar to the suit. Considerable reliance is placed by the lower Court and by Mr. Raghava Rao before me on two cases in favour of the view that a suit like the one in question is not prohibited by S. 47, Civil P. C. One case is 26 Mad 264,[1] and the other is A I R 1929 Lah 51,[2] which purports to follow 26 Mad 264.[1] In 26 Mad 264[1] it was held that a suit by an assignee of a decree for a declaration that he obtained a valid assignment of the decree might be brought and when such a suit is brought, the Court should simply decide as to the factum and validity of the assignment and should not declare that the assignee is entitled to execute the decree. It may be noticed that when the above decision was passed, the relevant provision of S. 244, corresponding to S. 47, Civil P. C., bearing on the present discussion, ran thus :

> If a question arises as to who is the representative of a party for the purposes of this section, the Court may (either stay execution of the decree until the question has been determined by a separate suit or) itself determine the question (by an order under this section).

It will thus be seen that a separate suit was not prohibited by S. 47, Civil P. C. In the particular case, in 26 Mad 264,[1] the transfer was not recognized and the result of the said order was that the assignee was not treated as the representative of the decree-holder. It may well be said in such cases there could be no decree and therefore no appeal. It does not decide whether a suit will lie if in fact an order for transfer is made and the assignee is treated as the representative. It seems to me therefore that, apart from the fact that 26 Mad 264[1] was decided before the passing of the new Civil Procedure Code, it will not be applicable to cases like the present. The language of the present Code is different. It is rendered obligatory on the Court to decide the question, i. e. the validity of the transfer and an order determining it will, for the purpose of the section, amount to a decree. A I R 1929 Lah 51[2] merely purports to follow 26 Mad 264.[1] But Mr. Raghava Rao relied upon the following observation therein :

> Besides, there is the practical inconvenience of entering upon an inquiry as to whether or not the assignment in favour of Salig Ram was genuine and for consideration or was intended to defeat the creditors of the assignors. It can hardly be said that this inquiry comes strictly within the purview of S. 47, Civil P. C.

There is no discussion by the learned Judges of sub-r. 3 of S. 47, Civil P. C. It

1. Bommanapati Veerappa v. Chintakunta Srinivasa Rau, (1903) 26 Mad 264.
2. Ishar Das Gorakh Ram v. Salig Ram, (1929) 16 A I R Lah 51=117 I C 893.

is not even noticed. I am not able to understand what the practical inconvenience the learned Judges envisage by entering upon an inquiry contemplated. The Rule provides that the question whether a person is or is not the representative for the purpose shall be decided by the Court and when the statute imposes an obligation to determine the said question, which as I have already pointed out involves of necessity all questions relating to the validity of the transfer, I do not see how any question of inconvenience is a matter of consideration at all. With great respect to the learned Judges who decided that case, I am unable to follow their view.

The next point raised by Mr. Raghava Rao is that the objection raised by the present plaintiff was not in the capacity of a judgment-debtor and therefore the present suit is not barred by S. 47. He outlined his argument thus. The present plaintiff occupied the position of attaching creditor of the decree in S. C. S. No. 208 of 1926 by virtue of the attachment effected in execution of the decree in S. C. S. No. 29 of 1926. Therefore according to him, the main question was whether defendant 2 was entitled to execute the decree or the present plaintiff as attaching creditor was entitled to execute decree and therefore not being a question between the parties or their representatives, but in effect between rival decree-holders, S. 47 cannot be a bar. I may at once say that a recent decision of the Madras High Court reported in 57 Mad 457 [3] is against this view. There is also authority for the other view: *vide* 24 M L W 70[4] and A I R 1927 Mad 1025[5] and other decisions noticed therein. It seems to me unnecessary to decide between this conflict and express my opinion as to whether 57 Mad 457[3] is right or wrong. In my opinion the plaintiff, when he put forward his objections, cannot be deemed to have urged them in a capacity different from the capacity of the judgment-debtor which he occupied in the suit. His objection is that the transfer in favour of defendant 2 is a nominal and collusive transaction and therefore the property in the decree did not vest in defendant 2. Mr. Raghava Rao concedes that this is an objection which the plaintiff qua judgment-debtor can legitimately raise and could be decided by the Court. But what he contends is the other objection that the transfer was executed with a view to defraud his rights as the transferee of the decree in S. C. S. No 29 of 1926 can only be in the capacity of the decree-holder in S. C. S. No. 29 of 1926 and not in the capacity of the judgment-debtor in S. C. S. No. 208 of 1926.

I am unable to agree with this view. As judgment-debtor, it was legitimately open to him to say that the transfer could not avail against him because by virtue of the transfer of the decree and by virtue of the attachment he had certain rights which he can assert against his assignor which he had been deprived of by virtue of the fraudulent transfer. For example, to the extent of the amount of the decree in S. C. S. No. 29 of 1926, satisfaction has to be entered up and for the balance only execution can be had: *cf.* A I R 1934 Cal 465.[6] The question of satisfaction of the decree is one which can be raised. It is unnecessary to decide what the effect of that contention may be, but it is certainly a contention which it is open to him to raise and arises by virtue of his occupying the position of the judgment-debtor. Therefore the substantial objection from which certain rights will flow in the present case is the objection that the assignment is a sham and collusive transaction and that being a question which is legitimately open to him qua judgment-debtor, it was raised and adjudicated by the Court by an order dated 14th March 1928, and it is therefore not open to him to agitate it again by a separate suit. I therefore overrule the objections of Mr. Raghava Rao and set aside the decrees of both the lower Courts and dismiss the suit with costs throughout. Leave to appeal granted.

C.R.K./S.C. *Decrees set aside.*

3. Narasimha Ayyar v. Venkatachalapathy Ayyar, (1934) 21 A I R Mad 181 = 148 I C 55=57 Mad 457=67 M L J 207.

4. Raman Chettiar v. Chokkalinga Chettiar, (1926) 13 A I R Mad 691 = 93 I C 649 = 24 M L W 70.

5. Ramakrishna Iyer v. Mari Goundan, (1927) 14 A I R Mad 1025=105 I C 606.

6. Kangal Chandra v. Nanda Lal, (1934) 21 A I R Cal 465=151 I C 1015=38 C W N 163.

A. I. R. 1938 Madras 81

GENTLE J.

D. Kondal Rao Naidu and another — Plaintiffs.

v.

Dhanakoti Ammal — Defendant.

Civil Suit No. 410 of 1933, Decided on 6th October 1936.

(a) Contract—Construction — Preliminary contract reduced into deed—In case of difference, deed governs preliminary contract.

When a preliminary contract (though in writing) is afterwards reduced into a formal deed and there is any difference between them, the preliminary written contract is entirely governed by the deed: (*1880*) *15 Ch D 306*, *Rel. on.* [P 82 C 1]

(b) Vendor and Purchaser — Vendee fully conversant with boundaries and extent of land, purchasing it — Sale deed describing land accurately by boundaries and stating it to be 'about 99 grounds'—Land measuring only 85 grounds after sale—Suit for compensation for deficiency — Principle of S. 15, Specific Relief Act held applied — Question of exact area held was immaterial and vendee could not succeed.

A vendee of certain land was fully conversant with all information concerning the property purchased. The sale deed stated that the land measured 'about 99 grounds' and the land was fully and accurately described by the boundaries. The vendee knew exactly what he was buying. The land was surveyed after the sale deed and it measured 85 grounds. The vendee brought a suit for compensation by way of damages on the ground that the vendor had agreed to sell 99 grounds while in fact he actually conveyed 85 grounds :

Held that though the suit was not for specific performance, the principle of S. 15 applied as the deficiency was a considerable portion. Moreover the vendee being thoroughly conversant with the boundaries and the extent of the land which was accurately described by metes and bounds in the deed, the question of the exact area of the land was immaterial for the sale. The sale deed gave no warranty that land was 99 grounds and the vendee therefore could not get damages : (*1883*) *11 Q B D 255*; (*1812*) *1 V & B 375* ; (*1843*) *11 M & W 188 and A I R 1920 Bom 164*, *Ref.* [P 85 C 1, 2]

K. P. Mahadeva Ayyar—*for Plaintiffs.*

K V. Ramachandra Ayyar for T. N. Sundaresa Ayyar — *for Defendant.*

Judgment.—Prior to the year 1931 the defendant was the owner of a piece of land in Madras which was known as the Koyyatope garden. It was about 4 3/4 cawnies in extent that is to say, about 114 grounds. Plaintiff 2, who throughout in matters referable to this suit has acted on behalf of himself and on behalf of plaintiff 1, knew of this land and I am satisfied was well conversant with every detail of it. In the year 1931 some 14 3/4 grounds or thereabouts were sold by the defendant of which 6 grounds were purchased by plaintiff 2 alone by a sale deed of 29th October 1931. In the early part of 1932 the defendant was anxious to raise money upon the balance of the Koyyatope garden either by selling it or by raising money upon mortgage in respect of it; and plaintiff 2 was offering to the defendant his assistance to try to further the defendant's objects in regard to this land. He was asked in cross-examination whether he was helping the defendant to sell the land, he stoutly denied it but admitted that a letter dated 15th April 1932, Ex. 2, was his letter ; and from that it is quite clear that he was doing what I have already indicated in my view he was, and this letter shows that he was well conversant with all matters concerning this property. It would also appear from this letter that it was in contemplation that it would be divided into sites as land was more easily saleable in that way than by larger areas. Sometime at about the period of this letter, Ex. 2, a notice, Ex. A, came into existence which was printed and the defendant's name appears at the foot of it, and para. 1 draws the attention of the public to the balance of the Koyyatope garden which was to be sold and it says that there was remaining to be dealt with 99 grounds. It was suggested that plaintiff 2 either assisted in the drafting or himself drafted this document for the defendant's use. He on the other hand says that he relied upon its contents when he was contemplating himself buying this land later in the year. Whether he did draft it himself I do not know, but I am perfectly satisfied that he placed no reliance in any way upon its contents when he himself was considering purchasing the land. It would seem that his efforts on behalf of the defendant to find either a purchaser or a mortgagee were unsuccessful. But on 25th July 1932, the defendant in fact mortgaged this property for a sum of Rs. 9,000, no doubt being in immediate need of money at that time, and it does not appear that plaintiff 2 brought about this mortgage or that he had the remuneration he hoped to earn which is indicated in his letter, Ex. 2. However, in November 1932 the defendant and plaintiff 2 on behalf of himself and his co-plaintiff were negotiating for the sale of the remaining land at the Koyyatope garden ; and as a result of

these negotiations the sale deed, Ex. F dated 11th November 1932, was executed by the parties. There was an antecedent document, Ex. B of 10th November 1932 which dealt with this piece of property and oral evidence has been tendered in regard to the price of the land sold and how that price was computed. In the sale deed the price expressed to be paid for this land is Rs. 17,500 and any oral evidence tending to contradict that, in my opinion, is entirely inadmissible. In like manner also is the document Ex. B. Fry L. J. referred to (1880) 15 Ch D 306[1] in (1884) 13 Q B D 351[2] at page 359 and says :

> When a preliminary contract is afterwards reduced into a deed and there is any difference between them, the mere written contract is entirely governed by the deed.

Therefore, so far as the price is concerned, one is confined to the wording of the deed, Ex. F. As I have said, I am quite satisfied that plaintiff 2 was fully conversant with all information concerning the property, the subject of the sale deed. He had bought a few grounds from the whole of the garden, he had visited it on numerous occasions and when he was negotiating and eventually agreed to buy the property, he knew perfectly well exactly what he was buying. The claim by the plaintiffs here is that the defendant agreed to sell to them 99 grounds of land, that she has in fact conveyed only 85 grounds 85 square feet and they have obtained 14 grounds less than they bargained to buy and that they should be compensated for this loss by way of damages for the breach of the covenant contained in the sale deed. There is also a claim in the plaint for some Rs. 350 by way of further damages, but there has been no evidence tendered upon that and indeed no reference has been made to that part of the claim. Plaintiff 2's story is this, that prior to this sale he was informed by the defendant that of the land to be sold, 9 grounds had already been allocated towards the making of a roadway through the property and therefore the actual land which he was buying for effective use, that is to say, in this case to divide into plots to re-sell, was 90 grounds and he based his price at so much a ground upon those 90 grounds. He says the price was Rs. 200, namely, Rs. 18,000 in all. That is not the price mentioned in Ex. B nor is it the price mentioned in the sale deed, Ex. F.

It was never suggested that before this sale this land was laid out or mapped out in plots and the plaintiffs have called a Mr. Doraiswami Pillai, P. W. 2, who is a surveyor employed by the Madras and Southern Maharatta Railway Company, who was called in to survey the land by plaintiff 2 after the purchase and he said in the course of his evidence that he made a plan, Ex. G, in which the plots are marked out and numbered in order to help the plaintiff to sell the land by plots, in other words, he surveyed it, marked out on the plan the division of the land in plots and also indicated a roadway through this property. He said he found in the area, the subject of Ex. F, a total amount of 85 grounds 85 square feet and that area is exclusive of the piece of land lying between plots 1 and 2 on the northern side which is land dedicated to a temple and which piece of temple land amounts to 3 grounds. Until this land was surveyed, no one could tell how much area would be required for the roadway and the area occupied by the roadway upon the property sold according to Mr. Duraiswami Pillai is something short of 8 grounds. On the easterly border of this land there are three plots which were not included in this sale deed and marked on the plan as sold. Between the larger of these plots and the two smaller ones the continuation of the roadway I have mentioned runs and the three plots together occupy an area of about 15 grounds and the roadway an area of about 1½ grounds. It is rather indicative when one adds this 1½ grounds to the 7 grounds and some odd number of square feet one arrives roughly at the figure of 9 grounds which, plaintiff 2 said, he was told by the defendant had been reserved for the road.

In my view this question of the 9 grounds reserved for the road was entirely an afterthought. It did not and could not arise until the land had been surveyed for division into plots and this matter occurred to plaintiff 2 only some time after the execution of the sale deed and indeed after he had entered into occupation, in order to explain the reduction from 99 to 90 grounds, the amount of land which would be effectively used by him by re-selling and allocating the price at Rs. 200 a ground. In my view the sale was not of

1. Leggott v. Barrett, (1880) 15 Ch D 306 = 28 W R 962.
2. Palmer v. Johnson, (1884) 13 Q B D 351=53 L J Q B 348=51 L T 211=33 W R 36.

any land of particular dimensions but plaintiff 2 being very familiar with the land to be sold belonging to the defendant, after the earlier dispositions, desired only to buy that land and the question of its area was, if anything at all, but a secondary consideration and the price which was agreed and which appears in the sale deed was a price for that piece of land as a whole.

The defence to the claim is put in this way, that the defendant sold and the plaintiffs bought the property as a whole, that in regard to area, if that question arose, before the figure 99, the word 'about' is to be found which qualifies the area mentioned and indicates that there is no specific warranty that a special or expressed amount of land is to be conveyed; and it is further said that this property in the sale deed is described as lying within four boundaries, the four boundaries being particularly and expressly mentioned and since the description is indicated in that way, namely that the boundary of each of the four sides of the land is clearly expressed, no complaint can be made if the area found to exist is less than the area expressed as conveyed in the deed. Plaintiff 2 in the course of his evidence agreed that the land which was conveyed to him by the sale deed is to be found on the site bounded by the boundaries mentioned in the sale deed, that these boundaries accurately and properly indicate the limits on each of the four sides of the land. What the plaintiffs say is that they agreed to buy 99 grounds of land, they have obtained only 85, there are 14 grounds less than what there should be, and they are entitled to damages. I wish to say that except for P. W. 2, Mr. Duraiswami Pillai, the surveyor and P. W. 3 Mr. Loganatha Mudali, who were witnesses whose evidence I accept, in so far as any testimony given by any witness called on behalf of the plaintiffs or the defendant including the parties themselves is concerned, I am not relying upon any of their evidence save where it is borne out by a document or is in accord with the testimony given by other witnesses.

The sale deed Ex. F describes the property sold. It gives the boundaries of the whole of the Koyyatope garden on the north, south, east and west with the paimash numbers and the cawnies contained in each paimash and goes on to say that out of this land there has been sold 14¾ grounds and the balance of this land pertains to the sale deed and it says this balance is about 99 grounds. The plaintiffs, by plaintiff 2 and the defendant were buying and selling respectively the balance left of the whole land which originally was owned by the defendant less the land which had been sold previously. The extent of the land sold was known to plaintiff 2 and similarly he was aware of what land was to be and was eventually the subject of the sale by the defendant. And, as I have said, he has admitted that this piece of land was accurately described in the sale deed by the boundaries therein mentioned. Quite apart from whatever the area of the piece of land might be, he knew exactly what he was buying. The statement "about 99 grounds" was not in my view a part of the description of what he was buying but was only a statement auxiliary to the description of the land which was sold. This land was fully and accurately described and any inaccuracy in any later description in my view has no effect upon the sale. In (1843) 11 M & W 183,[3] Baron Parke, at p. 189, in the course of his judgment, says :

> Then the other rule of law applies, that as soon as there is an adequate and sufficient definition with definite certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate according to the maxim *falsa demonstratio non nocet.*

And, Baron Alderson at p. 190 agreeing with Baron Parke, adds :

> It is quite clear that, applying the true principles of law to the construction of this deed, we must be governed by the description contained in it, and cannot travel out of it, to consider what the parties may have intended.

(1883) 11 Q B D 255[4] was a case in which the land, the subject of a contract of sale, was described as containing by estimation 3 acres or thereabouts and by admeasurement after completion of the purchase there was found to be only 2 acres 1 rood 12 perches, that is to say a deficiency of nearly one-third of the area described in the conveyance. Watkin Williams J. at p. 267 says this :

> I am of opinion, in the first place, that it has been the established practice of the Court of Chancery that a bill for compensation properly so called, the purchaser retaining the property, could not be entertained after the completion of the

3. Llewellyn v. Earl of Jersey, (1843) 11 M & W 183=12 L J Ex 243.
4. Joliffe v. Baker, (1883) 11 Q B D 255=52 L J Q B 609=48 L T 966=32 W R 59=47 J P 678.

contract and execution of the conveyance, and that the jurisdiction under which compensation was granted was exercised only as auxiliary to specific performance and was never exercised independently.

And later at page 268 he says this :

This rule seems to me also to rest upon sound principles of law and equity, because if it were otherwise, a purchaser might after conveyance, and while still insisting upon retaining the estate, ask for an abatement of the agreed purchase money, which would be wholly contrary to every principle. If he came before conveyance, he might, if misled, even by an innocent error, fairly say to the vendor, 'I have been misled, and do not wish to have the estate, and if you insist upon my performing the contract and taking it, a fair abatement from the price ought to be made', in which case the vendor would be placed in a fair position, because if he was unwilling to part with his estate at the reduced price he might retain it; on the other hand if the purchaser was entitled to insist upon retaining the estate, and at the same time claim an abatement of the price, the result would be that a vendor on account of a perfectly innocent and unintentional error might be compelled to part with his estate for a price that he never had and never would have agreed to, which appears to me contrary not only to the express terms of the contract but to every principle of law and justice.

At page 274 the learned Judge adds :

It appears that the defendant had himself bought the land by the description that it contained by estimation three acres or thereabouts, that he never measured it, and that he in fact believed it to be three acres ; that the plaintiff himself saw the land and was content to take it at the estimated quantity, and believed it to amount to three acres, and there is nothing, except the bare fact of the error, to show that this estimate was an irrational, still less an impossible one.

From this case it seems that the law in England is that when land is sold, properly described, and when the area given is expressed to be by way of estimate—such words as 'estimate' or 'about' or 'thereabouts', to my mind in this respect have similar meanings— the purchaser cannot keep the land and at the same time claim compensation for any deficiency in amount expressed to be by estimate. Turning to the cases in India, 57 I C 957[5] is a case in which property in Bombay was the subject of a sale and was clearly and specifically described by boundaries in the sale deed. This document also expressed the area to be by admeasurement 1480 square yards. In fact there was only 1280 square yards, roughly one-seventh deficient. The head-note says this :

Held that the property having been otherwise sufficiently described and having been fully known to the plaintiff, the mention of 1480 square yards was no more than a false description which had prejudiced no one.

Scott C. J. at p. 959, after saying that the property sold was described in every possible and conceivable manner, adds this :

There can be no possible doubt as to the property agreed to be transferred. It may measure 1482 square yards or it may measure 1282 square yards. But whatever it measures I am of opinion that the plaintiffs had determined to buy it and were prepared to pay the price of Rs. 7,41,000. In my opinion therefore the defendants are not unable to perform the whole of their contract. The mention of 1482 square yards, though the property which has been actually measured proved to be of a smaller area, is no more than a false description which prejudices no one since the subject matter of the conveyance was known without any possible shadow of doubt.

I am satisfied there was in this case no shadow of a doubt in plaintiff 2's mind of the property which he was buying when he entered into the sale deed with the defendant. Scott C. J. at p. 960 says this:

If I could have held that there had been failure on the part of the defendants to perform the whole of their part of the contract, I should still be unable to award to the plaintiffs the relief claimed by them, for the Court may only award compensation in money for the deficiency where the part left unperformed bears only a small proportion to the whole in value. According to the plaintiff's case, the part unperformed may amount to anything between Rs. 50,000 and a lakh. It is one-seventh in area of the whole of this very valuable town site, and it would be a misuse of language to say that the part alleged to be unperformed bears only a small proportion to the whole in value.

Hayward J. agreeing with the learned Chief Justice says at the same page :

The area was not basis of the price settled between the parties. The sale was for a lump sum. The area did not restrict the settlement to a portion only of the property.

This is not a suit for specific performance and for compensation. It is a suit in which the plaintiffs having affirmed and indicated their intention to abide by the sale deed are asking for compensation by way of damages, at the same time retaining and affirming the contract. The alleged deficiency, namely the difference between 85 and 99 or 14 grounds, cannot be said to be a small proportion of the whole. S. 14, Specific Relief Act, provides that :

Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be per-

5. Tata Industrial Bank Ltd. v. Rustomji Byramjee Jeejeebhoy, (1920) 7 A I R Bom 164=57 I C 957=22 Bom L R 849.

formed and award compensation in money for the deficiency.

In my view 14 out of 99 grounds is much larger a proportion than is contemplated by S. 14. When the deficiency is a considerable portion, then S. 15 is the relevant one under the Specific Relief Act. This provides:

> Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

Though, as I pointed out, this is not a suit for specific performance, the principles must be the same and when a party wishes to affirm, as these plaintiffs do, a contract and the deficiency is not inconsiderable, they are not entitled to compensation for any deficiency that there may be. But the matter does not rest there. If one looks again at the English case I have already indicated, (1883) 11 Q B D 255,[4] there was a considerable proportion of deficiency. In (1812) 1 V & B 375,[6] the deficiency was 6 acres, namely 35 instead of 41, and relief was not given. In this case I have no doubt that the plaintiffs through plaintiff 2 obtained exactly what they set out to buy, namely the remaining portion of the Koyyatope garden which remained unsold in November 1932. Plaintiff 2 knew the property well, was thoroughly conversant with its boundaries and indeed its extent, and if he was so minded, not indeed that I think it makes any difference, he could easily have had the land measured and surveyed before he entered into the sale deed of 11th November 1932. The plaintiffs have obtained for a round sum—price of Rs. 17,500, land which they were bargaining to buy. The question of the exact area that land contained in my view is a matter quite immaterial to this sale and indeed was given no thought, to my mind, by plaintiff 2 when he was negotiating the price. There is not in the sale deed a warranty that the land contains 99 grounds. It is that it contains about 99 grounds. I am not suggesting that 85 may be about 99, but am merely indicating that the question of area was not one upon which reliance was placed. If reliance had been placed upon the actual area, the word 'about' would not have been included in the sale deed. If it was a sale of an exact area, the sale deed by its verbiage would so have described it and it has not done so. It has described it actually by metes and bounds as plaintiff 2 acknowledges, and the result therefore is that the plaintiffs' claim fails and the suit is dismissed with costs.

I wish to say this about costs. In the course of the proceedings, the defendant swore an affidavit of document on 3rd January 1934, disclosing only one document, namely the sale deed and in para. 4 of the affidavit in the usual way she deposes that according to her best knowledge, information and belief she had not then and never had had in her possession, custody or power any further documents. During the course of the trial the learned counsel on behalf of the defendant produced documents one after the other, none of which were in the affidavit of documents. This is not a proper way of conducting litigation and is simply flaunting the discovery proceedings of this Court. In consequence of this, costs being in my discretion, whatever may be the amount recoverable by the defendant from the plaintiffs, I order a sum of Rs. 25 to be deducted therefrom as the discovery made by her was totally inadequate and improper, and this amount I assess as being the sum appropriate to the discovery proceedings.

C.R.K./S.C. *Suit dismissed.*

6. Winch v. Winchester, (1812) 1 V & B 375= 12 R R 288.

A. I. R. 1938 Madras 85

HORWILL J.

Majji Gurunaidu and another — Appellants.

v.

Gottemukkala Venkatraju and others — Respondents.

Second Appeals Nos. 666 and 667 of 1933, Decided on 9th September 1937, against decree of Sub-Judge, Vizagapatam, in A. S. Nos. 69 of 1931 and 253 of 1930.

(a) Mortgage—Person borrowing amount less than Rs. 100 and executing document thereby intending to mortgage property from ensuing year—Before beginning of that year,

document is agreement to mortgage and delivery at the time of execution of document is not necessary.

A person borrowed an amount less than Rs. 100 and executed a document stating "I have mortgaged to you with possession from the ensuing year . . . . . ":

Held that the actual mortgage of the property was intended to take place the following year. Before the date on which the mortgage was to operate, the document would presumably amount to an agreement to mortgage and delivery of the property was not necessary at the time the document was drawn up : *A I R 1917 Oudh 203* and *A I R 1928 Mad 546, Disting.* [P 86 C 2]

(b) Estoppel—Mortgage of property—Mortgagee leasing it to third person—Property resurveyed while lessee in possession—Lessee attorning to zamindar and registered as pattadar without there being any reference by lessee of his derivative title from mortgagor—Lessee held estopped from denying mortgagor's title even after attorning to zamindar.

A person mortgaged the property and the mortgagee leased it to a third person. While the lessee was in possession, there was a resurvey of the estate. The lessee was registered as pattadar and he attorned to the zamindar. The lessee took the patta from the zamindar without making a reference to his derivative title from the mortgagor. The mortgagor after redemption claimed the property :

Held that the lessee was estopped from denying the title of the mortgagor even after he attorned to the zamindar, for there was no change in the nature of his possession : *A I R 1926 Mad 187, Disting.* [P 87 C 1, 2]

V. Govindarajachari — *for Appellants.*

K. Venkataramaraju — *for Respondents.*

Judgment.—The plaintiffs in these two suits mortgaged a certain property to defendants 1 and 2; and there is evidence that the latter subsequently leased the property to defendants 4 and 5. The Appellate Court seems to have accepted this evidence; and it must therefore be assumed for the purpose of this appeal that the lease by the mortgagees to defendants 4 and 5 has been proved. While defendants 4 and 5 were in possession, there was a resurvey of the Vizianagaram estate in which these properties are situated; and defendants 4 and 5 were then registered as pattadars. The plaintiffs now bring these suits for the recovery of this property after redemption. The trial Court dismissed the suits; but the Appellate Court held that they were entitled to redeem. Defendants 4 and 5 have therefore filed these second appeals.

It has first been argued that there was no valid mortgage at all, because although the amount of the mortgage under these documents was less than Rs. 100, no immediate delivery took place. Reliance is placed on the fact that the deed is described as a mortgage deed and on the recital that by this document the land has been usufructuarily mortgaged to defendants 1 and 2. It has however to be remembered that although it is true that Ex. A does contain this expression, yet when the document is read as a whole it seems clear that the parties did not intend that the mortgage should operate at once; for example, after the preamble and the recital of the necessity for borrowing money, the document begins "we have mortgaged to you with possession from the ensuing year Durmukhi thereunder". Whatever value for the appellants the use of the past tense in 'we have mortgaged' might have, it is neutralised by the use of the words 'from the ensuing year.' "We have mortgaged to you with possession from the ensuing year" has no grammatical meaning. The nature of the transaction therefore seems to have been that on the date of Ex. A money was needed by the executants of Ex. A, that money was paid, and that the actual mortgage of the property was to take place the following year. Before the date on which the mortgage was to operate, Ex. A would presumably amount to an agreement to mortgage. Many cases have been quoted in which delivery was not given in pursuance of an agreement; and the Court was asked to consider the documents as agreements to sell or mortgage, as the case may be, the actual sale or mortgage being deferred until the time of delivery; and in which it was held that the documents could not be so construed. But in none of these cases did the documents themselves show that it was not the intention of the parties that possession should be given at once.

The only case that bears any resemblance to the present one is 41 I C 455,[1] where the transaction was apparently a simple mortgage with a stipulation that if the money was not repaid within a certain time, possession was to be given. It is therefore possible to distinguish that case; but if it were there intended to lay down any general principle that delivery must take place at the time the document is drawn up, I would respectfully differ. Reliance has already been placed on the much

1. Suraj Baran Singh v. Pratab Bali Singh, (1917) 4 A I R Oudh 203=41 I C 455=4 O L J 446.

discussed case, A I R 1928 Mad 546,[2] in which the question of the proof of a mortgage for an amount less than Rs. 100 came up for consideration. As the mortgage was for less than Rs. 100, the parties were not bound to draw up any document at all; and the learned Judges in that case, as will be seen from the head-note, were of opinion that:

> The moment the parties for some reason consider that it is not sufficient to effect the transaction of sale by mere delivery of property, but require that as evidence of such transaction there should be a deed or document, the transaction can scarcely be correctly described as one effected by mere delivery of property,
>
> and again,
>
> but the moment the parties reduce the terms to writing, it is the writing that thereafter must be regarded as containing and setting out the terms of the contract, and it would not be an apt or correct description of the transaction to call it a sale by delivery of property.

The exact effect of the drawing up of an unregistered document for a sum less than Rs. 100 has been much discussed in later cases; but it is not necessary to refer to these cases because this case can be clearly distinguished in that the mortgage was not intended to operate at once and that the delivery was an independent transaction that took place a year later. It cannot be said therefore that the parties did not here intend to effect a mortgage by delivery. It has lastly been argued that even if the appellants were lessees, the fact that they attorned to the zamindar of Vizianagaram in 1902 gives them an independent title and that they are no longer estopped from denying the title of the plaintiffs. It is conceded that as lessees from the mortgagees, they are in no better position than the mortgagees and that just as the mortgagees were estopped from denying the title of the mortgagors, so the defendants, had it not been for the resurvey in 1902, would have been estopped from denying the title of the plaintiffs. It is argued that Ex. J (1), the patta issued by the zamindar to the defendants, shows that the zamindar did not admit that the tenants had any occupancy rights. It is argued, on the authority in 49 M L J 742,[3] that if the zamindar either evicted the appellants or did some act signifying that he no longer admitted their right to remain in possession as lessees of the mortgagees and the plaintiffs, then the mere fact that the appellants continued in possession after attorning to the zamindar would not prevent them from setting up a title against the mortgagors. That contention is no doubt correct; but there is no evidence on the record which serves as a basis for that argument. Presumably, the settlement officer who issued the patta in the name of the defendants did so because the appellants were in possession and claimed the right to remain in possession. There is no reason to believe that the estate authorities insisted on issuing a patta to the appellants in spite of the fact that they knew that the appellants only derived their title from the plaintiffs. One must therefore presume, in the absence of evidence to the contrary, that the appellants made no reference to the title that they derived from the plaintiffs and that they were willing to take the patta from the zamindar without making a reference to their derivative title from the plaintiffs. I do not consider therefore that 49 M L J 742[3] in any way helps the appellants. There being no evidence that their possession was threatened by the zamindar in 1902, they are estopped from denying the right of the plaintiffs even after 1902; for there was no change in the nature of their possession. The appeals are therefore dismissed with costs one set of Rs. 35 in each case. Leave to appeal is refused.

C R.K./D.S. *Appeals dismissed.*

2. Kuppuswami v. Chinnaswami, (1928) 15 A I R Mad 546=111 I C 677.

3. Alaga Pillai v. Rameswami Thevan, (1926) 13 A I R Mad 187=91 I C 1024=49 M L J 742.

---

* A. I. R. 1938 Madras 87

VENKATARAMANA RAO J.

C. K. Samarapuri Chetty — Appellant.

v.

P. Thangavelu Chetty and another — Respondents.

Second Appeal No. 567 of 1933, Decided on 28th April 1937, against decree of Dist. Court, Chittor, in A. S. No. 6 of 1932.

*** Transfer of Property Act (1882), S. 78— Gross neglect—Meaning — Prior mortgagee failing to secure title deeds and delaying registration to enable mortgagor to secure necessary funds for payment of amount due to him—Subsequent mortgagee taking mortgage after satisfying himself that there was no prior mortgage — Prior mortgagee held guilty of gross neglect.**

Any act or omission on the part of the prior mortgagee which has enabled the mortgagor to deal with the property as if it was not encumbered would be gross neglect within the meaning of S. 78. Though failure to secure the title deeds or

delay in registration each standing by itself may not be evidence of negligence, yet both circumstances taken together coupled with such conduct on the mortgagee's part which would have the effect of inducing a subsequent mortgagee to advance money on the faith that the property was not encumbered, may be evidence of gross negligence. [P 89 C 1, 2]

Where the prior mortgagee failed to secure the title deeds and delayed registration in order to enable the mortgagor to secure the necessary funds for payment of the amount due to him, that is, to raise the money by borrowing or by selling any of his properties and the subsequent mortgagee took the mortgage after satisfying that there was no prior encumbrance:

Held that the prior mortgagee was guilty of gross negligence and hence his mortgage was postponed to that of the subsequent mortgagee: *A I R 1930 Cal 22, Approved.* [P 89 C 2]

K. Rajah Iyer and D. Narasaraju — *for Appellant.*

B. Somayya and N. C. Viraraghavachariar — *for Respondents.*

Judgment.—The question involved in this second appeal is whether the mortgage in favour of defendant 2 dated 12th May 1927 is entitled to priority over the plaintiff's mortgage dated 10th March 1927. To determine the point in controversy, a few facts may be necessary. Defendant 1 admittedly was a person who became indebted some time prior to 1927 and this is evidenced by the fact that there was a sum of Rs. 2,000 for principal and interest due to one Motichand: *vide* Ex. 8. It is stated that the amount due to Motichand was also secured by an equitable mortgage evidenced by Ex. 8.a. It is the case of defendant 2 that in order to discharge this equitable mortgage, defendant 1 borrowed from him a sum of Rs. 2,000 on 9th March 1927 on a promissory note bearing the said date and as security for repayment thereof executed also an equitable mortgage evidenced by Ex. 2.a, but he was also desiring to take a registered simple mortgage after he got an encumbrance certificate, assuring himself that there were no encumbrances on the property. This encumbrance certificate was obtained and delivered on 11th May 1927 which disclosed no registered encumbrances on the property. On 12th May 1927 a simple mortgage was executed in his favour for a sum of Rs. 2,500 part thereof being a sum of Rs. 2,185.15.0 being the amount stated to be due in respect of the loan already advanced by him and part thereof Rs. 314.0.2 advanced on the date of the mortgage. This mortgage was duly registered. His case further is that on his mortgage he obtained a decree and brought the properties to sale, and at the time when he brought the properties to sale in execution of his decree, he found that there was a mortgage in favour of the plaintiff, but in the meanwhile the plaintiff has instituted this suit on his mortgage. In defence thereto, defendant 2 pleaded in para. 4 of the written statement that he obtained a simple mortgage dated 12th May 1927 after assuring himself that there was no kind of encumbrances thereon and obtaining an encumbrance certificate dated 11th May 1927. He further pleaded the equitable mortgage dated 9th February 1927. It may be stated that the title deeds were produced by defendant 2, and it is his case that it was handed over to him on the date of the equitable mortgage or at any rate it may be taken that he was in possession of the title deeds on the date of his simple mortgage of 12th May 1927. There are other defences raised which it is not now material to consider for the point on which I propose to rest my decision. One of the issues in the case is " is defendant 2 entitled to priority, and if so, for what amount?".

The learned Subordinate Judge found in favour of defendant 2 on the equitable mortgage and gave priority on that footing to the extent of the amount covered by the equitable mortgage and for the balance amount Rs. 314 which was advanced on the date of the simple mortgage, under S. 76, T. P. Act. The learned District Judge on appeal was of the opinion that the equitable mortgage relied on was inadmissible in evidence on the ground that Ex. 2.a which evidenced the mortgage required registration. He further found that this equitable mortgage could not have come into existence on the date on which it purported to have come into existence, but he nevertheless found that the sum of Rs. 2,000 was really advanced by defendant 2 for discharging the loan in favour of Motichand. At any rate, according to him, the evidence is in favour of the discharge being on the date of 12th May 1927. I accept the said finding. What is the result? It must be taken that the entire sum of Rs. 2,500 must be deemed to have been advanced on 12th May 1927. Under what circumstances did he advance the amount? He wanted to assure himself that there was no prior encumbrance on the property. He

insisted on an encumbrance certificate and got it and it disclosed no encumbrance. He secured possession of the title deeds of the property and he got also an assurance from the mortgagor by introducing a recital to that effect in his mortgage deed. The question is, under such circumstances, is he not entitled to priority under S. 78, T. P. Act, over that of the plaintiff's mortgage? Under S. 78, before defeating a prior mortgagee of his right to recover the money under his mortgage in preference to all mortgages subsequent to the mortgage in his favour, it must be found as a fact that the prior mortgagee was guilty of fraud, misrepresentation or gross neglect. There is no question of fraud and misrepresentation in this case. The only question is whether there was gross neglect on his part. In my opinion, any act or omission on the part of the prior mortgagee which has enabled the mortgagor to deal with the property as if it was not encumbered would be gross neglect within the meaning of the section. I am prepared to accept the definition given by Page J. in 56 Cal 868[1] relied on by Mr. Somayya, wherein at p. 884 the learned Judge says thus :

> In my opinion, 'gross neglect' in S. 78 means and involves failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrancer being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority.

The question is, what is the act or omission which can be attributed to the prior mortgagee which would render his conduct to be grossly negligent? In his mortgage dated 10th March 1927 the mortgagor assured him that there was no alienation in favour of anybody. In token of that assurance there is the following recital "In support hereof I have delivered four title deeds to you," and it is a fact that the title deeds were not delivered on that date. It is no doubt, as pointed out in 31 Mad 7,[2] that the mere failure to secure possession of the title deeds may not be such evidence of gross negligence as would defeat his right to get the money secured on his mortgage in preference to other subsequent mortgagees, but the matter does not rest on the mere failure to secure possession of the title deeds. He has delayed registration of his document until June 1927. The case in 31 Mad 7[2] is again relied on by Mr. Somayya for the position that even though he may have delayed registration, still the delay coupled with the fact of his not securing the title deeds would not amount to gross negligence as laid down in that decision, but as that decision itself points out, there must not have been any conduct on the part of the mortgagee which would disentitle him to the relief which he can justly claim by reason of his being a prior mortgagee, that is, he must not have been guilty of any act or conduct on his part which would have the effect of inducing a subsequent mortgagee to advance money on the faith that it was not encumbered. He must not be himself a party to any act by which the mortgagor would be enabled to deal with the property. Failure to secure the title deeds or the delay in registration are circumstances each standing by itself may not be evidence of negligence, but both circumstances taken together, coupled with the other conduct, may be evidence of gross negligence. Now the plaintiff in his deposition admits what the reason for the delay is. He states thus :

> D. 1 asked me to delay the registration saying that he would pay back the amount soon and registration would make the transaction public and bring him to disgrace. He was a merchant and a Union member of Tiruttani. So I agreed to delay.

This shows that he allowed the mortgagor to delay registration in order to enable the mortgagor to secure the necessary funds for payment of the amount due to him, that is, to raise the money by borrowing or by selling any of his properties. Under such circumstances, allowing the mortgagor to retain the title deeds would be tantamount to allowing the mortgagor to deal with the property in order to enable him to raise and pay the money due under the mortgage. It seems to me, therefore, the plaintiff was guilty of gross negligence within the meaning of S. 78, T. P. Act. Mr. Somayya strenuously argued that the plea based on S. 78, T. P. Act, was not raised in the written statement, and it is not open to the Courts to go into that plea, and his client was put to considerable inconvenience thereby. I quite admit that the plea should have been taken in the written statement, but there were facts alleged in the written statement on which such a plea can be found, because para. 4 of the written state-

1. Lloyds Bank Ltd. v. Guzdar & Co., (1930) 17 A I R Cal 22=121 I C 625=56 Cal 868.
2. Rangaswami Naicken v. Annamalai Mudali, (1908) 31 Mad 7=17 M L J 499.

ment distinctly states that the simple mortgage was taken on the faith of an assurance given to the mortgagee that there was no encumbrance and after defendant 2 satisfied himself by production of the encumbrance certificate that there was no mortgage. Further, one of the issues in the case is, as I have already stated, "Is defendant 2 entitled to priority and if so to what amount?". In the first Court, at any rate, to the extent of Rupees 314-0-2 the plea based on S. 78, T. P. Act, was allowed to be raised and gone into by the first Court. Therefore if the plea to the extent of Rs. 314 0 2 was allowed to be gone into, I do not see that any more facts are necessary for the plea in regard to the rest of the amount secured by the document. In the view the first Court took it was not necessary to base its decision on S. 78 in regard to the amount covered by the alleged equitable mortage, though I must say that the first Court was even prepared to find in regard to the entire amount even on S. 78, T. P. Act. The learned Judge observes thus in para. 21 :

Defendant 2 had taken all reasonable precautions before Ex 5, and had insisted on an encumbrance certificate up to date. It was the plaintiff's negligence in not getting Ex. A registered forthwith and the absence of mention of his mortgage in the encumbrance certificate Ex. 4-b that induced defendant 2 to continue his loan under Ex. 2 and to advance a new loan of Rs. 314-0-2.

Now that the learned District Judge was not prepared to uphold the equitable mortgage and only finds that an entire sum of Rs. 2,500 must have been advanced on the date of Ex. 5, there is no reason for disallowing the priority under S. 78 in respect of the entire amount on the facts as found. I therefore set aside his decree. Defendant 2 is hereby declared entitled to priority in respect of the sum of Rupees 2,938.13.4 allowed by the first Court. Therefore, the decree of the learned District Judge will be varied by allowing priority to defendant 2 in respect of this amount. In regard to the question of costs, I think defendant 2 is entirely to blame in not specifically raising this plea in the written statement and he left it to the Courts to give him the relief on the facts deposed to by the plaintiff. In the circumstances I direct each party to bear his own costs throughout. The memorandum of objections is dismissed but without costs. (Leave to appeal refused).

C.R.K./D.S. *Decree varied.*

A. I. R. 1938 Madras 90

LEACH C. J. AND MADHAVAN NAIR J.

Municipal Council, Dharapuram — Appellant.

v.

Muhammad Ismail Rowther — Respondent.

Appeal No. 546 of 1931, Decided on 7th September 1937, against decree of Sub-Judge, Coimbatore, in O. S. No. 178 of 1928.

(a) Madras District Municipalities Act (1920), Ss. 68 and 69—Contract involving consideration of over Rs. 1,000 signed by Vice-Chairman and two members merely as witnesses — Sanction of Municipal Council not obtained—Contract held invalid.

A contract entered into by a Municipal Committee involved a consideration of over Rs. 1,000. It was duly reduced to writing and was signed by the Vice-Chairman and two members but only as witnesses. There was no evidence of the Municipal Council having approved the terms of the agreement as required by S. 68 or of having authorised the members to sign it :

Held that the contract could not be said to be on behalf of the Council as required by S. 69. [P 91 C 1]

(b) Attestation—Person signing as witness cannot be looked upon as signing in any other capacity.

If a person has signed a document merely as a witness and this is expressed on the face of the document, he cannot be deemed to have appended his signature in another capacity: *(1883) 11 Q B D 651*; *(1835) 2 Ad & E 500 and 34 Cal 1030, Rel. on*; *(1804) 9 Ves 234, Not foll.* [P 91 C 2]

K. K. Gangadhara Iyer — *for Appellant.*

T. V. Ramanatha Iyer — *for Respondent.*

Leach C. J.—In this appeal the Court is called upon to interpret the provisions of S. 69, Madras District Municipalities Act, 1920, as amended by the Act of 1933. At a public auction held in 1927 at the instance of the Municipal Council of Dharapuram the respondent purchased the right of collecting the tolls to be levied on all vehicles entering the municipal area during the year commencing 1st April 1927. His bid was Rs. 47,800, which he agreed to pay in 12 equal instalments on the 15th of each month. He further agreed to pay a penalty of Rs. 2 per diem for every day in respect of which he was in default in payment. He did not however observe the conditions of the contract. His payments were irregular and he did not complete them. Altogether he paid to the Municipal Council a sum of Rs. 37,820.3.0, which meant that he was in default to the extent of Rs. 9,979.13.0, apart from the penalties for which the contract stipulated. Nothing turns on the question of the validity of the

penalty clause. The suit out of which the appeal arises was filed to recover a sum of Rs. 12,025-13-0, made up of the Rupees 9,979-13-0 and Rs. 2,046, claimed by way of penalty.

Having purchased the right of collecting the tolls, a contract was drawn up and executed by the respondent, whose signature was witnessed by the Vice-Chairman of the Municipal Council and by two other members. The Vice-Chairman and the two members merely signed the document as witnesses to the signature of the respondent. This appears from the document itself, but the matter is put beyond all controversy by the evidence of Abdul Karim Sahib, the Chairman of the Council, who admitted that they had merely signed as witnesses. Sub-s. (1) of S. 69 of the Act provides that every contract made by, or on behalf of, a Council whereof the value or amount exceeds Rs. 100 shall be in writing and except in the case of contracts made under the provisions of sub-s. (3) of S. 68 (with which we are not concerned), shall be signed by two Municipal Councillors. Sub-s. (2) says that a contract executed or made otherwise than in conformity with the provisions of the section shall not be binding on the Municipal Council. The trial Court held that S. 69 had not been complied with because the contract had not been executed by two members of the Council, and we are asked to say that this decision is wrong. The Council sued on the contract and it was conceded by the learned advocate who appeared in support of the appeal that if the document was not signed in accordance with the provisions of the section the appellant Council was out of Court. He however maintained that it was in fact signed in accordance with the section. Before turning to the authorities, I will refer to S. 68 which has also some bearing on the question under discussion. That section inter alia provides that in respect of a contract whereof the value or amount exceeds Rs. 1,000, the sanction of the Council should be obtained before the contract is made. There is no evidence that the Council here ever approved of the terms of the contract and no evidence to show that the three members who witnessed the contract were ever authorized to sign it. It was not even proved that the three members referred to knew the nature of the document. The learned advocate for the appellant relies on a dictum of Lord Eldon in (1804) 9 Ves 234=7 R R 167.[1] Lord Eldon there said:

> It is true that where a party, or principal or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal.

This dictum was not accepted by Lord Denman C. J. in (1835) 2 Ad & E 500=111 E R 193.[2] After quoting the words of Lord Eldon, Lord Denman C. J. proceeded to observe:

> But I think that remark open to much observation. A witness might be drawn into transactions which he did not contemplate, and of which he was ignorant. That would be a great step to take; no such decision has been actually made; and, if it had, I should pause, unless I found it sanctioned by the very highest authority, before I hold that a party attesting was bound by the instrument.

It seems to me that the criticism of Lord Denman is well founded. If a person has signed a document merely as a witness and this is expressed on the face of the document, I fail to understand how he can be deemed to have appended his signature in another capacity. The question is really one of evidence as was pointed out in (1883) 11 Q B D 651.[3] In the course of the judgment in that case, Lord Esher (then Brett M. R.) said:

> But the questions whether a person has signed his name at the foot of a document, and if so, for what purpose, are questions of evidence, and any evidence on the subject which does not contradict the document is admissible.

Here the evidence is that the three members of the Council signed as witnesses and in no other capacity. There was no intention to sign as executants on behalf of the Council, and as it is common ground that they signed merely as witnesses, it cannot be said that the document was executed by them on behalf of the Council. The Calcutta High Court expressed the same opinion in 34 Cal 1030.[4] There the document was signed by the Chairman and was witnessed by two Commissioners who did not sign it as contracting parties, which the law required them to do before the document could be sued upon.

It having been decided that the Council was not able to sue on the contract, it was agreed by the parties that the suit should

1. Coles v Trecothick, (1804) 9 Ves 234=7 R R 167=1 Smith 233.
2. Gosbell v. Archer, (1835) 2 Ad & E 500=111 E R 193=4 M & N 485=1 H & W 31=4 L J K B 78.
3. Young v. Schulder, (1883) 11 Q B D 651=49 L T 546.
4. Chairman, South Barrackpore Municipality v. Amulya Nath Chatterjee, (1907) 34 Cal 1030 =12 C W N 50.

proceed and be decided on the basis of a *quantum meruit*. The matter was then referred to a Commissioner to record evidence and report whether anything was due by the respondent to the Council. He reported that as the respondent had received a sum of Rs. 37,096.1.8 and had paid to the Council Rs. 37,820.3.0, there was nothing due by him. No attempt was made by the Council, either before the Commissioner or in Court, to show that the respondent had in fact received more than this sum or Rs. 37,096.1.8, but stress was laid on the failure of the respondent to produce a certain book of account. Although the criticism here appears to have been well founded, the failure to produce the book is not sufficient to entitle the Municipal Council to a decree against the respondent. The Council ought to have placed before the Court evidence on which it could form an estimate of what was due by the respondent to the Council. They did not do so and the learned trial Judge rightly held that they were not entitled to recover anything. The learned trial Judge directed the parties to bear their own costs. This decision has also been challenged, but again no adequate reason has been given for varying it. The appeal therefore fails and must be dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1938 Madras 92

LEACH C. J. AND VARADACHARIAR J.

N. Shanmukham Chetty — Appellant.

v.

M. Govinda Chetty and others — Respondents.

Appeal No. 2 of 1937, Decided on 22nd July 1937, from judgment of Wadsworth J. in Suit No. 231 of 1933.

Civil P. C. (1908), S. 92—Applicability—Suit for accounts by trustee against co-trustee — S. 92 does not apply — Nature of relief prayed for is not conclusive and exclusive test in determining applicability of S. 92.

Sub-section (2) of S. 92, though expressed in general terms, must be read along with sub-s. (1) and it follows on such reading that it is not every suit claiming any of the reliefs specified in sub-s. (1) that should be brought with the consent of the Advocate-General, but those suits only which besides claiming any of those reliefs are brought by individuals as representatives of the general public. In a suit for accounts brought by a trustee against a co-trustee, the relief, though it may be of the kind mentioned in S. 92 (1), is not sought in the larger interests of the public but is merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust. S. 92 has therefore no application and no sanction of Advocate-General is necessary before its institution. The nature of the relief prayed for in a suit cannot be made the conclusive and exclusive test in determining the applicability of S. 92 : *A I R 1922 Mad 17 (F B), followed and held not shaken by A I R 1928 P C 16; Case law discussed.* [P 94 C 2]

K. V. Sesha Ayyangar and R. Gnanasambandam — *for Appellant.*

K. Narasimha Ayyar and T. R. Srinivasa Ayyangar — *for Respondents.*

Leach C. J. — This appeal arises out of a suit for an account and other reliefs instituted by certain trustees against their co-trustees on the Original Side of this Court. In Royapuram, Madras, is an Indian Hindu temple known as Subrahmanyaswami Koil, which belongs, according to the pleadings, to the Pattinava sect of the Hindus. The plaintiffs' case is that in 1922 a meeting of the members of the community was held at Royapuram at which the plaintiffs and defendants 1 to 3 were elected trustees for the purpose of collecting subscriptions for the improvement of the temple, for the performance of the rites therein and for the conduct of festivals and other cognate matters, with power to spend the collections on these objects. It is common ground that this meeting was held and that the plaintiffs and defendants 1 to 3 were elected trustees for these purposes. The contesting defendants, defendants 2 and 3, however, aver that the duties of the trustees were not confined to the temple and say that they were also given authority to collect and spend for the good of the community in general and for purposes of general utility. The plaintiffs allege that defendants 1 and 2 were acting as the managing trustees and were throughout in charge of all the moneys collected and the accounts, defendants 1 and 2 being the only literate members of the Board. Defendant 3 admittedly never took any part in the management of the affairs of the trust and as defendant 1 died after the institution of the suit, the case is really confined to the question of the liability of defendant 2. The plaintiffs further allege that from 1922 to the date of the suit, large sums of money were collected by defendants 1 and 2 who utilised them for their own purposes and suppressed the accounts. The contesting defendants deny that there is any truth in the allegation that defen-

dants 1 and 2 utilised the trust money for their own purposes or that they suppressed the accounts. It is clear from their written statement, however, that defendants 1 and 2 did participate in the management of the trust and are liable to account, and the learned trial Judge so held. Accordingly he directed that accounts should be taken from 9th November 1925 (the date from which the defendants admit the collections began) and referred the case to the Official Referee for the purpose.

It is not in dispute that this is a public trust and it is conceded that defendant 2 is liable to account. But it is said that the decision of the learned trial Judge is erroneous for two reasons: (1) because the suit could not be instituted without the sanction of the Advocate-General under S. 92, Civil P. C., and (2) because the learned trial Judge did not decide issue 4 before referring the suit to the Official Referee. Issue 4 is as follows : "What, if any, were the accounts maintained for the collections and by whom ?". The argument with regard to this issue is based on the contention that the plaintiffs are also accounting parties. Before the learned trial Judge there was no suggestion that they should also be made liable to account; the only question in this connexion was with regard to the liability of defendant 2. The learned trial Judge was therefore justified in adopting the course which he did.

The contention with regard to the necessity for the prior approval of the Advocate-General needs more consideration as it is said that the decision of this Court in 45 Mad 113[1] is no longer good law. In that case it was held by a Full Bench of five Judges that a suit by a trustee of a public, charitable or religious trust against a co-trustee for accounts does not fall within S. 92, Civil P. C. and may be brought without the sanction of the Advocate-General. It is said that this decision has been set at nought by the judgment of their Lordships of the Privy Council in 55 Cal 519,[2] and that of this Court in 58 Mad 988.[3] I can see nothing in these decisions to warrant any such assertion. Before referring to them, however, it is necessary to refer to the provisions of S. 92, Civil P. C. The section deals with the procedure to be adopted in a representative suit for relief in respect of a public trust. But to come within the section there must be a breach of trust or the necessity for the direction of the Court with regard to the administration of a trust. The section requires that there shall be at least two plaintiffs and that the Advocate-General must give his sanction to the institution of the suit. If these conditions are fulfilled, a suit can be launched under the section. It was never intended, in my opinion, that this section should take away the right of a trustee to launch a suit for an account against a co-trustee, unless he obtained the approval of the Advocate-General and I consider that it has not this effect. That a trustee has such a right cannot be denied. The right is necessary for his own protection; otherwise he might be made liable for acquiescing in unlawful dealings with the trust funds.

In 55 Cal 519[2] the Judicial Committee were careful to point out that in a Code regulating procedure it is unlikely that the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at the time the Code was enacted. If the argument advanced on behalf of the appellants were sound, it would mean that a trustee could not proceed against a co-trustee for an account without joining a third party and he could never proceed at all if the Advocate-General refused his sanction. This was pointed out by Oldfield J. in 45 Mad 115[1] and it appears to me to provide a complete answer to the appellant's case. The learned advocate for the appellants has relied on a passage in the judgment in 55 Cal 519,[2] where it was pointed out that in inserting sub-s. (2) of S. 92 the Legislature adopted the view of the Bombay High Court that a suit which prays for reliefs mentioned in S. 92 can only be instituted in accordance with the provisions of that section. But it must be a suit contemplated by that section and as I have already mentioned the Judicial Committee in this very case expressed the opinion that the section did not operate to abolish existing rights. With regard to 58 Mad 988[3], the learned Judges who decided that case pointed out

1. Appanna v. Narasingha, A I R 1922 Mad 17 =69 I C 304=45 Mad 113=41 M L J 608 (F B).
2. Abdur Rahim v. Abu Mahomed Barkat Ali, A I R 1928 P C 16=108 I C 861=55 I A 96= 55 Cal 519 (P C).
3. Janaki Bai Ammal v. Vinayakar of Melmandai, A I R 1935 Mad 625 = 157 I C 63 = 58 Mad 988=69 M L J 291 (F B).

that it was entirely a different case to that in 45 Mad 113[1] and there is nothing in the judgment which throws the slightest doubt on the correctness of the former decision.

We have been referred to two other cases, 63 M L J 703[4] and 42 M L W 264.[5] In the first of these cases it was held that a trustee could not, apart from S. 92, ask for the framing of a scheme, and a suit which did ask for the framing of a scheme and did not comply with the section was bad to that extent. This is so, but the decision does not in any way assist the appellants in this case. It does not affect the question under discussion at all. The case in 42 M L W 264[5] was a decision of my learned brother Varadachariar J. My learned brother there held that the mere fact that the plaintiffs may in a sense be trustees will not necessarily preclude the application of S. 92, Civil P. C., if the reliefs in the suit relate not to the vindication of their personal rights, but to the advancement of the interests of the institution itself by securing more efficient management. A perusal of that judgment shows that the learned Judge was careful to distinguish the case where a plaintiff is suing to vindicate a personal right and that is what the plaintiffs are doing in the case out of which the present appeal arises. The correctness of the Full Bench decision in 45 Mad 113[1] is unshaken and we are bound by it. We accordingly hold that the learned trial Judge was right in deciding that the suit did not require the sanction of the Advocate General before institution.

I might mention that one of the prayers in the plaint asks for an injunction restraining defendant 2 from acting further as a trustee. The question whether such a prayer can be included in the present suit does not arise in the appeal and therefore I express no opinion on it. The appeal fails and must be dismissed with costs.

Varadachariar J.—I respectfully agree. But, in view of the state of the authorities, I think it right to add a few observations on the question of the applicability of S. 92, Civil P. C., to a suit like the present. If the matter were res integra, it may be conceded that there is a fair volume of authority in favour of the wider construction of S. 92 contended for by Mr. Sesha Ayyangar on behalf of the appellant. The decisions referred to in the judgments in 45 Mad 113[1] are themselves sufficient to show this. I may add that even more recently the Bombay High Court has expressed views which seem to lend considerable support to the appellant's contention: *see* 26 Bom L R 950[6] and 35 Bom L R 1119.[7] So far however as this Court is concerned, we have to start with the fact that a Bench of five Judges have decided in 45 Mad 113[1] that S. 92 has no application to a suit like the present. The principle underlying that decision is perhaps best stated in the words of Sir D. F. Mulla: *see* page 309, Edn. 10, Civil Procedure Code, viz. that sub-s. (2) of S. 92, though expressed in general terms, must be read along with sub-s. (1) and it follows on such reading that :

> It is not every suit claiming any of the reliefs specified in sub-s. (1) that should be brought with the consent of the Advocate-General, but those suits only which besides claiming any of those reliefs are brought by individuals as representatives of the general public.

In a suit like the present, the relief though it may be of the kind mentioned in S. 92 (1) is not sought in the larger interests of the public but is merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust. That in certain circumstances similar reliefs may have to be prayed for in the one kind of action as in the other is pointed out in the judgment of Kumaraswami Sastri J. in 45 Mad 113.[1] It therefore does not seem to me right to make the nature of the relief prayed for in a suit the conclusive and exclusive test in determining the applicability of S. 92.

Mr. Sesha Ayyangar had, in view of the Full Bench decision, to contend that that decision can no longer be regarded as authoritative after the decision of the Judicial Committee in 55 Cal 519.[2] I agree with my Lord that there is nothing in the judgment of their Lordships of the Judicial Committee which throws doubt on the authority of Full Bench decision. As

4. Ramanuja Krishna Ayyangar v. Ramanuja Alwarappa Ayyangar, A I R 1933 Mad 70 = 140 I C 197 = 63 M L J 703.
5. Sundara Ayyar v. Murari Varada Ayyar, A I R 1935 Mad 855 = 158 I C 369 = 42 M L W 264 = 69 M L J 300
6. Narayan v. Vasudeo, A I R 1924 Bom 518 = 86 I C 490 = 26 Bom L R 950.
7. Chhaganlal v. Sobharam, A I R 1934 Bom 26 = 148 I C 1159 = 35 Bom L R 1119.

pointed out in the judgment just delivered, their Lordships have there taken care to say that it is too much to presume that the Legislature intended to make any serious alteration in the previous state of the law or to extinguish or impair pre-existing rights of action and that the main purpose of the enactment of sub-s. (2) of S. 92 was to settle the conflict of the previous state of the decisions in India. To understand the effect of this observation of their Lordships, some regard must be had to the previous state of authority in this country and attention must also be bestowed on the circumstances in which the question arose before the Judicial Committee. In that case the action had been brought by certain Mahomedan inhabitants of the neighbourhood who were interested in the institution. The suit was therefore not one by trustees who had any personal rights of their own to assert, but corresponded to what is spoken of as a representative suit on behalf of the public.

The contention before the Judicial Committee on the one side was that wherever the litigation related to a public trust, the suit could be framed only in accordance with the provisions of S. 92, Civil Procedure Code, and the reference in sub-s. (2) of S. 92 to the nature of the reliefs prayed for in such a suit was sought to be ignored by the appellant's learned counsel. It was in those circumstances that their Lordships emphasized the antithesis between a suit praying for reliefs specified in sub-s. (1) of S. 92 and for reliefs outside that sub-section and they observed that S. 92 could apply only to suits praying for reliefs specified in sub-s. (1). But as I have already pointed out, the whole discussion arose in connexion with what was undoubtedly a representative suit. It does not seem to me right to ignore that circumstance and read the judgment as laying down that even where a suit is not in any sense of a representative character, the mere fact that the reliefs asked for in the suit may fall within sub-s. (1) of S. 92, Civil P. C., was intended by their Lordships to be a conclusive test. Mr. Sesha Ayyangar relied on one observation on page 529 as supporting his contention that their Lordships must have had even suits based on individual rights in their contemplation when they laid down their proposition. This observation relates to the previous cases in India which had held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by an ordinary suit without being obliged to bring a suit of a representative nature as above-mentioned. It seems to me that Mr. Sesha Ayyangar's contention does not give effect to the words used in that sentence. That sentence clearly relates to cases where a representative suit could have been or might have been brought and not to cases where the cause of action sued on was such that no representative suit could have been brought.

An examination of the earlier cases in India will show that even when a suit was not intended to enforce a right in the nature of the rights of a trustee but related to the enforcement of the obligations of the defendant in the performance of the trust for the benefit of the public, it had been held that a suit of that kind need not necessarily be brought only in conformity with the provisions of S. 539 but may be brought either under O. 1, R. 8, Civil P. C., or even independently of it. It is in this sense that their Lordships point out that the question had arisen in this country whether the provisions of S. 539 were merely permissive or mandatory. The question of permissive or mandatory cannot possibly arise in respect of a suit which cannot be brought in a representative character at all. All that the Judicial Committee intended to lay down and did lay down was that wherever the cause of action on which the suit is founded is one which could have sustained a representative suit, the procedure prescribed by S. 92 must necessarily be followed and no suit could be maintained in any other form. I particularly wish to point out that in this judgment, their Lordships did not add the sentence which is somehow introduced in a later judgment of this Court, namely that the character of the plaintiff is immaterial. It is only in the judgment of this Court in 58 Mad 988[3] that Cornish J., in attempting to state the effect of the Privy Council decision, puts the antithesis in the following words :

> Whether the suit falls within S. 92 depends not upon the character in which the plaintiff sues but upon the nature of the relief sought.

With great respect I would state that this is not the proper test to be applied and was certainly not the test laid down by the Judicial Committee. It has sometimes been said that whenever relief is sought on the allegation of a breach of trust, the suit must necessarily be brought

in conformity with S. 92, if it in any manner relates to a public charitable trust. Here again, I think, this will not be a safe or conclusive test, because an allegation of breach of trust may in certain circumstances be necessary even when a co-trustee is trying to assert or vindicate his own rights against other co-trustees who are in management: *see* 53 Mad 214.[8] The test seems to me to have been stated with fullness and accuracy in the passage that I have already cited from Sir D. F. Mulla's book. Even in Bombay the principle that S. 92 will not apply to suits instituted for the vindication of the right of management vested in the plaintiffs has always been recognized (*see* 28 Bom 20[9] at p. 54 and 26 Bom L R 950,[6] particularly the judgment of Fawcett J.), but differences have arisen mainly on the construction of the scope of the plaint in each case. In the view that we are bound by the judgment of the Full Bench in 45 Mad 113,[1] and that its authority has not been shaken by the decision of the Judicial Committee in 55 Cal 519[2], we have no alternative but to disallow the appellant's contention.

C.R.K./S C. *Appeal dismissed.*

8. Narayanan v. Mootha Poduval, A I R 1930 Mad 295=122 I C 460=53 Mad 214.
9. Nowroji v. Dastur Kharsetji, (1904) 28 Bom 20=5 Bom L R 745.

✻ A. I. R. 1938 Madras 96

LEACH C. J. AND VARADACHARIAR J.

Mohamed Hasan Khaleeli—Appellant.

v.

P. Varadarajulu Naidu, Liquidator of Tamil Nadu Ltd. and others — Respondents.

Appeal No. 52 of 1937, Decided on 24th August 1937, from order of Gentle J., D/- 28th April 1937.

✻ Company—Winding up—Costs—Petition by one creditor for winding up under supervision of Court—Notice to other creditors to appear—Petitioning creditor not willing to pursue his petition—Other creditors appearing but instead of opposing petition, supporting it but not willing to undertake burden of petition — Petition dismissed — Supporting creditors held not entitled to costs.

As a general rule, the successful party is entitled to costs in his favour and the unsuccessful party is liable to have an order for costs against him. A creditor appearing in a winding up petition is not entitled to his costs as a matter of right. To entitle him to them he must show reasonable ground for appearing : (*1879*) *1 Ch D 130, Rel. on.* [P 98 C 1]

By the notice referred to in R. 27 of the Rules of the Original Side of the Madras High Court under the Companies Act which is required to be in terms of Form No. 9, the Court only intended notice to issue to persons who wished to oppose and not to support it. [P 97 C 2]

Where a creditor made a petition for the winding up of a Company under the supervision of the Court and when a notice was served on other creditors who wished to oppose it but the creditors instead of opposing the petition professed to support it and were not willing to bear the burden of the petition which the petitioning creditor was unwilling to proceed with and the Court dismissed the petition :

Held that the supporting creditors were not entitled to costs. [P 97 C 2]

K. Krishnaswamy Iyengar and Mahomed Asker Ali — *for Appellant.*

W. A. P. Lobo, S. S. Rajagopalan, T. K. Rajagopalan, Kasturi Ranga Iyengar and K. M. Balasubramaniam — *for Respondents.*

Leach C. J.—This appeal raises a question with regard to costs in a winding up petition. In November 1936 a resolution was passed for the voluntary winding up of the 'Tamil Nadu, Ltd.' a Company registered under the Indian Companies Act, 1913. The Company had been formed for the purpose of publishing a daily newspaper in Tamil in Madras. On 11th December 1936, the appellant filed a petition on the Original Side of this Court asking that an order might be passed for the winding up of the Company under the supervision of the Court. This action was taken as the result of a resolution passed at a meeting of creditors held on 2nd December 1936. On 15th December a further application was filed for the appointment of an interim Official Liquidator. These petitions came before Gentle J. on 27th April of this year. The learned advocate appearing for the appellant then informed the Court that his client did not propose to pursue the winding up petition and he had no interest in it. The learned Judge inquired whether any other creditor would proceed with the petition. I should mention that six creditors had entered appearances and professed to support the petition. Two of them, respondents 2 and 7, asked for time to look into the matter. Time was accordingly granted until next day when the case was again placed in the list. The learned advocate for respondent 2 intimated that his client would like to continue the petition in the place of the petitioner, but later realising that he was not in a

position to prove facts which would justify a supervision order being passed, he informed the Court that he was not in a position to proceed further. Respondent 7 was also not willing to go on with the petition. In his case there was only a small amount due by the Company. The learned Judge then passed an order dismissing both the petitions ; and in respect of the petition for a supervision order, he directed that the petitioner should pay the costs of all parties appearing before him. As there were seven respondents, the voluntary liquidator and six creditors, this meant that the petitioner was required to pay seven sets of costs which would amount, we are told, to a sum of over Rs. 2,000. The petitioner has appealed against this order and contends that the learned Judge was not entitled to pass any order for costs against him.

While the position of the creditors who appeared is on a different basis, it is quite clear that the voluntary liquidator would have been entitled to his costs, because he had successfully opposed the petition. But he had agreed before the case came into Court on 27th April that he would not press for his costs and that there should be an order dismissing the petition without costs. In these circumstances, he does not ask for the dismissal of the appeal. In fact, he is quite agreeable to the appeal being allowed. Respondent 3 in the appeal leaves the matter in the hands of the Court. Respondents 2, 4, 5, 6 and 7 in the appeal strongly oppose the appeal. The question involves a reference to the provisions of the Rules of the Court and consideration of the principles which apply. Dealing first with the Rules, R. 27 of the Rules of the Original Side of this Court under the Companies Act provides that every petition for the winding up of any Company by the Court or subject to the supervision of the Court shall, after admission, be advertised fourteen clear days before the hearing, and the advertisement is required to be in the terms of Form No. 9 to be found at page 324 of the Rules. The form reads as follows :

> Notice is hereby given that a petition for the winding up of the above-named Company by the (or subject to the supervision of the) High Court of Judicature at Madras was on the day of 19 , presented to the High Court of Judicature at Madras, by the said Company (or A, B of , a creditor or contributory of the said Company, or as the case may be). And that the said petition is directed to be heard on the day of 19 ; and any creditor or contributory of the said Company desirous to oppose the making of an order for the winding up of the said Company under the above Act, should appear at the time of hearing by himself or his counsel or vakil for that purpose and a copy of the petition will be furnished to any creditor or contributory of the said Company requiring the same, by the undersigned, on payment of the regulated charge for the same.
>
> Attorneys or vakils for the petitioners.

It will be observed that this form only refers to the appearance of persons who desire to oppose the winding up order. It differs materially from the form prescribed by the English Rules which allow interested persons to appear to oppose or to support. Rule 101 of this Court states that in cases not provided for by the Rules or by the Rules of procedure laid down in the Act, the practice and procedure of the High Court of Justice in England in matters relating to Companies shall be followed so far as they are applicable and not inconsistent with the Rules and the Act. It is said that by reason of this Rule the English Rule can be applied here and that the Court is justified in regarding the notice to appear as an invitation to appear to oppose or to support. I am unable to accept this contention. It is quite clear from the form of the notice that this Court only intended notice to issue to persons who wished to oppose. The law allows the Court to permit another creditor to take the place of a petitioning creditor who does not wish to proceed with his petition, but this is another matter and does not really affect the point under discussion.

We have here a notice inviting creditors who wished to oppose the application for a winding up order to appear at the hearing. The creditor-respondents to this appeal appeared in answer to the notice issued, but they appeared to support, not to oppose, the petition. It is said that in these circumstances the petition having failed they are not entitled to costs in their favour. They supported a petition which the Court dismissed. We consider that there is great force in this argument. Moreover, none of the creditors who did appear were willing to undertake the burden of the petition. Respondent 2 did express his willingness at one time to undertake this burden, but he found it too much for him and quickly abandoned the idea. It seems to us that in these circumstances it is not open to him to oppose

this appeal, and the same remark applies to the other opposing creditors.

We have been referred to a number of cases decided in England on questions relating to costs in winding up petitions. It appears to be usual there to allow one set of costs to the successful party and where the petition is withdrawn one set even to the supporting creditor or creditors. But it must be remembered that in England supporting creditors are invited to come in. They are not invited to come in under the Rules of this Court. The question of costs must be decided in the light of the facts of the particular case. As a general rule, the successful party is entitled to costs in his favour and the unsuccessful party is liable to have an order for costs against him. The opposing respondents in this case are not the successful parties. A case which has a general application is that in (1879) 10 Ch D 130,[1] where it was decided that a creditor appearing in a winding up petition is not entitled to his costs as a matter of right. To entitle him to them he must shew reasonable ground for appearing. In giving the judgment in this case, Jessel M. R. observed :

> I refuse these costs, and I will state my reasons for doing so. I by no means assent to the proposition that creditors appearing on a petition to wind up a Company are entitled to their costs as of right. It is usual to give one set of costs when many appear, and when there is a reasonable ground for appearing ; but I have said before, and I repeat it, that I will not lay down any such rule as that creditors are entitled to their costs as of right, because that would induce solicitors to instruct counsel simply for the purpose of obtaining costs, and for no other purpose whatever.

I do not wish to suggest that appearances have been entered in this case for the mere purpose of obtaining costs, but the appearances of the respondent creditors have not been justified. When they were called upon to adopt the petition they refused to do so. I will not pause to consider what their motives might have been, but it is clear that they have not made out a case for an order for costs in their favour. The only order for costs which might have been made in the circumstances was an order in favour of the voluntary liquidator, but he did not ask for it. The appeal will be allowed but we make no order for costs in the appeal. The appellant did not disclose before the learned trial Judge the reasons why he was not proceeding with the appeal and his attitude was one which was sufficient to raise suspicion as to his motives. The liquidator will have his costs of the appeal out of the assets of the Company.

C.R.K./D.S. *Appeal allowed.*

1, In re Hull and County Bank, (1879) 10 Ch D 130=27 W R 377.

A. I. R. 1938 Madras 98

LEACH C. J. AND MADHAVAN NAIR J.

Madana Palo and others — Appellants.

v.

Hindu Religious Endowments Board, Madras — Respondents.

Appeal No. 61 of 1932, Decided on 15th September 1937, against decree of Dist. Judge, Ganjam, in O. S. No. 10 of 1929.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (5)—Excepted temple — Trusteeship in one family for four generations—Temple should be regarded as 'excepted' and trusteeship hereditary.

Where the office of a trustee has been held by the head of a family for four successive generations and there is no suggestion that the trusteeship had ever been held outside the family, the temple should be regarded as an excepted temple under S. 9 (5) and trusteeship as hereditary: *10 Mad 292 and 36 Mad 364, Rel. on.* [P 99 C 2]

(b) Deed—Construction—Words importing hereditary character not imported in deed—Evidence of long enjoyment and descent—Hereditary character presumed.

Where in the deed words importing the hereditary character of the tenure are absent but it is supplied by evidence of long and uninterrupted enjoyment and by the descent of the tenure from the father to the son, it could be legally presumed that the tenure is of a hereditary character: *10 M I A 183 (P C) and 12 M I A 263 (P C), Rel. on.* [P 100 C 1]

B. V. Ramanarasu — *for Appellants.*

P. V. Rajamannar and K. Subba Rao — *for Respondents.*

Leach C. J. — The appellants were the plaintiffs in the Court below. They claim that appellant 1 is the hereditary trustee of the Sri Radhakanta Mahaprabho temple of Bhavanipur. By an order dated 16th October 1928, the Board of Commissioners for Hindu Religious Endowments framed a scheme for the management of this temple under the provisions of S. 57, Madras Hindu Religious Endowments Act, 1927. In spite of the contentions by the appellants to the contrary, the Board refused to recognize the temple as being an excepted temple within the meaning of S. 9 (5) of the Act and rejected the claim set up by the appellants that their family possessed

the hereditary right of appointing a member as trustee of the temple. On this basis the Board decided that there should be a council of three trustees and placed the management of the temple in hands of this council. No member of the appellants' family was however appointed to this council of trustees. The appellants were not satisfied with the Board's decision and instituted the suit out of which this appeal arises, as they had the right to do under S. 57 (3) of the Act. The learned District Judge agreed with the findings of the Board of Commissioners and adopted the Board's scheme. He held that the hereditary right claimed had not been established; that the temple was not an excepted temple within the meaning of S. 9 (5) and therefore a scheme should be framed under S. 57; that the lands which the appellants claimed to be theirs were in fact temple lands; and that the appellants had been guilty of mismanagement of the temple while carrying out the duties of trustees. All these findings have been challenged before us.

It will be convenient to take the question relating to the lands first. It is quite clear in our opinion that these lands were not granted to the appellants' family, but have throughout been temple lands. There are two parcels of lands, one situate in the village of Bodogumala, and the other in the village of Bhawanipur where the temple is situate. The Bodogumala lands were granted to the temple some time prior to the inam settlement of 1862. The register of inams shows that the original grantee of the lands was the deity of this temple and the title deed which was granted by the inam commissioner on 3rd December 1862 was granted to the great-grandfather of the appellants as the manager for the time being of this temple. Para. 2 of the grant reads as follows:

> This inam is confirmed to you and your successors tax free to be held without interference so long as the conditions of the grant are duly fulfilled.

It will be observed that the grant was to the manager and to his successors and not to the great-grandfather of the appellants and his heirs. The register shows that the grant was given to the temple to defray the costs of daily pujas therein. In Col. 8, which is intended to contain the requisite information in the case of grants made for service, appear the words: "for the daily offerings of the deity service performed". It is on the strength of these words that the appellants contend that the grant was to their ancestors personally, subject to their defraying the cost of daily pujas in the temple. But this construction cannot be accepted in view of the fact that the register specifically states that the name of the original grantee is the deity of the temple and in face of the wording of the inam grant. We have no doubt that the appellants and their forefathers have regarded the Bodogumala village lands as their own and have so dealt with it. The fact that they have done so does not alter the fact that it was a grant to the temple and not to them. The title to the Bhavanipur lands is based on a patta granted in 1880 to the paternal uncle of appellant 1. It is not necessary to discuss whether the fact that this grant was in the paternal uncle's name makes any difference, because it is admitted by the learned advocate for the appellant that the Bhawanipur lands stand in the same position as the Bodogumala lands and if the Bodogumala lands are temple lands and not family lands, the Bhavanipur lands must also be regarded as temple lands. For these reasons we agree with findings of the learned trial Judge that the appellants' family does not possess any right of ownership.

With regard to the question whether appellant 1 is the hereditary trustee of the temple, we do not accept the finding of the learned trial Judge. It appears to us on the evidence read in the light of the authorities that the only conclusion open to the Court is the appellants' family does possess right of appointing the trustee of the temple, which means that it is an excepted temple. There is uncontradicted evidence that the management of this temple has been in the hands of the appellants' family for four generations. The trustee in 1862, that is at the time of the inam settlement, was their great grandfather and the office has been held by their paternal grandfather and by their father in succession. It has not been suggested that anyone outside the appellants' family has ever partaken in the management of the temple. That this justifies the conclusion that appellant 1 is the hereditary trustee is to be gathered from the decisions in 10 Mad 292[1] and 36 Mad 364.[2]

1. Ganapathi v. Sitharama, (1887) 10 Mad 292.
2. Ramdass v. Hanumantha Rao, (1913) 36 Mad 364=12 I C 449=21 M L J 952.

The case in 10 Mad 292[1] dealt with a claim to the office of karnam which had been held by the same family for three generations. The case in 36 Mad 364[2] related to temple lands and a question was raised whether the trusteeship was hereditary in the family of the plaintiff. The members of the family had held the office of trustee continuously for over a hundred years and there was no evidence that it was ever held by any other family. White C. J. and Phillips J. considered that this was sufficient to prove the hereditary right which had been set up. In 10 M I A 183,[3] their Lordships of the Privy Council held that the absence in the deed of words importing the hereditary character of the tenure was supplied by evidence of long and uninterrupted enjoyment and by the descent of the tenure from father to the son, and that from this hereditary character could be legally presumed. The same opinion was expressed by the Judicial Committee in 12 M I A 263.[4] We have in the case before us proof that the office has been held by the head of the appellants' family for four successive generations and that it is at present held by appellant 1 as the son of his father. Further, there is no suggestion that the trusteeship has ever been held outside the appellants' family. For these reasons we consider that the learned trial Judge was wrong in refusing to regard this as an excepted temple.

It is said however that the trial Court had the right to deprive appellant 1 of his trusteeship and vest the management of the temple in a board of trustees because appellant 1 and his brothers had been guilty of breach of trust. The alleged breaches of trust are: (1) the failure to keep accounts and (2) the mortgaging of the temple lands. It may be observed that there is no suggestion that the appellants or their forbears have improperly spent the income of these lands, and when the complaint was made against them that accounts had not been kept they took steps immediately to rectify this. In addition they have since discharged all the encumbrances on the temple properties. In these circumstances we are unable to concur in the opinion that there has been such mismanagement on the part of the appellants that the Court is justified in taking away the right of management which the family possesses.

This means that the scheme has been framed on a wrong basis. The learned advocate for the appellants does not object to a scheme being framed for the management of the temple, provided that appellant 1 is allowed to continue to be the trustee and the hereditary right is not interfered with. We have held that appellant 1 is entitled to be the trustee and that the family does possess the hereditary right of appointment. The scheme should provide for this. In view of the fact that the learned District Judge has placed the management of the temple in a board of trustees, it will be necessary for the scheme to be re-settled. The case will therefore be sent back to the District Judge for the re-settlement of the scheme in the light of this judgment. We direct each party to bear his own costs throughout.

C.R.K./B.D. *Appeal allowed.*

3. Baboo Gopal Lala v. Teluck Chunder Rai, (1863-66) 10 M I A 183=2 W R 1=1 Suther 558=2 Sar 98 (P C).

4. Raja Suttosurrun Ghossal v. Moheshchunder Mitter, (1867-69) 12 M I A 263=2 Beng L R 23=11 W R 10 (P C).

A. I. R. 1938 Madras 100

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Rathnaswami Mooppanar and others —Appellants.

v.

R. C. Nagaraja Mooppanar — Respondent.

Appeal No. 505 of 1931, Decided on 3rd September 1937, against decree of Sub-Judge, Tanjore, D/- 5th October 1931.

Transfer of Property Act (1882 before amendment of 1929), S. 107—Lease of reversion upon existing term can be created—Such lease operates as assignment of reversion and entitles lessee to recover rent due under prior lease—Distinction between assignment of rents and profits and lease of reversion stated.

There is nothing in the Transfer of Property Act to preclude the lease of a reversion. If a document has mentioned simply that a lease of the lands which were also the subject matter of the prior lease is being granted, that would in law without anything more operate as an assignment of the reversion and entitle the lessee under the latter lease to recover the rent due and payable under the former lease. There is always a distinction between an assignment of the rents and profits and a lease of a reversion. In the case of an assignment of rents and profits, all that the assignee will be entitled to is the right to realise the rents and profits by virtue of the assignment in his favour, but in the case of a reversion, it is not merely the right to recover

the rents and profits that are transferred to him but also the rights which the lessor had on the date of the reversion, for example, his right to recover possession immediately on the expiry of the previous term and if before the expiry of the term by virtue of any forfeiture, the lessor had the right to re-enter, the right of such re-entry.

[P 101 C 2 ; P 102 C 1]

T. R. Venkatarama Sastri for A. C. Sampath Iyengar and T. R. Srinivasa Iyer — *for Appellants.*

K. Raja Iyer for B. C. Seshachala Iyer —*for Respondent.*

Venkataramana Rao J. — This is an appeal from the decree of the Court of the Subordinate Judge of Tanjore awarding a sum of Rs. 12,942-8-3 in favour of the plaintiff. The suit was to recover arrears of rent on the basis of a lease, Ex. B, dated 25th December 1920, executed by defendant 1 in favour of one Seethalakshmi Ammal, the then proprietrix of Kapisthalam estate and defendants 2 and 3 are the undivided father and brother of defendant 1. The said lease was to run for ten Faslis commencing from Fasli 1333 to Fasli 1342. The lands comprised in the lease were about 59 acres 37 cents in the village of Sathyamangalam. Subsequent to the execution of this lease, on 23rd September 1925, the said Seethalakshmi Ammal gave a lease Ex. A in favour of the plaintiff of the whole of the Sathyamangalam village including the lands which had been leased under the prior lease of 1920. The latter lease was for ten Faslis from Fasli 1335 to Fasli 1344 and was to commence from Fasli 1335. The document was executed by the plaintiff in favour of Seethalakshmi Ammal. Not only did it comprise the lands which were the subject matter of the lease of 1920, it also included lands comprised under three other leases whose terms were outstanding. This lease deed was attested by defendant 1 in whose name the lease of 1920, Ex. B, had been executed. In and by the terms of the said document, Ex. A, the plaintiff was authorised to collect the lease paddy and cash rent due from all the lessees mentioned in the said document including the lease of 1920. This suit has been instituted for the recovery of arrears for Faslis 1335 to 1339 payable under Ex. B.

Two defences were urged by the defendants in answer to the plaintiff's claim. One was that the plaintiff had no right to sue for the recovery of the arrears of rent in the absence of any assignment executed by Seethalakshmi Ammal in his favour and the lease deed in favour of the plaintiff does not operate as such an assignment. The second defence was that on the date of the execution of the lease in favour of the plaintiff, Seethalakshmi Ammal was not in a sound state of mind ; therefore the lease must be deemed to be void and no rights accrued to the plaintiff thereunder. In regard to the first point, the contention of Mr. T. R. Venkatarama Sastriar is that once a lease has been executed for a term and it is outstanding, there can be no lease of the reversion, because such a lease would in law amount to a transfer of the rents and profits due and recoverable from the prior lessee and can only be done by an assignment executed by the lessor.

It seems to us that this contention is not sound. Under S. 107, T. P. Act (before the amendment) which governs this case, there can be a lease of immovable property by virtue of a registered document executed by the lessee in favour of the lessor : *vide* 35 Mad 95.[1] The subject matter of the lease must be immovable property and the immovable property may be actual land or may be a reversion upon an existing term. There is nothing in the Act to preclude the lease of a reversion. Under the English law it is open to a landlord to create concurrent leases, that is he can execute a lease today for a term and tomorrow he can execute another lease for another term to run from the date on which he executed the latter lease. Such a lease has always been held to be valid and in law would operate as an assignment upon the existing term : *vide* (1653) 78 E R 410.[2] There is nothing to preclude the application of this principle to India and it has been adopted by the Indian High Courts : *vide* 33 M L J 684.[3] Therefore the question is, "would Ex. A be a valid lease according to the Transfer of Property Act ?" It is conceded that it is. If Ex. A had mentioned simply that a lease of the lands which were also the subject matter of the prior lease is being granted, that would in law without anything more operate as an assignment of the reversion and entitle the lessee under the latter lease to recover

1. Ajam Sahib v. Meenatchi Devastanam, (1912) 35 Mad 95=8 I C 668=21 M L J 202 (F B).
2. Palmer v. Thorpe, (1653) 78 E R 410.
3. Manickam Pillai v. Ratnasami Nadar, (1919) 6 A I R Mad 1186=43 I C 210=33 MLJ 684.

the rent due and payable under the former lease.

On a construction of the plaint document, the intention is clear that there should be a lease of the reversion ; in fact all the rights and obligations which the lessor had at the date of the lease were intended to be leased to plaintiff and the lease is not a bare assignment of the rents and profits in which case probably, as Mr. T. R. Venkatarama Sastriar contends, such an assignment would be an assignment of an actionable claim within the meaning of S. 130, T. P. Act, and therefore require a transfer in writing signed by the transferor. But the present document Ex. A is not a bare assignment of the rents and profits and it is not logical or possible in this case to treat the right to recover profits and rents apart from other rights and obligations which the lessor had on the date of the lease. There is always a distinction between an assignment of the rents and profits and a lease of a reversion. In the case of an assignment of rents and profits, all that the assignee will be entitled to is the right to realize the rents and profits by virtue of the assignment in his favour, but in the case of a reversion it is not merely the right to recover the rents and profits that are transferred to him but also the rights which the lessor had on the date of the reversion, for example, his right to recover possession immediately on the expiry of the previous term and if before the expiry of the term by virtue of any forfeiture, the lessor had the right to re-enter, the right of such re-entry.

We are therefore clearly of the opinion that Ex. A is a lease of the reversion upon the existing term under Ex. B in regard to the suit property and the plaintiff is therefore entitled to realise the rents and profits for the Faslis in question. In regard to the second point, the only evidence that has been relied on is an alleged admission of the plaintiff in his deposition to the effect that he presented an application in 1926 to the Court of Wards requesting them to take possession of the Kapisthalam estate on the ground that Seethalakshmi Ammal, the proprietrix, was not in a sound state of mind and had been so for a period of two years before the date of the application, but what he says in that deposition is that she was not in a sound state of mind now and then and not continuously. But in order to invalidate the suit document, it must be established that on the date of its execution in September 1925, Seethalakshmi Ammal was not in a sound state of mind and there is no evidence whatever on this point. Mr. Venkatarama Sastriar requests us to admit the application which the present plaintiff preferred to the Court of Wards as additional evidence in this case. The defendants had ample time to make that application to the lower Court and no explanation has been given for their delay in not doing so and we are not inclined to entertain this request at this stage. No other point was argued before us. Therefore on the evidence on record, the finding of the learned Subordinate Judge that Seethalaksmi Ammal was in a sound state of mind on the date of the lease in favour of the plaintiff must be affirmed. In the result, the appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 102

LEACH C. J. AND VARADACHARIAR J.

Ananthachari and others — Appellants.

v.

Krishnaswami — Respondent.

Appeal No. 21 of 1936, Decided on 4th August 1937, from the judgment of Lakshmana Rao J. D/. 12th February 1936.

Hindu Law—Partition—Setting aside — *S* and *G* constituting joint Hindu family — *S* out of self-acquired income paying all family debts — Partition between *S* and *G* — *G* in consideration of services rendered by *S*, conveying moiety of his share to *S* in addition to *S*'s legal share — Transaction so far as it affected *G*'s share held could not be challenged by *G*'s son.

S and *G* constituted a joint Hindu family. The family estate was burdened with debts and *S* out of his separate and self-acquired income paid all the debts and made some improvements to the ancestral property. Subsequently *S* and *G* decided to partition the family estate and in the partition deed, *G*, in consideration of the services rendered by *S* to the family estate, agreed to convey, and in fact conveyed, a moiety of his share to *S* in addition to what *S* was legally entitled to get in the family estate. The son of *G* instituted a suit challenging the transaction and claiming the share paid to *S* in excess of his share :

Held that on equitable principles, the son of *G* was not entitled to tear up the transfer deed so far as it affected his father's share : *Case law discussed.* [P 105 C 1, 2]

K. Rajah Ayyar and K. E. Rajagopalachari — *for Appellants.*

K. S. Krishnaswamy Ayyangar and C. Narasimhachariar — *for Respdt.*

Leach C. J.—The appellants are sons of one Gopala Bhattachariar who died in the year 1931. Gopala who was the son of one Manavala Iyengar was born after his father's death which took place in 1888. Three years before he died Manavala adopted Srinivasa Bhattachariar, defendant 1 in the suit out of which this appeal arises. Srinivasa died during the pendency of the suit and he is now represented by the respondent. Srinivasa and Gopala remained joint until 1923 when a partition of the family estate was effected. At this time Gopala had one son, appellant 1, then a boy of five years of age. By the deed of partition which was dated 30th March 1923, the family estate was divided equally between Srinivasa and Gopala, notwithstanding that Srinivasa being an adopted son was only entitled in law to a one-fifth share. No question with regard to the validity of the transaction was raised during Gopala's lifetime, but in the month after his death the suit was launched by the widow as the next friend of the appellants who were then all minors. Appellant 1 has since come of age. The appellants contend that they are entitled to recover from the estate of Srinivasa the difference between the share he received and the one-fifth share allowed by law. The suit was tried by Lakshmana Rao J. who decided that in the circumstances of the case, Gopala was justified in giving a moiety of the estate to Srinivasa on partition. At the time of Manavala's death the estate consisted of about 80 acres of land. He was financially involved and it was necessary to sell a portion of the land to relieve pressure by a creditor. In a good year the income from the lands did not amount to more than Rs. 1,300 and the only other source of income which the family had was a half share in the chinna murai of the Sri Parthasarathy Temple, Madras. The income from this half share of the chinna murai did not amount to more than Rs. 40 per mensem and in all probability to much less; but whatever the exact figure was, it is clear that the joint income was not sufficient to provide for the maintenance of the family, the upkeep of the family properties and the discharge of the family debts.

On 3rd March 1903, the owners of the peria murai gave Srinivasa a power of attorney authorizing him to supervise the collections in the temple to which they were entitled with power to appoint others to assist him in his work. For these services he was to be paid Rs. 10 per mensem. Srinivasa himself took an active part in collecting monetary offerings from worshippers and it is common ground that he was entitled to retain a percentage of the amounts actually collected by him. His earnings in this respect are said to have amounted to about Rs. 40 per mensem, in addition to the Rs. 10 mentioned in the power of attorney.

But it is a legitimate inference from the proved facts in this case that his personal income was not limited to this Rs. 50 per mensem and he must have received much more by way of gifts from wealthy people interested in the temple. Srinivasa held this power of attorney for 20 years and it is very significant that 12 months after he obtained it, borrowings on behalf of the family ceased. The significance does not stop there. During the period for which Srinivasa held this power of attorney, the family debts were all paid off, improvements were made to the ancestral house, a second house was built and three small plots of land were purchased. This could only have been done out of moneys which Srinivasa acquired as the result of the position which he held as the agent of the owners of the peria murai, and this is in effect acknowledged in the deed of partition itself. It cannot be gainsaid that the family income alone was insufficient to do all this and Gopala who was a minor up to 1906 had no separate income of his own, apart from what he earned as a gumastha under Srinivasa, which could not have amounted to much. The position, therefore, was that Gopala had to thank Srinivasa for removing the oppression of debt and reviving the prosperity of the family. In these circumstances it is not surprising, when it was decided to put an end to the joint family status and partition the family estate, that Gopala agreed to Srinivasa having a half share instead of one fifth. The recitals in the deed of partition show that Gopala realized how much he owed to Srinivasa. These recitals read as follows :

> Whereas both of us were living hitherto in one joint family, and whereas, in view of certain inconveniences it is now deemed fit to effect a partition and live separately, and whereas the moveable and immovable properties belonging to us in common and mentioned hereunder belonging to us both as our ancestral property and self-acquired property, which are in our possession and enjoyment are most of them acquired and

improved to a great extent by Srinivasa Iyengar alone, the adopted son amongst us, under the patronage of great men. . . . .

The reference to the patronage of great men has been interpreted as meaning that as the result of coming into contact with wealthy worshippers Srinivasa received substantial gratuities, and no alternative interpretation has been suggested. The learned trial Judge had no reason to doubt the truth of the recitals and on the basis that Srinivasa had discharged the family debts held the partition deed to be valid. The learned advocate for the appellants challenges the correctness of this decision. He says that because Srinivasa threw into the common fund his own individual income, thereby providing moneys for the discharge of the family debts and the improvement of the estate, he had no claim in law to a greater share than one-fifth on partition. He had blended his own moneys with those of the family. There is certainly no evidence to show when the debts were paid off and there is no evidence that Srinivasa ever made a claim to be repaid any moneys spent by him for the benefit of the family, or any evidence that he had ever made any stipulation for repayment. Therefore, if the case rested here, there would be much to be said for the argument of the learned advocate for the appellants. The defendants in their written statement supported the partition deed on the ground that Srinivasa had done much for Gopala, and that therefore Gopala was entitled to do what he did. Before us it was also supported on the ground that it was in the nature of a family arrangement, but unfortunately for this argument there is no evidence that it was entered into in order to settle a family dispute or to avoid the expense or delay of litigation, or that there was, in fact, any real necessity for giving Srinivasa a larger share. But as it is true that Srinivasa had rendered services of real value to Gopala, I think that the deed can be supported. Gopala had by a registered deed in effect conveyed his share in the family property to Srinivasa in consequence of these services and as appellant 1 has received his individual share in the family estate in full, he cannot be allowed to repudiate the transaction. The other appellants were not born at the time and standing alone have no right to challenge the transaction.

Here it will be convenient to examine some of the authorities which have been quoted to us in the course of the arguments. The first of these is that in 33 Bom 267.[1] A perusal of the report in that case shows that their Lordships of the Privy Council had at an earlier stage dealt with the validity of a deed whereby a son in consideration of a monetary payment by the father relinquished his own share in the ancestral property, and that at a later stage the Bombay High Court held that this operated to prevent a son born subsequently from having any claim to share in the property. There was here however no express transfer by the son to the father and the facts differ to that extent. I will now turn to the series of connected decisions to be found in 26 M L T 460,[2] 1917 M W N 30[3] and 43 M L J 298.[4] One Venkata Row, who died in 1871, had four sons, Ramachandra Row, Luchman Row, Rajaram Row, and Tuljaram Row. After the dissolution of the family in 1881, a large part of the family property remained in the hands of Tuljaram Row. In 1886, Atmaram, the son of Luchman, brought a suit for the purpose of ascertaining what the assets in the hands of Tuljaram Row were and for the recovery of his share. In the course of this case it was held that Tuljaram Row was liable to Rajaram Row and his branch of the family in certain sums of money. Rajaram on behalf of his branch agreed to release Tuljaram from payment of these moneys in consideration of Tuljaram agreeing not to appeal. In other words, Rajaram gave up his own and his son's rights without any struggle. On the son attaining majority he filed a suit to enforce his rights.

This suit failed both in the trial Court and in this Court on appeal, but the case was carried to the Privy Council where it was held that the compromise not having received the sanction of the Court was not binding on Rajaram's son who was a minor at the time. The agreement did not purport to be a release of individual rights nor to effect any division of the joint family property ; it only purported to release the debts owing to Rajaram's branch of the family in consideration of Tuljaram

1. Shivajirao v. Vasantarao, (1909) 33 Bom 267 =2 I C 249=10 Bom L R 778.
2. Ganesh Row v. Tuljaram Row, A I R 1914 Mad 91=24 I C 696=26 M L J 460.
3. Venkata Row v. Tuljaram Row, A I R 1917 Mad 30=38 I C 270=1917 M W N 30.
4. Venkata Row v. Tuljaram Row, A I R 1922 P C 69=74 I C 765=49 I A 91=45 Mad 298 =43 M L J 298 (P C).

refraining from appealing. The case was then sent back for re-trial on the other issues. On the remand this Court decided that the compromise was binding to the extent of the father's share. Another appeal followed to the Privy Council which held that the agreement entered into by Rajaram Row did not purport to be a release of individual rights or shares in the fund at all, and it did not purport to effect any division of the joint family estate then existing between Rajaram Row and his son in the subject matter of the decrees. Their Lordships accordingly held that Rajaram Row's attempt to alienate, or to release, from the estate substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated. But the case before us goes further than this. Gopala did in fact execute in favour of Srinivasa a transfer of half the property and put him into possession of it.

In 59 M L J 139[5] it was pointed out that the compromise there did not purport to alienate the father's share alone but the whole of the family interest in the property and therefore was not binding on the family. It was recognized however that when such an alienation has been effected, the Court will enforce an equity in favour of the alienee to the extent of the alienor's share, though it does not follow that the Court will enforce such a compromise before the equity has in fact arisen. In 19 M L J 62[6] it was held that a gift by a member of a joint Hindu family made in consideration of past services voluntarily rendered to the family would not bind any of the members of the family other than the donor, without proof that they were for family necessity or for family benefit; but it would be binding on the donor himself as one made for consideration received. In that case it was pressed upon the Court that past services voluntarily rendered would not amount to consideration to support a promise, but the Court held that it did not follow that the services were not of value when set against an alienation. The services rendered were in fact capable of valuation and the defendant had valued them and paid for them by the transfer. This is exactly the case here. It seems to me that in the circumstances of this case the Court, exercising as it does jurisdiction in equity, is entitled to say that appellant 1 shall not be allowed to tear up the transfer deed so far as it affects his father's share. For these reasons I think the decree passed by the learned trial Judge was a correct one. The appeal will accordingly be dismissed with costs.

Varadachariar J. — I agree and shall only add a few observations on the points of law argued before us. The conclusion of the learned trial Judge that the facts which he found proved 'would unquestionably justify the equal division' between the two brothers seems to me, with all respect, open to criticism. On behalf of the appellants it was contended, with some justification, that when under the law Srinivasa was only entitled to a fourth of Gopala's share, the facts that Srinivasa (who was the family manager) had by his labours or even with the aid of his self-acquisitions improved the family properties or paid off its debts would not entitle him to claim a larger share. The learned Government Pleader (who appeared for the respondent) sought to support the lower Court's conclusion as a finding based on the principles applied in favour of family settlements; and he relied in this connexion on the decisions in 12 Bom L R 621,[7] 36 Mad 151[8] and 30 M L J 308.[9] The grounds on which 'family settlements' are supported are well established; but in applying to a case like the present, observations in judgments dealing with family settlements, there is an obvious distinction, which ought not to be lost sight of, between cases in which the question of validity arises only as between the parties to the transaction and those in which it is sought to bind by the transaction persons who were only represented therein by one of the parties thereto. This distinction is material when it is sought to bind Hindu reversioners or minor co-parceners in a joint family by transactions entered into by a widow or an undivided father. In this latter class of cases, it will not be enough merely to prove that the transaction was intended to secure peace and harmony in the family or the preservation

5. Veeranna v. Seetanna, A I R 1931 Mad 218=128 I C 701=59 M L J 139.
6. Natesa Iyer v. Rathai Ammal, (1909) 19 M L J 62.
7. Ramdas v. Chabildas, (1910) 12 Bom L R 621=7 I C 134.
8. Anantanaryana Iyer v. Savitri Ammal, (1913) 36 Mad 151=13 I C 458=22 M L J 231.
9. Ramamurti v. Ramamma, A I R 1917 Mad 571=33 I C 961=30 M L J 308.

of its property and that it was not tainted by fraud or similar vitiating circumstances.

In 40 Cal 966,[10] the sons of a Hindu father impeached an arrangement under which the father had allotted a share in the family property to one who claimed to be a co-parcener as the result of an adoption. The sons contended that there had been no valid adoption ; but the Courts in India, without trying this question, upheld the allotment on the ground that in the absence of any allegation of fraud or collusion, the sons would be bound by their father's act as 'the arrangement was in the nature of a compromise of a claim either disputed or which might have been disputed.' The Judicial Committee remanded the case for further investigation, observing that if on a partition a share is given to a stranger (which the respondent would have been but for the alleged adoption) 'the partition may be impeached as a disposition of property made without consideration unless it can be supported as a bona fide compromise of a disputed claim.' I see no difference in principle between the allotment of a share to a person who has no legal claim and the allotment to an admitted co-parcener of a share far in excess of his legal claim. The cases relied on by the respondent's learned counsel will on examination be found to satisfy the test indicated in the extract above quoted. In the present case the respondent's father raised a plea on the same lines in the written statement; but the respondent did not seriously attempt to establish it at the trial. I am therefore of opinion that the partition under Ex. I cannot as such be held binding on the plaintiff's branch.

The respondent is however entitled to succeed on another ground. Gopala had only one son at the date of the partition and his own share would then have been 2/5th of the whole estate. If on any grounds recognized by law, Srinivasa could be held to have become entitled at least to that share, the respondent can insist on maintaining the division under Ex. I, because Srinivasa has not thereby obtained more than his own 1/5th plus the 2/5th share of Gopala. On this footing, plaintiffs 2 and 3 who were not in existence on the date of Ex. I cannot claim any right to disturb the arrangement under Ex. I: 33 Bom 267.[1] It has been held in some decisions of this Court, 11 Mad 406[11] and 27 M L J 272,[12] that it is open to one co-parcener to relinquish his share to another co-parcener individually and that no pecuniary consideration is necessary to validate such relinquishment. It is however difficult to read into Ex. I an intention on the part of Gopala to relinquish or transfer his share as such. The decision of the Judicial Committee in 45 Mad 298[4] is an authority against reading any such intention into the document : (*see also* 59 M L J 139[5]). But, as recognized in 59 M L J 139,[5] there is another class of cases in which, though the father's transaction is not valid in law and did not distinguish his own share from that of his son, the law will split the transaction and on grounds of equity hold the father's transferee entitled to stand in his transferor's shoes and claim the share which he could have got if a partition between the transferor and his son had taken place at the date of the transfer. That this principle of equity may be invoked even in connexion with transactions in the nature of a partition was recognized by the Judicial Committee in 40 Cal 966[10] already referred to. On page 981 their Lordships observe that as between Kedarnath and Jainarain,

> it may well be that the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath on a partition ; and that the Court, if that position were established, would itself, at Jainarain's instance decree a partition as between the plaintiffs on the one hand and Kedarnath on the other.

As pointed out in 59 M L J 139[5], this principle of equity can be invoked only when there is a completed transfer by the father and the transfer is not gratuitous. In 45 Mad 298[4] the Courts in India had applied this principle but the Judicial Committee reversed that decision because in their Lordships' opinion the facts of the case did not warrant its application. In the present case, Mr. Rajah Iyer (the learned counsel for the appellants) sought to exclude that principle on the ground that the transfer of the excess share under Ex. I was gratuitous. He contended that as Srinivasa must be deemed to have 'blended' his self-acquisitions with the joint family property, the whole property that was divided under Ex. I had become joint property and there was accordingly

10. Ramkishore v. Jainarayan, (1913) 40 Cal 966 =20 I C 958=40 I A 213=10 N L R 1 (P C).

11. Peddayya v. Ramalingam, (1888) 11 Mad 406.

12. Thangavellu Pillai v. Doraisami Pillai, A I R 1915 Mad 113=26 I C 211=27 M L J 272.

no independent consideration moving from Srinivasa. This question of 'blending' was not distinctly raised by the plaintiffs at any stage of the case and the limitations governing such a plea are indicated in the recent judgment of the Privy Council in (1937) 2 M L J 114.[13] Even on the evidence as it stands, there is nothing to support the theory of 'blending' so far as the house in the village is concerned. Further, assuming for the sake of argument that Srinivasa could not have enforced at law a claim to retain any portion of the properties as his self-acquisition, that will not by itself exclude the equities arising on a transfer for value. That in entering into the arrangement embodied in Ex. I, Gopala acted—and rightly acted — on the footing that he had greatly benefited at the expense of Srinivasa, is clearly established by the evidence. This, in my opinion, is sufficient to entitle Srinivasa to the benefit of the equitable principle above referred to : (*see* 19 M L J 62[6]). As the transfer had been completed by Ex. I, and the rights of the parties have to be determined as on the date of Ex. I, the death of Gopala before the institution of this suit or the death of Srinivasa pending the suit can make no difference.

C.R.K./D.S. *Appeal dismissed.*

13. Nut Behari Das v. Nani Lal Das, A I R 1937 P C 61=167 I C 321=(1937) 2 M L J 114=31 S L R 218 (P C).

A. I. R. 1938 Madras 107

BURN AND ABDUR RAHMAN JJ.

Sheik Muhammad Rowther and another — Appellants.

v.

Aiyesha Bivi — Respondent.

Second Appeal No. 343 of 1933, Decided on 19th August 1937, against decree of Sub-Judge, Dindigul, in A. S. No. 59 of 1932.

Mahomedan Law — Dower—Madras Presidency — Dower not postponed by agreement —Presumption is that entire dower is prompt and payable on demand.

Unless payment of the whole or any part of dower is expressly postponed, it must be presumed to be prompt and payable on demand. This is the rule of law governing all Mahomedans without any distinction so far as Madras Presidency is concerned : *38 Mad 371 (F B), Explained; 19 W R 315 (P C), Rel. on; A I R 1929 Pat 207 and 33 All 291, Not foll.* [P 110 C 2; P 111 C 1]

K. Rajah Ayyar and U. Ramaswamy — *for Appellants.*

S. Panchapakesa Sastri and K. P. Krishnaswami — *for Respondent.*

Order of Reference.

Venkataramana Rao J.—Three points have been argued by Mr. Rajah Iyer in this second appeal, one relating to a question of fact and the other two relating to questions of law. The question of fact relates to the genuineness of Ex. F which is the document on which the suit claim for dower is based. There is a concurrent finding of both the Courts that Ex. F is genuine, and it is not open to Mr. Rajah Iyer to challenge it in second appeal. The second point urged before me is that as the contract Ex. F does not fix any time for payment of the dower and as the parties are governed by Hanafi law, part of the dower must be presumed to be prompt and part deferred, and that the view of the lower Court following 35 Bom 386[1] is not correct. It is admitted that the parties to this suit are Hanafis. The text-writers on Mahomedan Law seem to make a distinction between the Shia law and the Hanafi law in regard to the payment of dower where the contract does not fix the time for payment. In Shia law the presumption seems to be that in the absence of a contract fixing the time for payment, the dower is prompt and payable on demand; but in Hanafi law the presumption seems to be otherwise. In 8 Pat 645[2] at page 649, Das J. states the rule of law thus :

> It seems to be well settled that amongst the Sunnis, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom or in the absence of custom by the status of the parties and the amount of dower settled.

According to the learned Judge, the presumption will apply even in a case where an agreement is set up but is not substantiated. This seems to be the view also of the Allahabad High Court in 33 All 291.[3] But Mr. Panchapakesa Sastri contends that so far as this Presidency is concerned, no such distinction is drawn between Shia law and Hanafi law, and the Full Bench

1. Hussein Khan v. Gulab Khatum, (1911) 35 Bom 386=11 I C 558=13 Bom L R 511.
2. Mt. Bibi Mahbooban v. Md. Ameer-ud-din, (1929) 16 A I R Pat 207=117 I C 207=8 Pat 645.
3. Unda Begam v. Muhammad Begam, (1911) 33 All 291=9 I C 200=8 A L J 27.

in 23 Mad 371[4] must be deemed to have laid down the law for all Mahomedans. According to the said decision, unless payment of the whole or any part is expressly postponed, it must be presumed to be prompt and payable on demand. It is not clear from the judgment or from a reference to the printed papers whether the parties were Shias and/or Sunnis. In the argument of Mr. K. Srinivasa Iyengar for the appellant before the Full Bench there is a statement to the effect that he contended that the parties were Shias. At any rate both the Allahabad and the Patna High Courts are inclined not to treat that case as laying down any rule of Hanafi law but that the principle of that decision must be confined to Shias. I may observe that the decision in 23 Mad 371[4] purports to follow a decision of the Privy Council in 19 W R 315,[5] where the parties were Shias. It is not clear from the Full Bench decision whether it is intended to govern all classes of Mahomedans, whether Shias or Hanafis. In view of the decisions of the Allahabad and Patna High Courts which have taken a definite view on this matter, it is desirable that there should be an authoritative ruling whether the decision of the Full Bench in 23 Mad 371[4] was intended to lay down the law for all Mahomedans whether Shias or Sunnis. I accordingly refer the matter to a Bench for disposal. The other point raised by Mr. Rajah Iyer relates to the question of interest. This matter also will be disposed of by the Bench dealing with the second appeal.

Judgment.

Burn J.—The facts are all set forth in the judgment of my learned brother which I have had the advantage of perusing. Since I agree with his conclusions, it is not necessary for me to say more than a few words upon the subject for decision in this appeal. The point upon which our learned brother Venkataramana Rao J. felt some doubt was whether the Full Bench in disposing of the case, 23 Mad 371,[4] intended to lay down the law for all Mahomedans whether Shias or Sunnis. If it did, there is no question about the binding nature of the decision so far as we are concerned, and since the decision is now 37 years old I should be very reluctant to suggest that it requires reconsideration, whatever the nature of the decisions in other provinces might be. I do not think there is any room for doubt upon this matter. The order of reference to a Full Bench which gave occasion for the decision reported in 23 Mad 371[4] states simply that the parties were "Mahomedans". It goes on to state that this Court in 6 M H C R 9[6] held that "according to Mahomedan law dower is presumed to be prompt in the absence of express contract." The ground of this decision was stated to be that "the authorities agreed that there was a presumption of Mahomedan law to this effect". Later in the order of reference the learned Judges draw attention to Ameer Ali's work on Mahomedan Law in which a distinction is made between the Shia law and the Hanafi doctrines. Nevertheless, in the opinion delivered by the Full Bench there is no reference to any difference between Hanafi doctrine and Shia doctrine. It cannot be presumed that the learned Judges overlooked the reference to Ameer Ali's work and the only conclusion I can draw from their opinion is that they deemed themselves to be laying down the law for all Mahomedans irrespective of sect.

There is undoubtedly a divergence of view between Macnaghten and Baillie in those parts of their treatises in which they were propounding the principles of Hanafi law. There was not, I believe, at any time any question about Shia doctrine on this point. According to Shia law the whole dower is prompt when the contract is silent. I agree with my learned brother that the remark attributed to Mr. K. Srinivasa Iyengar in the report of his argument in 23 Mad 371[4], "these parties are Shias," must be the result of incorrect reporting. If the parties had been Shias, the contention put forward on their behalf could never have arisen. Macnaghten and Baillie differed. This Court in 6 M H C R 9[6] (which was a case affecting Shafis, i. e. Sunnis) followed Macnaghten in preference to Baillie and their Lordships of the Privy Council in 19 W R 315[5] expressed the opinion that the view laid down in Macnaghten's Principles was "the admitted rule". I am quite clear that we should do nothing now to indicate

4. Masthan Sahib v. Assan Bivi Ammal, (1900) 23 Mad 371=10 M L J 123 (F B).
5. Mirza Bedar Bukht Mohommed Ali Bahadur v. Mirza Khurrum Bukht Yahya Ali Khan Bahadur, (1873) 19 W R 315=2 Suther 823 (P C).
6. Tadlya v. Hasaneblyari, (1872) 6 M H C R 9.

any doubt about the correctness of the decision in 23 Mad 371.[4] On the question of interest, no sufficient reason was shown for interference with the decree of the lower Court. The appeal must be dismissed with costs.

Abdur Rahman J.—This appeal arises out of a suit brought by one Aiyesha Bivi for the recovery of her dower amounting to Rs. 2,000 and for subsequent interest. The suit was filed on the basis of a deed of dower which was silent on the point whether the dower was prompt or deferred. It was alleged on behalf of the plaintiff however that as the deed was silent on the point, the dower should be presumed to be prompt and in any case there was a communal custom prevailing to that effect in the Nallam Pillai community. In answer to this claim, her husband defendant 2 pleaded that the deed filed on behalf of the plaintiff was a forgery and that a sum of 2,000 tangas (a tanga being 1/3rd of a rupee) was fixed as a dower between the parties and was so entered in a document which had also provided that the whole of the dower was deferred in character. It was also pleaded that the aforesaid dower of 2,000 tangas, i. e. Rs. 667 was, although deferred, already paid to the plaintiff. In the alternative it was pleaded that the plaintiff was not entitled to recover any mahr during the continuance of the nikah and that there was no custom which would entitle her to claim it before dissolution of marriage.

Finding that the plea of payment raised on behalf of the defendants was not substantiated and that the deed of dower relied upon by the plaintiff was a genuine document, the trial Court did not give an explicit finding on the custom alleged on behalf of the plaintiff but referring to the question of law it was stated that the view taken by the Bombay High Court was probably the more correct view. He therefore found that the whole of the dower was payable on demand and decreed the claim. Aggrieved by this order the defendants filed an appeal to the Subordinate Judge at Dindigul who went into questions of facts carefully but disposed of the question of law with a statement that according to the Bombay High Court, if the document was silent on the point when the dower was to be paid, it should be taken to be payable at once.

Not being satisfied with the orders of the trial and the lower Appellate Court, the defendants came up to the High Court. The appeal was heard in the first instance by my learned brother Venkataramana Rao J. who came to the conclusion that the genuineness of the deed of dower could not be challenged in the second appeal. But in view of a Full Bench decision of this Court given in 23 Mad 371,[4] which followed a decision of the Privy Council in 19 W R 315[5] on the one hand and divergent views taken particularly by the High Courts of Allahabad and Patna in the rulings cited below on the other, 1 All 483,[7] 1 All 506,[8] 33 All 291[3] and 8 Pat 645,[2] he considered it desirable to refer the case for an authoritative ruling, and the case has consequently been sent to a Bench of this Court for disposal. This was done particularly as some doubt existed on the question whether the Madras Full Bench case and the Privy Council case, both of which have been cited above, intended to lay down the law for all Mahomedans whether of Shia or Sunni persuasion or only for Mahomedans of the Shia sect alone. This doubt was natural as the Privy Council decision was given in the case of certain members of the ruling house of Oudh who were Shias and although there was nothing to show on the records of the Madras Full Bench case printed in 23 Mad 371[4] that the parties were Shias, a statement has been printed as having been made by Mr. K. Srinivasa Iyengar, counsel for the appellant, that the parties to that suit were Shias. This is surprising as this statement is preceded by the words "Syed Amir Ali in his work on 'Mahomedan Law', Vol. 2 at p. 386, draws a distinction between Shias and Hanafis". If the counsel for the appellant in that case were alive, as he must have been, to the distinction pointed out by Syed Amir Ali, which laid down that under the Shia law where no time was specified for the payment of the dower or where its nature was described only in general terms and it was not mentioned in the contract of marriage how much was prompt and how much deferred, the whole was to be considered as prompt. Mr. Srinivasa Iyengar was contending for the appellant in that case that the dower in Mahomedan law, if not specified to be prompt, could not be presumed to be so. He is then stated to have cited in support

7. Eidan v. Mazhar Husain, (1885) 1 All 483.
8. Taufik-un-nissa v. Ghulam Kambar, (1885) 1 All 506.

of his contention the following words out of Baillie's Digest of Mahomedan Law:

When the parties have explained how much of the dower is to be mooujjul or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman and so much is to be mooujjul or prompt accordingly, without any reference to the proportion of a fourth or a fifth, but what is customary must also be taken into consideration.

If the parties to the suit were on the other hand Shias, Baillie's Digest of Mahomedan Law, Vol. 1, which deals with the law amongst Sunnis, would not have been quoted at all, particularly when the counsel had, as pointed above, admitted that in the case of Shias the presumption would be otherwise. It might be stated here that Baillie discusses the Imamea law in Vol. 2 of his work. The contention that Mr. Srinivasa Iyengar could not have made such a statement in 23 Mad 371[4] was also supported by the counsel for respondent by a reference to Wilson's Mahomedan Law, who has pointed out that an admission of that nature would have been fatal to the appellant's case (pp. 118, 119, Edn. 5). I have gone through the records of the case printed in 23 Mad 371[4] and find nothing there which would show that the parties to the suit were Shias. In view of what has been said, I have no hesitation in finding that the statement imputed to Mr. Srinivasa Iyengar to the effect that the parties to that suit were Shias and printed at page 375 of 23 Mad 371,[4] could not have been made by him. On the other hand, a reference to the other authorities which were cited by the Division Bench in referring the case to the Full Bench for decision and those which were cited before the Full Bench leads me to conclude that the Full Bench was dealing with a case between persons who were of Sunni persuasion, and not those who followed the Imamea law.

As for the decision given by their Lordships of the Privy Council in 19 W R 315[5], it is true that the parties to that suit must be presumed to have been Shias as the ruling family of Oudh was a Shia family. But a reference to the judgment in that case shows that their Lordships of the Judicial Committee did not, while considering this question, refer to Shia texts but to those which were applicable to Sunnis. There is nothing to show in fact that they intended to differentiate between the two schools of thought. The observations which they made in that case were wholly general in character. It would thus follow that the Full Bench case reported in 23 Mad 371[4] is binding on us and is really based on the observations made by their Lordships of the Privy Council in 19 W R 315,[5] in which they preferred to follow the law as laid down in Macnaghten's Principles and Precedents, Chap. 7, Art. 22, to the effect that :

Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand.

Had the Full Bench case not been based on the law laid down by the Privy Council, it would have been necessary to consider whether in view of the pronouncements of the learned Judges of Allahabad and Patna High Courts, based as they are on the dicta of the learned authors like Baillie and Ameer Ali, it would not be advisable to refer the case to another Full Bench. But in view of the conclusions arrived at by me, I do not feel called upon to do so. Moreover, while examining the original authorities referred to by Mr. Ameer Ali and Baillie, I came across an original text from Hammadeyah—a work of great authority and fully recognized to be so amongst the Sunni Mussalmans in India—in which the position of the law has been stated as described by Macnaghten in his Principles of Mahomedan Law. I find at page 89 of the first volume of Hammadeyah, 1825 edition :

Summal-mahre la yakhlu amma in-yakuna be-shart-it-tajila au be-shart-it-tajila au maskutan anhu amma iza kana be-shart-it-tajila au maskutan anhu fa-innahu yajib fil-hale moujjil le-inna haza aqdun moawezatun fa-yaqtazal-masawat fij-janebaine fal-marat aiyanat haqqaz-zauje fa-wajib in-yataaine haqqaha wa innama yataaine bit-laslim. [transliteration].

Rendered into English, it would read as follows :

The dower is not free then from one condition and other. It would either be with a condition of immediate payment (i. e. moujjil) or with a condition of its being deferred (movajjal) or it may be silent. But if it is with a condition of immediate payment or is silent, it would become immediately payable (muajjal) for it is a contract with consideration and is therefore required to be equal on both the sides. As the woman (wife) has established the husband's right, it is essential that he (husband) may establish hers and this would be established on payment.

The learned author then proceeds to refer to expressly deferred dower with which we are not concerned here. It is

true that Mr. Ameer Ali has based his opinion on Fatawa Alamgiri, which relies for its authority on a passage from Fatawa Kazi Khan. I have consulted both these original authorities and find that the statement of the law as given by them has been correctly put down by Mr. Ameer Ali in his well-known work at page 499, Vol. 2, and by Baillie in his Digest at page 127, Edn. 1875. But the fact remains that Hammadeyah lays it down differently and this view of law was propounded by Macnaghten and recognized by the Privy Council in 19 W R 315[5] and followed subsequently by this High Court in 23 Mad 371.[4] This rule of law is more commendable as it makes it more exact and workable in practice and fits in with the advancing state of society which gives more rights to helpless ladies in getting what they do not generally get on account of their dower—a liability which flows from the contract of marriage and which was, although generally discharged previously yet from which the husbands have latterly tried to escape in spite of a contract of which they have taken full advantage themselves.

As in 23 Mad 371[4], the defendants in this case appear to have entertained the view themselves that the dower was payable on demand as in spite of the plea that it was deferred, they pleaded payment of the whole sum and thus, as pointed out in 23 Mad 371[4], showed that their consciousness that it ought to have been so paid. At all events, it would be dangerous to go back upon or overrule decisions which are not manifestly erroneous. They have stood the test of time and must be deemed to have influenced a majority of Mahomedans —living in this Presidency at least—into a belief that if the character of dower is not specified, it would be taken to be prompt. The question of interest was not seriously contested and there is no reason why the plaintiff should not get it at the rate allowed by the lower Court, when she has been deprived of the use of her dower for such a long time, although it has been found to have been payable to her on demand. For the reasons given I would dismiss the appeal with costs throughout.

C.R.K /B.D. *Appeal dismissed.*

A. I. R. 1938 Madras 111

BURN J.

Nagayya Naidu and another —
Appellants.

v.

R. Duraiswami Naidu—Respondent.

Second Appeal No. 440 of 1935, Decided on 2nd December 1936, against decree of Sub-Judge, Chingleput, in A. S. No. 30 of 1934.

Limitation Act (1908), S. 21 (2) — *A* and *B* each purchasing half share in mortgaged property from original mortgagors— Mortgagee accepting payment by *B* in full satisfaction of amount due by him—Subsequent suit by mortgagee against *A*—S. 21 (2) held applied and payment by *B* could not be relied upon to save limitation against *A*.

Two persons *A* and *B* purchased approximately one-half of the hypotheca from the original mortgagors. The mortgagee accepted from *B* on a certain date the payment made by him in full satisfaction of the amount due by him. The mortgagee subsequently sued *A* to recover the amount due from him and relied on the payment made by *B* to save the bar of limitation :

Held that in the circumstances of the case *A* and *B* were joint contractors. Hence S. 21 applied to the case : *A I R 1929 Mad 419 and A I R 1930 Mad 738, Disting.* [P 112 C 1]

V. S. Rangachariar — *for Appellants.*

M. S. Venkatarama Iyer —
for Respondent.

Judgment.—The only question for decision in this appeal is whether the payment of the suit mortgage on 16th November 1926 by defendant 13 saved limitation as against defendant 12. The learned District Munsif held that it did not and the learned Subordinate Judge, disagreeing with him, held that it furnished the start of a fresh period of limitation and that therefore the suit was not barred. Defendants 13 and 12 are purchasers from the original mortgagors. Defendant 11 had purchased a portion of the hypotheca before and defendants 12 and 13 purchased one-half of the rest. Defendant 11 was exonerated during the trial and with regard to defendant 13, it was found by the learned District Munsif—and the learned Subordinate Judge agreed—that the payment made by him on 16th November 1926 was accepted by the mortgagee in full satisfaction of the mortgagee's claim against defendant 13. The learned Subordinate Judge says :

Was the amount received by plaintiff from defendant 13 in full satisfaction of the claim so far as he is concerned or no ? I find that plaintiff received it in full quit in view of the language of

Ex. A-1 (which is the endorsement of payment). I agree with the District Munsif on the point. It would therefore,

the learned Subordinate Judge goes on to say,

be inequitable to allow plaintiff to proceed against defendant 13 again from whom the full amount which he had agreed to pay by his sale deed with interest has been received.

Now, it has been held by two Benches of this Court, *vide* 55 I C 763,[1] and 53 Mad 119,[2] that the expression 'joint contractors' in S. 21 (2), Lim. Act, includes co-mortgagors. Defendants 12 and 13 in this suit are, as I have already said, purchasers of approximately one-half of the hypotheca from the original mortgagors, each purchased the share belonging to one of the original mortgagors. In view of this fact and also in view of the finding that the mortgagee definitely accepted the payment made by defendant 13 in full quit of what was due by him, it is peculiarly appropriate in my opinion to say in this case that defendants 12 and 13 are joint contractors within the meaning of S. 21 (2). This is a case in which not only by construction or implication but in actual fact the purchasers have taken over the contract made by the original mortgagors with the mortgagee. My attention has been drawn to the case in 56 M L J 630,[3] which was referred to in the case in A I R 1930 Mad 738.[4] In the first case Thiruvenkatachariar J. held that co-heirs of a single debtor are not 'joint contractors' within the meaning of S. 21 (2), Lim. Act, and in the latter case Curgenven J. held that the descendants of a deceased mortgagee are not joint contractors. The facts of the present case are however quite different. It is quite intelligible that co-heirs of a single debtor should not be held to be joint contractors with the original creditor, and in the case decided by Curgenven J. there is nothing to indicate that the purchasers with the concurrence of the mortgagee had taken over definite shares of the liability under the original mortgage. It appears to me quite clear that S. 21 (2), Lim. Act, applies to this case and therefore the decision of the learned Subordinate Judge is wrong. I set aside the decree passed in appeal and restore the decree of the learned District Munsif, holding that the suit as against defendant 12 was barred by limitation. The appellants will recover their costs from the respondent in this Court and in the lower Appellate Court.

C.R.K./D.S. *Appeal allowed.*

1. Muthu Chettiar v. Muhammad Hussain, (1920) 7 A I R Mad 418=55 I C 763.
2. Thayammal v. Muthukumaraswami Chettiar, (1929) 16 A I R Mad 881=121 I C 858=53 Mad 119=57 M L J 588.
3. Narasimha Rama Iyer v. Ibrahim, (1929) 16 A I R Mad 419=118 I C 302=56 M L J 630.
4. Lokhanda Naiko v. Lokhono Naiko, (1930) 17 A I R Mad 738=127 I C 641.

A. I. R. 1938 Madras 112

NEWSAM J.

In re Arikatla Nagireddi and others — Petitioners.

Criminal Revn. Case No. 377 and Petn. No. 346 of 1937, Decided on 23rd September 1937, from order of Dist. Magistrate, Guntur, in C. R. P. No. 4 of 1937.

Criminal P. C. (1898), Ss. 203, 436—Complaint dismissed under S. 203—District Magistrate cannot order complaint to be restored to file.

Where a Magistrate dismisses a complaint under S. 203, the District Magistrate cannot under S. 436 order that the complaint should be restored to file. The proper order is to direct further inquiry and the Magistrate has unfettered discretion to dismiss the complaint once more if he thinks it proper to do so. [P 112 C 2]

K. S. Jayarama Aiyar and G. Gopalaswami — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — The order of the District Magistrate under S. 436, Criminal P. C., is not correct in form or in substance. He cannot compel a Magistrate to take cognizance of a complaint. He has said that the complaint "should be restored to file", but as it was dismissed under S. 203 it never was on the file. The proper order to have made was to direct further inquiry into the case, which does not necessarily imply that process should be issued to the person against whom the complaint was directed. All that it is necessary to say is that the Magistrate before whom the case now is should hold an inquiry under S. 202, Criminal P. C., and proceed according to law, with unfettered discretion to dismiss the complaint once more if he thinks it proper to do so. The criminal revision petition is allowed.

C.R.K./B.D. *Petition allowed.*

A. I. R. 1938 Madras 113

BURN AND LAKSHMANA RAO JJ.

Muthu Rama Reddi — Appellant.

v.

Motilal Daga, trading under name and style of Sait Balakisandas Motilal and others — Respondents.

Appeal No. 325 of 1934, Decided on 6th August 1937, against order of Sub-Judge, Cocanada, D/- 5th July 1934.

(a) Limitation Act (1908), Art. 182, Expl. 2 —Decree transferred for execution—Application to Court which passed decree to transfer it to another Court is application to proper Court and is step-in-aid.

There is nothing in the Civil P. C. to prevent simultaneous execution of a decree in more than one Court, though it is a matter for the discretion of the Court to permit or refuse concurrent execution. The Court which passed the decree retains control of execution proceedings. Hence, even where a decree is transferred for execution to another Court, an application to the Court which passed the decree to transfer the decree to a third Court for execution is one made to the proper Court and amounts to a step-in-aid of execution within meaning of Art. 182, Limitation Act: *A I R 1928 Mad 493*; *A I R 1935 Lah 465* and *A I R 1937 Rang 258*, *Foll.* [P 114 C 2; P 115 C 1]

(b) Civil P. C. (1908), S. 42 — Transferee Court—Powers of.

Section 42 does not empower the transferee Court to order simultaneous execution or send the decree to another Court for execution. [P 114 C 2]

(c) Limitation Act (1908), Art. 182, Cl. (5) —'Final order' — Meaning—Application for transfer of decree to another Court for execution— Application being defective, Court ordering further time for remedying defects —Such order is not final order.

What is material under Art. 182, Cl. 5 is the final order on the application and not the date of the application. The order need not be an order on the merits or a judicial determination of the matter involved in the application. But the words 'final order' imply that the proceeding has terminated so far as the Court passing it is concerned. It cannot mean the 'last order' in point of time, irrespective of whether it terminates the proceeding so far as the Court is concerned. Where therefore an application is made to a Court for transfer of a decree for execution to another Court and, the application being defective, the Court makes an order granting further time for remedying the defects such order does not terminate the proceeding and hence does not amount to final order within the meaning of Art. 182, Cl. 5: *A I R 1937 Mad 885 (F B)*, *Rel. on.* [P 115 C 1]

K. Bhashyam Aiyangar for Advocate-General and A. Satyanarayana — *for Appellant.*

K. Subramanyam — *for Respondents.*

Lakshmana Rao J.—This appeal arises out of an application for transmission of the decree in O. S. No. 72 of 1922 on the file of the Subordinate Judge of Cocanada for execution to the District Court of South Arcot and the questions for determination are (1) whether the application is barred by limitation against the appellant (defendant 3) and (2) whether the decree is executable against him. Respondent 1 is the decree-holder and the suit was for recovery of Rs. 28,374.11.9 due under two promissory notes executed by the appellant and respondents 2 and 3. The appellant pleaded that he was a surety and the suit was decreed on 19th February 1923 as follows:

> It is ordered and decreed that the plaintiff (respondent 1) do proceed against defendants 1 and 2 (respondents 2 and 3) in the first instance and against defendant 3 (appellant) in case the amount cannot be realised from defendants 1 and 2 and do recover Rs. 25,777-4-9 with further interest and proportionate costs.

A sum of Rs. 3,652-4-1 was realised by 1926 by executing the decree against respondents 2 and 3, and two applications were filed by the decree holder on 18th January 1927 for transmission of the decree to the District Munsifs of Kovvur and Rajahmundry for simultaneous execution against respondents 2 and 3. The applications were ordered on 20th January 1927 and decree copies were transmitted to the District Munsifs of Kovvur and Rajahmundry. No steps were however taken at Kovvur or Rajahmundry and an application for transmission of the decree to the Sub-Court of Vizagapatam for execution against respondents 2 and 3 was filed in the Sub-Court of Cocanada on 20th January 1930 (18th and 19th January being holidays). It was alleged in the petition that the decree copies transmitted to the District Munsifs of Kovvur and Rajahmundry had been returned, though in fact only the decree copy sent to the District Munsif of Kovvur had been returned, and the application was defective in other respects as well. So it was returned on 23rd January 1930 for amendment, and the decree holder applied for and obtained time for that purpose on several occasions. The application was returned for the last time on 9th October 1930 and it was not represented thereafter. The application out of which this appeal arises was filed on 27th September 1932 for transmission of the decree to the District Court of South Arcot for execution against the appellant and respondents 2 and 3, and the latter did not appear. It was not alleged in the application that the decree amount cannot be realised from respondents 2 and 3 and the

appellant pleaded that the decree cannot be executed against him until then. Even otherwise he contended that the application of 20th January 1930 was not made to the proper Court and cannot save limitation, but the Subordinate Judge overruled the plea of limitation on the ground that the present application was filed within three years of the prior application. The contention that the prior application was not made to the proper Court and cannot save limitation was not considered, and though evidence was not led, and there is nothing on record to show that the decree amount cannot be realised from respondents 2 and 3, the Subordinate Judge negatived the other plea on the ground that the decree does not say that the decree-holder should exhaust the properties of respondents 2 and 3 before proceeding against the appellant, and that the time for executing the decree against the appellant had arisen in 1932 when the decree-holder was obliged to take out the execution against him.

Hence this appeal and it was argued first, that assuming the decree to be executable against the appellant, the application of 20th January 1930 cannot prevent time from running and the present application was barred by limitation against him. Art. 182, Cl. 5, Limitation Act, which was relied upon by the decree-holder, allows three years from the date of the final order on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree, and it was contended on behalf of the appellant that the application of 20th January 1930 was not even made to the proper Court within the meaning of that clause. 'Proper Court', according to Expln. 2 to Art. 182, means the Court whose duty it is to execute the decree, and it was urged that once the decree is transmitted to another Court for execution, that Court alone can execute it and the Court which passed the decree is not competent to entertain an application for transmission or execution, until the decree is returned to it with a certificate of non-satisfaction. This contention was not dealt with by the Subordinate Judge, though it was pressed before him and a finding had to be called for as to whether the decrees transmitted to the District Munsifs of Kovvur and Rajahmundry had been returned to the Subordinate Judge of Cocanada by 20th January 1930. It is now agreed that, as found by the Subordinate Judge, only the decree copy sent to the District Munsif of Kovvur had been returned, and the question is whether by reason of the non-return of the decree copy by the other Court, the Sub-Court of Cocanada was not competent to entertain an application for transmission of the decree to the District Court of South Arcot. This question was decided in A I R 1928 Mad 493,[1] in which all the previous decisions were considered and we see no reason for dissenting from the view taken therein that in such cases the Court which passed the decree is competent to transfer the decree to a third Court for execution. To the same effect are the decisions in 5 Rang 397[2] and A I R 1935 Lah 465,[3] and an examination of the relevant provisions of the Civil Procedure Code leads to the same result.

There is nothing in the Code to prevent simultaneous execution of a decree in more than one Court, though it is a matter for the discretion of the Court to permit or refuse concurrent execution, and it is clear from the provisions of O. 21, R. 26, which requires the transferee Court to stay execution to enable the judgment-debtor to apply to the Court which passed the decree for an order to stay execution or for any other order relating to the decree or execution which might have been made by such Court if execution had been issued thereby or if application for execution had been made thereto, that the Court which passed the decree retains control of the execution proceedings. S. 46, which relates to precepts, points to the same conclusion and the power to order simultaneous execution or send the decree to another Court for execution is vested in the Court which passed the decree. S. 42 does not empower the transferee Court to order simultaneous execution or send the decree to another Court for execution, and as pointed out in A I R 1928 Mad 493[1] and 63 M L J 788,[4] the decision of the Privy Council in 39 Mad 640[5] does not touch this question. The

1. Mahadum Beg v. Muhammad Meera Sahib, A I R 1928 Mad 493=110 I C 829.
2. K. K. Deb v. N. L. Chowdury, A I R 1927 Rang 258=104 I C 133=5 Rang 397.
3. Kanti Narain v. Madan Gopal, A I R 1935 Lah 465=157 I C 488=37 P L R 696.
4. Subba Rao v. Ankamma, A I R 1933 Mad 110 =140 I C 591=63 M L J 788.
5. Maharajah of Bobbili v. Raja Narasaraju, A I R 1916 P C 16=36 I C 682=43 I A 238=39 Mad 640 (P C).

question there was whether an application would lie to the District Court of Vizagapatam for sale of property attached by the District Munsif of Parvatipur, and as observed already, it is for the Court which passed the decree to decide whether in the circumstances of any case simultaneous execution against different properties in different Courts should be ordered or the proceedings should be withdrawn from one Court and transferred to another Court. An application for either relief would therefore lie only to the Court which passed the decree and it would be the proper Court within the meaning of Expl. 2 to Art. 182. The Sub-Court of Cocanada was thus the proper Court and the application of 20th January 1930 was an application to take some step-in-aid of execution. But what is material under the amended Art. 182, Cl. 5 is the date of the final order on the application and not the date of the application, and it remains to consider whether the order of 9th October 1930 granting further time for remedying the defects is such an order. The order need not in our opinion be an order on the merits or a judicial determination of the matter involved in the application, but as pointed out in (1937) 1 M L J 453[6] in which the previous decisions were considered, the words 'final order' imply that the proceeding has terminated so far as the Court passing it is concerned. It cannot mean the 'last order' in point of time, irrespective of whether it terminates the proceedings so far as the Court is concerned, and the order of 9th October 1930 merely granted further time for remedying the defects. It did not terminate the proceeding and the application was not represented. There was thus no final order within the meaning of Art. 182, Cl. 5 and it follows that the application is barred by limitation as against the appellant.

As regards the second question, the decree provides that the appellant should be proceeded against only in case the amount cannot be realised from respondents 2 and 3 and it was not alleged in the application for transmission that the amount cannot be realised from respondents 2 and 3. No evidence was led about it nor is there anything on record to show that the amount cannot be realised from respondents 2 and 3. The assumption of the Subordinate Judge that the decree-holder must have been obliged to apply for execution against the appellant in 1932 is unwarranted, and it follows that the appellant cannot be proceeded against. In the result the appeal is allowed and the application will stand dismissed against the appellant with costs throughout. The advocate's fee is in the circumstances of the case fixed at Rs. 250.

C.R.K./D.S. *Appeal allowed.*

6. Chidambara Nadar v. Rama Nadar, A I R 1937 Mad 385=168 I C 561=I L R (1937) Mad 616=(1937) 1 M L J 453 (F B).

A. I. R. 1938 Madras 115

STODART J.

Pendyala Basawanjanayulu and others — Petitioners.

v.

Lingamullu Ramalingayya — Respondent.

Civil Revn. Petn. No. 284 and Misc. Petns. Nos. 4021 to 4024 of 1935, Decided on 18th February 1937, from order of Dist. Munsif, Guntur, D/- 6th September 1934.

Civil P. C. (1908), O. 22, Rr. 3, 4—Applicability to petitions under S. 115 — High Court passing order in ignorance of death of petitioner more than ninety days back—Order held was a nullity.

Order 22, Rr. 3 and 4 are applicable to proceedings under S. 115 and an order passed by the High Court on a petition under S. 115 in ignorance of the fact of death of the petitioner more than ninety days previously is one made without jurisdiction and is a nullity: *Case law discussed.*

[P 116 C 1, 2; P 117 C 2]

B. V. Ramanarasu — *for Petitioners.*

V. Govindarajachari and N. Vasudeva Rao — *for Respondent.*

Order.—This petition, C. R. P. No. 284, is by the minor sons of Pendyala Subba Rao and is a sequel to C. R. P. No. 1605 of 1932. In C. M. P. 4021 petitioners apply to be recognized as Subba Rao's legal representatives and this petition is granted. Subba Rao filed C. R. P. 1605 in this Court to vacate a decree which had been passed against him for Rs. 628. The decree had been passed on an award and no appeal lay against it. That is why Subba Rao had to come by way of a petition to the High Court under S. 115, Civil P. C. This Court set aside the decree and directed the trial Court to make a fresh decree after giving Subba Rao an opportunity to substantiate his objections to the award. That order was passed on 10th May 1934. But when the trial Court took up the suit for retrial, it discovered that

Subba Rao had died on 7th January 1934, a fact which of course the High Court did not know when it passed orders in C. R. P. No. 1605.

The trial Court without bringing on the present petitioners as Subba Rao's representatives held that the High Court's order was not valid and declared that the decree already made in the suit must stand. C. R. P. No. 284 is to set aside this order and to affirm the order passed in C. R. P. No. 1605 and to direct the trial Court to proceed to determine the suit as directed by that order. In my opinion the order made by the trial Court is right and the decree already passed in the suit must stand. It seems to me that the matter is free from all doubt. Ninety days after Subba Rao's death, that is to say on 7th April 1934, Subba Rao's petition abated since his legal representatives did not apply to be brought on the record and to continue that petition. After 7th April there was no petition before the High Court and its order passed in ignorance of the fact of abatement was a nullity. O. 22, Rr. 3 and 4 govern the case. Where the sole plaintiff in a suit dies, the Court shall cause his legal representative to be made a party and shall proceed with the suit. But the Court cannot do this except upon an application made to it and if no application is made within the time allowed by law the suit shall abate. Article 176 of Sch. 1, Limitation Act, prescribes ninety days as the time in which an application of this kind must be made. The C. R. P. No. 1605 therefore abated ninety days after 7th January. Elaborate and skilful arguments have been addressed to me by the learned counsel for these petitioners. He contends first that in the case of petitions under S. 115, Civil P. C., it does not matter whether the parties are dead or alive at the time the order is passed, since in such case the matter is entirely one between the High Court and the trial Court. To admit such a principle would be to deny the fundamental right of parties to a litigation to be heard. Learned counsel's second argument is that O. 22 does not apply to proceedings under S. 115, and therefore there can be no abatement in the case of a petition filed under that section. But if O. 22 does not apply, the natural consequence is that on the death of a party the petition abates at once. Moreover, in this Court, at any rate, and in the Calcutta High Court (*see* 18 C L J 141[1]), O. 22 has always been applied to petitions under S. 115. Still another argument is that there have been cases where decrees passed after the death of a party have not been treated as a nullity. And the cases have been cited to me. But in none of them had the suit or other proceedings abated at the time of the decree. In all of them there was at the time of the decree a case before the Court which it was necessary to determine and which could not be dismissed forthwith. If in these cases the Court had become aware of the death of the deceased party, it could not have proceeded forthwith to pass a decree. It would have had to adjourn the case till the expiration of the time allowed by law for an application to bring on the legal representative of the deceased. In the present case the order of the High Court is a nullity because at the time it was passed there was no case before the Court at all. For a similar case, *see* A I R 1925 Bom 290.[2]

39 Mad 386[3] and A I R 1930 Mad 719[4] are cases where an unsuccessful appellant attempted to have the appellate decree set aside on the ground that a respondent had died before decree. It was held that in the interests of justice it was not advisable to give an unsuccessful litigant a right to argue his case more than once merely on the ground that one of the parties to the proceeding was dead at the time of hearing. In 33 Mad 167[5], the plaintiff in the suit died on the morning of the day on which the suit was heard and decided. Sixteen years later, the plaintiff's successor in title brought a similar suit on the same cause of action on the footing that the decree in the former suit was a nullity. It was held that the second suit was barred. Benson and Sankaran Nair JJ apparently considered that in spite of the decree having been made, the deceased plaintiff's heir could at once have brought the fact of plaintiff's death to the notice of the Court which tried the suit and could have applied to have the abate-

1. Annadamoyi Dasi v. Rudra Mahanti, (1913) 18 C L J 141=21 I C 407.
2. Amarsangji v. Desai Umed, (1925) 12 A I R Bom 290=86 I C 31=27 Bom L R 91.
3. Vellayan Chetti v. Mahalinga Iyer, (1916) 3 A I R Mad 574=28 I C 83=39 Mad 386=28 M L J 198.
4. Suryanarayana v. Joga Rao, (1930) 17 A I R Mad 719=128 I C 607.
5. Goda Kuppurama Iyer v. Sundarammal, (1910) 33 Mad 167=3 I C 739.

ment set aside. Those learned Judges applying O. 22, R. 9 held that this was his only remedy and since he had not taken it he was not entitled to bring a fresh suit on the same cause of action. Incidentally, they observed that a decree passed in favour of a deceased plaintiff is not void when the record does not show the fact and time of death. In A I R 1928 Lah 784,[6] one of the defendants had died before the decree. The learned Judges who decided the appeal of the defendants held that since the suit had not abated as against the deceased defendant at the time of the decree, the decree could be set aside and the suit ordered to be retried in the presence of his legal representative from the stage it had reached immediately before the date of his death. But they considered this course unnecessary as the legal representative had been brought on record in the appeal itself and his introduction at that stage was an introduction for all stages and moreover all the evidence touching the question in issue in the appeal had been produced before the defendant died. 49 C L J 482[7] was a case where the appellant died 29 days before the appellate decree. It was similar to the case now under consideration in this respect that the decree on appeal was in favour of the deceased; but dissimilar in what I consider to be the decisive point, namely that the appeal had not abated at the time of the appellate decree: 49 C L J 482[7]

This Court has not gone the length of A I R 1928 Lah 784[6] in holding that a decree made against a deceased defendant is valid provided that it appears that his legal representative is not prejudiced by the decree. On the contrary, in 52 Mad 933[8] this Court has held that such a decree has no validity in law. In that case, which was a civil revision petition, ninety days had not elapsed from the death of the respondent when the decretal order was passed. And this circumstance was regarded as in itself sufficient to invalidate the decretal order, it being held that during the time the legal representative may be brought on record, the action is in a state of suspense and that during that time no valid act which involves decision on the merits of any part of the action can be done by the Court: *see also* A I R 1931 Lah 73.[9] It is hardly necessary to cite authority for the proposition that a decree made after the action has abated as against a deceased defendant is a nullity as against that defendant: 15 Lah 879[10]. In the result I hold that the learned District Munsif was right in refusing to obey the order made in C. R. P. 1605 of 1932 when he became aware that that order was passed without jurisdiction and was a nullity being passed after the petition had abated and without the legal representatives of the petitioner being brought on the record. This C. R. P. is dismissed with costs. (His Lordship then dealt with C. M. Ps. 4022, 4023 and 4024 and dismissed them.)

C.R.K./B.D. *Petitions dismissed.*

6. Tota Ram v. Kundan, (1928) 15 A I R Lah 784=112 I C 704
7. Noai Chowkidar v. Official Trustee, Bengal, (1929) 16 A I R Cal 527=120 I C 459=49 C L J 482.
8. Balaramier v. Vasudevan, (1929) 16 A I R Mad 802=120 I C 874=52 Mad 933=57 M L J 424.
9. Mohammad Ali v. Allah Ditta, (1931) 18 A I R Lah 73=122 I C 562.
10. Ganga v. Govind Das, (1934) 21 A I R Lah 442=152 I C 227=15 Lah 879=35 P L R 457.

* A. I. R. 1938 Madras 117

GENTLE J.

Kuppammal — Plaintiff.

v.

M. & S. M. Ry. Co. Ltd. and Corporation of Madras — Defendants.

Suit Nos. 96 and 445 of 1934, Decided on 19th April 1937.

*** (a) Tort — Negligence — Public latrine erected by Corporation against compound wall of Railway Company — Knowledge to company that if wall not kept in proper repairs it would cause danger to those using latrine—Duty of company to repair wall—Wall falling and killing two persons using latrine—Latrine wall in reasonably good condition - Company and not Corporation held liable for damages.**

Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. [P 121 C 2]

A public latrine was erected by the Corporation against the compound wall of the Railway Company. The Company were aware that the members of the public were in the habit of using the latrine and they were also aware that if their compound wall were allowed to get into a state in which it was likely to fall, danger to the members of the public using the latrine would be occasioned.

It was one of the duties of the building inspector of the company to inspect the wall. The wall was not properly kept in repairs and it fell upon the latrine causing the collapse of the wall of the latrine thereby killing two persons using the latrine. The wall of the latrine was in a reasonably good condition. In a suit for damages against the Railway Company and the Corporation:

Held that the Railway Company owed a duty to the lawful users of the latrine, including the two deceased, to take reasonable care to prevent this wall falling. In failing to remedy the defects and to keep the wall in a safe condition, they were guilty of breach of duty which they owed and were therefore negligent and liable to pay damages. [P 122 C 2]

Held further that the Corporation was not liable to pay damages as it was only responsible for the latrine and it was in reasonably safe condition: *(1883) 11 Q B D 503*; *(1932) A C 562 and (1934) 51 T L R 21, Ref.* [P 122 C 2]

(b) Madras Municipal Act (4 of 1919), S. 258—S. 258 is not mandatory but permissive - Failure to give notice does not give any member of public right of complaint against Corporation.

In order to establish that a public body like a Corporation is liable to action for default in performing a duty imposed by statute, it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed, and unless such intention on the part of the Legislature is clearly disclosed, no action will lie. [P 123 C 1]

The wording of S. 258 is not in its terms mandatory but permissive. The section merely empowers the Corporation, if they deem it right so to do, to notify the occupier of defective buildings. If they fail to exercise their power under the section, it does not give any member of the public a right of complaint against the Corporation. There is nothing in the Municipal Act which indicates a liability cast upon the Corporation at the suit of a member of the public for their failure to exercise their powers under S. 258: *(1895) 1 Q B 64 and (1892) A C 345, Rel. on.* [P 122 C 2; P 123 C 1]

*** (c) Practice—Costs—In proper case, unsuccessful defendant can be ordered to pay successful defendant's costs directly.**

In an action claiming relief against more than one defendant who are reasonably joined, the Court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant directly: *(1914) 3 K B 181*; *(1903) 2 K B 533 and (1881) 17 Ch D 600, Foll.* [P 124 C 1]

M. Chockalingam and T. R. Srinivasa Aiyer for T. R. Ramachandran — *for Plaintiff.*

C. Krishnaswamy and S. Rajamanickam — *for Defendants.*

Judgment.—These are two suits brought under the provisions of the Fatal Accidents Act 1855, and by consent of all parties have been tried together as the facts in regard to both claims are identical save in respect of the damages which are claimed. In C. S. No. 96 of 1934 the plaintiff is the widow of one Venkataswami Naidu. In C. S. No. 445 of 1934 plaintiff 1 is the widow and plaintiffs 2 and 3 are the minor children of one Saman. The claims in both suits are for damages representing the loss of maintenance which the respective plaintiffs allege that they have sustained on account of the death of the two deceased who were the wage-earners of their respective families. There has been a considerable body of evidence given in these suits, none of which is very reliable and all the witnesses exaggerated in their evidence, what, I have come to the conclusion, were the real facts. 1st defendants own land in Walltax Road upon which is erected a railway station and permanent way. This is bordered on Walltax road by a wall of the total length of about 3,000 feet running approximately north and south. So far as this case is concerned, a small portion only of that wall is affected, some 300 or 400 yards north of the railway station. At this point there was erected a public latrine. The latrine was 58 feet 6 inches in length and having an over-all width of 16 feet. The railway wall, which I will hereafter refer to as the compound wall, formed the western boundary of the latrine. There were two walls, being the north and south boundaries running at right angles to the compound wall and joining to it. These two walls were about 16 feet in length. The eastern boundary of the latrine was formed by a wall joining the outer ends of the north and south walls. The latrine was divided into two parts by a central wall running parallel to the compound wall and to the eastern wall of the latrine. This wall was about 58 feet 6 inches in length. The compound wall was about 10 or 11 feet high and the other walls I have mentioned were about 6 feet 6 inches in height. The entrance to the latrine was gained by two openings made in the north wall. The access to the latrine from Walltax road was gained by means of a passage from that road leading to the latrine, the distance from the road to the latrine being about 53 feet and around the north, east and south boundaries of the latrine, there was an open space leading from the passage I have mentioned. This latrine was erected by 2nd defendants. Under S. 184, Madras City Municipal Act 1919, it is provided as follows:

The Corporation shall provide and maintain in proper and convenient places a sufficient num-

ber of public latrines and shall cause the same to be kept clean and in proper order.

It is admitted by all parties that this latrine is one coming within the provisions of the above section and therefore it was a latrine belonging to the 2nd defendants, the Corporation, for which they were responsible as set out in the above section. At about 8 a. m. on 16th December 1933, the two deceased men I have mentioned were using the latrine and for that purpose were in the eastern or outer portion. The 1st defendants' compound wall fell and in falling knocked over the central wall of the latrine. These two men were killed by the falling of these two walls. The part of the compound wall which fell included not only the 58 feet 6 inches bordering the latrine but also about 10 feet on the north and south sides, in all about 80 feet of the compound wall fell. The claims against the two defendants are based upon negligence and nuisance. So far as the 1st defendants are concerned, in C. S. No. 96 of 1934 it is alleged that they left the relevant portion of the compound wall in a state of disrepair and were therefore negligent. After the close of all the evidence and indeed after the counsel on behalf of the two defendants had addressed me, an application was made by counsel on behalf of the plaintiff in that suit to add a claim against 1st defendants in nuisance. It was made at a very late stage of the proceedings and I granted this application upon the terms that in the event of succeeding upon that cause of action, the plaintiff should pay the costs of the defendants up to the date when the application was made, namely 5th April 1937. In C. S. No. 445 of 1934 the plaintiff alleges in the plaint that the claims of the plaintiffs in that suit are based on nuisance as well as negligence.

As regards the 2nd defendants, the claim against them is on the ground of negligence, the negligence being that they failed to keep the western wall of the latrine, being the 1st defendants' compound wall, in a proper state of repair and also they failed to inform the 1st defendants of the dangerous state in which this wall was previous to this fall. The basis of the latter allegations arises from the provisions of S. 258, Madras City Municipal Act, which provides that if any building be deemed by the Commissioner to be in a ruinous state or dangerous to passers-by or to the occupiers of neighbouring structures, the Commissioner may, by notice, require the owner or occupier to fence off, take down, secure or repair such building so as to prevent any danger therefrom. It is contended that the provisions of this section provide a cause of complaint by a member of the public if the Commissioner, that is to say the 2nd defendants do not warn the occupier of the dangerous condition of buildings or take the necessary steps to see that dangerous buildings are prevented from causing danger to the public.

The defences to the claims as pleaded in the written statements in addition to the denials of negligence and nuisances are that the compound wall and central wall fell owing to violent storms of rain and wind amounting to *vis major*. This would mean that the storms were such as to be beyond the ordinary contemplation of man. During the course of the evidence with which I shall deal more fully later, it appears that rain had fallen, but the above contention finds no support from the evidence called either on behalf of the plaintiffs or on behalf of the two defendants and indeed neither of the learned counsel for the defendants really relied upon this in their addresses to me at the close of the evidence. Whilst the erection of a wall upon land is an ordinary user of the land, nevertheless it is an uncommon occurrence for a wall to fall and when a wall does fall, in my view an explanation should be forthcoming from those who are responsible for its repair; (1880) 5 Q B D 411[1] was a case in which a brick in a bridge over a highway used by locomotives fell upon a foot passenger and it was held this was an unusual occurrence and the falling of the brick itself was prima facie evidence of negligence. In the absence of a satisfactory explanation from those responsible for the upkeep of the bridge, it was held, in that case, that the fall of the brick itself was sufficient evidence of negligence to justify the plaintiff succeeding in an action against the Railway Company.

The only explanation for the fall of the compound wall which has been given to me in the present case was that supplied by the building inspector employed by the 1st defendants, P. N. Swami Naidu, D. W. 1. It was this: He said that the flooring of the latrine was made of concrete but was not in satisfactory repair inasmuch as

1. Kearney v. London Brighton & South Coast Railway, (1871) 6 Q B 759=40 L J Q B 285 =24 L T 913 = 20 W R 24; on appeal (1880) 5 Q B D 411=39 L J Q B 200.

there were holes, which he called pits, in the floor. There had been rain in Madras on 14th and 15th December, that is to say two days previous to the fall of the wall. On account of the defects in the flooring, the rain had not flowed away but had stagnated in these pits against the wall during those two days and in stagnating it had percolated into the compound wall undermining its strength and caused its fall. I cannot accept such an explanation. A copy of the Fort St. George Gazette was produced with the concurrence of all parties. It is recorded that on 14th December there was 2.1 inches of rain, on the 15th December, 2.05 inches, on the 16th December, that is to say the day of the fall of the wall, the rainfall was 6.42 inches. The evidence of the conditions existing at the time of the fall, which I accept, was that it was drizzling. The accident occurred at 8 o'clock in the morning and there was no evidence before me that between midnight and 8 o'clock in the morning there had been any unusually heavy amount of rain; and although on the day of the accident there was the quantity I mentioned, I am satisfied that there had been very little of rainfall by the time the compound wall fell at 8 A. M. All the witnesses called for the plaintiff who were asked in cross-examination regarding wind denied that there was any violent wind at the time when the compound wall fell and no evidence was called on behalf of the defendants to suggest that that part of the plaintiffs' witnesses' evidence was inaccurate. With the comparatively small amount of rain, which I have mentioned, falling prior to this accident, and the unacceptable suggestion that pools of water collecting for the short period of 2 days at the base of a substantial wall would destroy its strength, the explanation which has been given to me as regards this unfortunate accident cannot be accurate and I reject it. The one or two witnesses who arrived after the wall had fallen and helped to extricate the two unfortunate deceased men did not speak to any collection of water in the latrine.

It therefore follows that so far as the fall of the compound wall is concerned, no explanation is forthcoming from either of the defendants. I have mentioned already that the witnesses called before me exaggerated matters in their testimony. This also applies to the several witnesses who were called on behalf of the plaintiffs. I accept however from these witnesses that prior to this fall the compound wall showed signs of wear inasmuch as there were many cracks showing in the wall. During the course of the hearing, in the presence of the advocates on behalf of all the parties, I inspected this wall. The part which is now in the position occupied by the fallen portion is of course in excellent condition. Immediately to the south of the new wall there is a length of wall which clearly is not very old and one of the witnesses called on behalf of the plaintiffs told me that some five or six years ago this portion of wall to the south of the latrine had been rebuilt and the appearance I saw bears out the evidence of that witness. Further south of this portion, to which I have just referred, part of the old wall exists, which part is doubtless similar in age and construction to the fallen part by the latrine. The condition of this I can describe only as deplorable. Large pieces of mortar between the bricks with which this wall was built are missing, in some places to a depth of nearly half an inch; and generally it shows signs of decay and wear. I also saw cracks and loose bricks in this part of the wall. This condition is compatible with the fallen wall as described by some of the witnesses called on behalf of the plaintiffs, the defective condition being clearly visible to any one including persons with no knowledge of buildings.

I accept the evidence of the witnesses called on behalf of the plaintiffs who described the fallen wall as defective, not to the extent to which some of these witnesses mentioned. One of them said that there was a hole in the wall through which a man was able easily to pass. I do not believe that part. I do accept their evidence that many other defects were apparent in the compound wall, bordering on the latrine, which defects at the time of the accident required urgent repair. In regard to this wall, D. W. 1, 1st defendants' building inspector, told me that it was part of his duty every two months to inspect the compound wall in order to see whether any parts were defective and whether any work was required to repair the wall in order to keep it in proper order, and that his last inspection was carried out within two months prior to the accident. He told me that at that inspection he found no cracks, that if there had been cracks he would have discovered them, that

if there had been defects in the wall which would cause it to fall within two months after his inspection he would have been able to discover those defects and that in his experience he had never known a wall to be caused to fall by the stagnation of water near its base for two days. He also told me that it was his responsibility to his employers, 1st defendants, to inform them of the condition of this wall so that they could carry out the necessary repairs. In the light of the evidence which I have accepted, I am quite satisfied that either he made no inspection which it was his duty to make or, if he made it, it was of such a cursory nature that he failed to notice the defects which existed or, if he did notice them, he failed to report them. The 1st defendants, if they were not aware of the defective condition of this wall, certainly should have known of it as every opportunity was available for them to do so through their building inspector P. W. 1 whose duty it was to inform them.

I am satisfied that the fall of the compound wall was caused solely on account of its serious defective condition and by the failure of 1st defendants to carry out the necessary repairs which were required. By allowing this wall to get into this condition and in failing to remedy the existing defects, 1st defendants did not use ordinary care and skill which they should have used in order to maintain the compound wall in a safe condition. Had they used ordinary care and skill, they would have prevented this wall from falling. It was not suggested that 1st defendants were unaware that the latrine had been erected against their compound wall and that they did not know that members of the public had a right to use and were in the habit of using this latrine. Both these matters were within their knowledge. So far as the latrine itself is concerned, whilst it may not have been in a perfect condition, I am satisfied on the evidence I have heard that it was in a reasonably good state of repair and I accept the evidence of the two witnesses called on behalf of the Corporation when they say that a short time before the fall of the compound wall the latrine was whitewashed and that the condition of the walls and the floor was reasonably good. It is perfectly clear to me that the fall of the central wall was caused by the compound wall falling on to it and the weight breaking it down and not because of any defect in that wall itself. I come to the question whether 1st defendants are responsible to the plaintiffs in these suits. In (1883) 11 Q B D 503,[2] Brett, M. R., as he then was, at p. 509 in the course of his judgment says:

> Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and the skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

In the circumstances which existed here, the Railway Company were aware that members of the public, as I pointed out above, were in the habit of using a latrine erected against their compound wall. They would be aware that, if their compound wall were allowed to get into a state in which it would be likely to fall, danger to the members of the public using the latrine would be occasioned; they appreciated this inasmuch as they appointed D. W. 1 to inspect this compound wall, including the part adjoining the latrine, to see if any defects required attention. By doing this one can assume they appreciated this wall required repeated inspection in order that defects could be remedied and unless they were remedied the wall was likely to fall. The above statement of Brett, M. R. was referred to in (1932) A C 562[3] at p. 580. Lord Atkin in the course of his speech somewhat criticised the statement of the Master of the Rolls but added that if properly limited, that statement appeared capable of forming a valuable practical guide. Later at p. 580 Lord Atkin says:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is in law your neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

At page 614, Lord Macmillan, having quoted the above passage and another passage of Brett, M. R., says:

> The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism and their universality may require some qualification, but as enunciations of general legal doctrine, I am

2. Heaven v. Pender, (1883) 11 Q B D 503=52 L J Q B 702=49 L T 357=47 J P 709.
3. Donoughue v. Stevenson, (1932) A C 562=101 L J P C 119=1932 Sc (H L) 31=1932 Sc L T 317=147 L T 281=87 Com Cas 350=76 S J 396=48 T L R 494.

prepared like Lord Hunter to accept them as sound guides.

It appears that the learned Law Lords, whilst to some extent they consider the passage of Brett, M. R., I have quoted above, may be somewhat widely worded, think it is a very sound guide regarding the duties which are owed by one member of the public to another. In (1934) 51 T L R 21,[4] the plaintiff was lawfully in a churchyard and whilst there, was injured by the fall of a tombstone which had been erected by the defendants. It was found that the defendants had been negligent in the erection of the tombstone. Lawrence J. in his judgment referred to and quoted from (1932) A C 562[3] at p. 580, cited above, and also referred to the question of proximity and the duty owed by one person to another mentioned by Lord Atkin and Lord Macmillan and later he says:

> The proximity referred to by Lord Atkin is in my view involved in the fundamental principle of the law of negligence that every one is bound to take the care which an ordinary prudent man would take in the circumstances.

He held that in that case the plaintiff was entitled to recover damages from the defendants who had been negligent in erecting the tombstone, that there was a duty cast upon them to every member of the public who might lawfully enter the churchyard, to use reasonable care in its erection and a responsibility to any who might be injured by the fall of the tombstone unless it were properly erected. In the present case, 1st defendants were aware that members of the public used this latrine, that unless the compound wall was in a satisfactory condition it might or would fall and endanger such persons, it was therefore their duty with this knowledge to take reasonable care. Allowing the compound wall to get into the dangerous condition in which it was, and in failing to repair the obvious existing defects or otherwise preventing it falling, were omissions by the 1st defendants which they could reasonably foresee might cause injury to the persons using the latrine. These persons were closely and directly affected by these acts which the 1st defendants should have had in contemplation. In the respects I have mentioned, they failed to take the care which ordinary prudent men would take in the circumstances which existed and were known. I see no difference in principle between the facts in this case and those in (1934) 51 T L R 21[4] in which it was held there was a duty cast upon tombstone erecters to every member of the public lawfully entering the churchyard in which it was erected to use reasonable care to prevent injury to such persons. The 1st defendants owed a duty to the lawful users of the latrine, including the two deceased, to take reasonable care to prevent this wall falling. In failing to remedy the defects and to keep the wall in a safe condition, they have been guilty of a breach of duty which they owed and were therefore negligent. In my view the plaintiffs in these two suits are entitled to succeed against the 1st defendants.

In regard to the 2nd defendants, they were not the owners, nor in control of the compound wall. The premises for which they were responsible was the latrine, which, I have already said, was in a reasonably safe condition. The failure by the Corporation to notify the Railway Company of the unsafe condition of the compound wall, as required by S. 258 is not in my view a matter which gives to any member of the public a right to recover from the 2nd defendants on the ground that they did not carry out their duty under this section. The wording of the section is not in its terms mandatory but permissive inasmuch as it provides that the Commissioner, that is the 2nd defendants, may by notice require the owner or occupier to repair. Apart from the provisions of that section, it cannot be and has not been contended before me that the Corporation are responsible to the plaintiffs inasmuch as they failed to notify the 1st defendants of the defective condition of the wall. This section in my view merely empowers the Corporation if they deem it right so to do to notify the occupier of defective buildings. It does not, if they fail to exercise their power under that section, give any member of the public a right of complaint against the Corporation. In (1895) 1 Q B 64,[5] the defendants were empowered under the Public Health (London) Act, 1891, to remove street refuse from streets. Having failed to remove refuse, the plaintiff was caused to fall on account of such failure and he claimed damages from the defendant on account of their negligence in failing to remove the

4. Brown v. Cotterill, (1934) 51 T L R 21.

5. Saunders v. Holborn District Board of Works, (1895) 1 Q B 64=64 L Q B 101=15 R 25=71 L T 519=43 W R 26=59 J P 453.

refuse. Mathew J. at p. 68 says in the course of his judgment:

> It is that, in order to establish that a public body of this description is liable to action for default in performing a duty imposed by statute, it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed and unless such intention on the part of the Legislature is clearly disclosed, no action will lie.

Later he says:

> Before the Act the public had no right of action in such a case; why should it be supposed that the statute creates any such obligation? In my opinion the meaning of the section must be confined to the plain meaning of the words employed.

In (1893) A C 524,[6] Lord Hobhouse at page 527 says:

> The latest English case is that in (1892) A C 345.[7] It must be now taken as settled law that transfer to a public corporation of the obligation to repair does not by itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.

I cannot find and have not been referred to any part of the City Municipal Act which indicates a liability cast upon the 2nd defendants at the suit of a member of the public for their failure to exercise their powers under S. 258, and in this respect the plaintiffs' contention fails. So far as their personal neligence is concerned, whether the two deceased were invitees or licensees, in my view it is not necessary for me to decide. The premises of the 2nd defendants were in a reasonably good condition; and neither of the deceased was injured by reason of any defect in the structure of the 2nd defendants' latrine. The 2nd defendants were not the occupiers of the compound wall. This was in the occupation of 1st defendants. No authority has been quoted to me which lays down the principle that when a man is upon the premises of one person and is injured on account of the defective condition of another person's property, the person upon whose premises he is at the time of the injury is liable to compensate him for the damages sustained. In my view 2nd defendants are not liable to the plaintiffs in either of these suits in respect of the fall of the compound wall.

The next question is one of damages. In C. S. No. 96 of 1934, the evidence of Kuppammal, the plaintiff, was that her husband gave her one rupee every day out of which she paid the rent of the house in which she lived with her deceased husband. The food for both of them cost about 12 annas a day. Judging as best as one can, I have come to the conclusion, the maintenance which she was receiving from her husband amounted to a sum of about 6 to 8 annas a day. She is about 37 years of age and her husband, the deceased, was about 40. The sum she is entitled to is an amount by which she is a loser in respect of her future maintenance. Many factors have to be considered and borne in mind when endeavour is made to arrive at this sum. The possibility of her own early death, again the possibility that her deceased husband might have died from other causes had he not been killed by this accident. He might have also lost the employment upon which he was engaged at the time of his death and have been unemployed. She is not entitled, as it was contended before me, to a sum calculated upon a stated number of years from the moment of her loss. Allowance must be made because she is now receiving a lump sum. Bearing all these factors in mind I have come to the conclusion that the amount of damages which I should award to her is a sum of Rs. 1,200. In C. S. No. 445 of 1934 the dependants of the deceased Saman are his widow, plaintiff 1, who is about 35 years of age, plaintiff 2, the son of the deceased, a boy aged 10, and plaintiff 3, a girl aged 5. The deceased was 45 years of age. Plaintiff 1 informed me that her husband gave her one rupee a day out of which she paid the rent of the house and bought some of the clothes and spent 10 to 12 annas a day on food. Part of it of course would be consumed by the deceased. The deceased no doubt had eaten more food than the other members of the family. The loss of maintenance which these three have suffered appears to be about 8 or 10 annas a day, being a larger amount per day than in the other suit, because there were more members of the family to feed; consequently the deceased would not be able to avail himself of as much of the family contribution. The amount which I have to award must be allocated. Because there are three dependants, it does not mean that treble the amount given in the other case must

---

6. Municipality of Picton v. Geldert, (1893) A C 524=63 L J P C 37=1 R 447=69 L T 510=42 W R 114.

7. Cowley v. New Market Local Board, (1892) A C 345=62 L J Q B 65=1 R 45=67 L T 486=56 J P 805.

be awarded. It is a sum based upon the actual loss, as far as one can estimate it, of the three plaintiffs concerned. The same factors must be borne in mind which I have mentioned. I have come to the conclusion that in this case a total sum of Rs. 1,750 is the amount which the plaintiffs are entitled to recover in respect of the damages they have sustained by being deprived of their maintenance. This amount I allocate as to Rs. 1,000 to plaintiff 1, Rs 250 to plaintiff 2 and Rs. 500 to plaintiff 3. The amounts in respect of the minors, namely plaintiffs 2 and 3, will be paid in Court. There will be decrees in favour of the plaintiffs in both these suits against 1st defendants with costs.

As I have found in C. S. No. 96 of 1934 the plaintiff is entitled to succeed upon the plea of negligence, the question of the plaintiff paying 1st defendants' costs does not arise. There will be a decree in favour of 2nd defendants with costs. In regard to this order for costs, I intend to follow the English practice. The plaintiff acted reasonably in suing both defendants and it is therefore proper that the plaintiffs' liability to bear 2nd defendants' costs should be borne by 1st defendants : *see* (1914) 3 K B 181.[8] I make an order in favour of 2nd defendants direct against 1st defendants for costs according to the rule in (1903) 2 K B 533[9] and (1881) 17 Ch D 600.[10] These being pauper suits, it is necessary for me to order further that the fees to Government shall be a first charge on the amounts received.

C.R.K./S.C. *Suits decreed.*

8. Besterman v. British Motor Cab Co. Ltd., (1914) 3 K B 181=83 L J K B 1014=110 L T 754=58 S J 319=30 T L R 319.
9. Sanderson v. Blith Theater Co., (1903) 2 K B 533=72 L J K B 761=89 L T 159=52 W R 33=19 T L R 660.
10. Rudow v. Great Britain Mutual Life Assurance Society, (1881) 17 Ch D 600=50 L J Ch 504=44 L T 688=29 W R 585.

A. I. R. 1938 Madras 124

LEACH C. J. AND VARADACHARIAR J.

D. Doss — Appellant.

v.

C. P. Connell and another (Joint Official Liquidators)—Respondents.

Appeals Nos. 26, 27 and 28 of 1937, Decided on 12th August 1937, against order of Gentle J., D/- 5th February 1937.

(a) Company—Directors—Wilful negligence—Essentials to be proved stated.

Where an Article of Association comprises the indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, in order to be guilty of wilful negligence the director must not only be guilty of negligence, but he must know that he is committing a breach of duty or is recklessly careless in the matter. A director is justified in trusting the integrity, skill and competence of the officials unless he has ground for suspicion. Where, apart from the insolvency of an official, there is no reason to suspect his integrity, the director is justified in trusting such official, as insolvency does not necessarily mean that a man is dishonest: (*1925*) *1 Ch 427*; (*1899*) *2 Ch 629 and* (*1901*) *A C 477, Rel. on.*

[P 127 C 1, 2]

(b) Companies Act (1913), Ss. 103 and 235—Directors allowing company to start business in spite of their knowledge that permission to start business had been obtained owing to false declaration—Company suffering loss—Directors held guilty of wilful negligence and liable to make repayment.

The directors of a company must be deemed to know the law: (*1908*) *2 Ch 240, Rel. on.*

[P 128 C 1]

Where the directors permitted the company to commence business in spite of their knowledge that permission to do so had been obtained owing to false declaration and that the directors had not paid what was due in respect of their respective shares and consequently the company suffered loss:

Held that the directors were guilty of wilful neglect and hence were liable to make repayment under S. 235. [P 128 C 2]

K. Krishnaswamy Ayyangar, E. Antoney Lobo, S. R. Subramaniam, K. C. Subramanian Chettiar, O. Rajavelu Chetty and A. Ramaswami — *for Appellant.*

A. Westmoreland Wood — *for Respondents.*

Leach C. J.—This appeal and Appeals Nos. 27 of 1937 and 28 of 1937 arise out of a misfeasance summons taken out by the Official Liquidators of the General Banking Corporation Limited against the directors of that Company. The appeals have been heard together and it will be convenient to deal with them in one judgment. The Company was registered on 11th May 1933, for the purpose inter alia of doing all kinds of banking business. The promoter was one P. K. Nair, a barrister-at-law, who was at the time and has since remained an undischarged insolvent. Nair, who was respondent 9 in the proceedings before the learned trial Judge, arranged that he should be appointed legal adviser to the Company and the "advisory director". A prospectus was prepared, but for-

tunately there was no general application made to the public to subscribe shares. There were eight other directors, who were respondents 1 to 8. Two of them, respondents 3 and 5 (B. Gulabchand Sowcar and M. L. Ranganayakulu), were not served and they took no part in the proceedings. Respondent 4, A. Madhava Rao, who was the chairman of the Company, and Nair absconded before the proceedings commenced. The Official Liquidators sought to make all the respondents, except respondents 3 and 5, liable under S. 235, Companies Act, 1913, for (1) a sum of Rs. 4,988-7-2, which has been misappropriated by Nair, and (2) a sum of Rupees 6,331-9-3, representing liabilities incurred by the Company from the date it started business until the date it closed its doors. The certificate permitting business to be started was issued on 4th September 1933, and business was actually commenced on the 7th of that month. The bank's doors were closed on 16th February 1934; a petition for winding up was presented on 5th March of that year and on 6th April 1934 a compulsory winding up order was passed.

Gentle J. before whom the case came held that respondents 1, 2 and 4 (Rao Bahadur M. C. Rajah, V. Venkateswara Sastrulu and A. Madhawa Rao) were each liable to pay the sum of Rs. 4,988-7-2 claimed as the first item and respondents 2, 4 and 6 (respondent 6 being D. Doss) were each responsible for the payment of the sum of Rs. 6,331-9-3 the second item claimed. He also held that in respect of the sum of Rs. 6,331-9-3 respondent 1 was liable to pay Rs. 2,833-9-9, and respondent 7, Rs. 5,408, these sums being calculated in accordance with the dates on which they resigned from the Board of Directors. Appeal No. 26 is the appeal of respondent 6 in respect of the sum of Rs. 6,331-9-3. Appeal No. 27 is by respondent 7 in respect of the sum of Rs. 5,408; and Appeal No. 28 embraces the appeals of respondents 1 and 2 in respect of the sum of Rs. 4,988-7-2, that of respondent 1 in respect of the sum of Rs. 2,833-9-9 and that of respondent 2 in respect of the sum of Rs. 6,331-9-3. Respondent 4 has not appealed and the order of the learned Judge has become final as against him.

The nominal capital of the Company was Rs. 1,00,000 divided into 2,000 shares of Rs. 50 each. Of the Rs. 50 payable on each share, Rs. 10 was payable on application, Rs. 15 on allotment and the balance in five equal instalments. The Articles of Association provided that the business of the Company might be commenced as soon as 50 shares, that is Rs. 2,500 had been subscribed. Before the Company was incorporated, a draft agreement had been prepared under which the Company was to advance to Nair a sum of Rs. 10,000 on the security of his interest in the assets of the Indian Law Times Ltd., and a life policy of Rs. 10,000. The Indian Law Times Ltd. had been acquired by Nair and his insolvency arose in connexion with this business. The arrangement was that of the loan of Rs 10,000, Rs. 5,000 should be paid to Nair for the purpose of enabling him to redeem the assets of the Indian Law Times Ltd. from the hands of the Official Assignee. After the incorporation of the Company, the agreement was executed and in due course Nair executed the requisite mortgage deed. Although business was not started until 7th September 1933, advertisements were inserted by Nair in the local press on 21st June and 15th July 1933, calling for applications for posts on the staff of the Company. It was intimated that the successful candidates would be required to deposit security for the proper performance of their duties. Applications were received in the course of July and August and a number of appointments were made, the persons appointed furnishing security in the aggregate sum of Rupees 10,720. I should mention that Art. 63 of the Articles of Association provided that the chairman should have the power of appointing, promoting, reducing, suspending and removing all officers of the bank, subject to the approval of the Board of Directors, and should have the power to fix all remunerations, salaries, and wages to be paid by the Company. Subscriptions were received for only sixtyfive shares. The subscriptions by the respondents were as follows :

Respondent No.		Number of Shares
1	...	5
2	...	5
3	...	20
4	...	10
5	...	5
6	...	5
7	...	5
8	...	5

Respondents 1, 2, 4 and 6 paid nothing in respect of their shares. Respondent 3

paid Rs. 250 on account of the Rs. 1,000 owed by him in respect of his 20 shares, and respondent 7 paid Rs. 30 on account of the Rs. 250 owed by him in respect of his five shares. Respondents 5 and 8 appear to have paid for their shares in full. The actual capital which the Company had when it started business was Rs. 780. Item 1 of the claim, viz. the sum of Rupees 4,988.7.2, represents security deposits provided by the employees which Nair put into his own pocket. The Company had no right to utilise these moneys for its own purposes and the fact that Nair misappropriated them is common ground. The learned Judge held that respondents 1, 2 and 4 were responsible for this sum, because they had not used reasonable care in carrying out their duties. He considered that it was incumbent on them to see that the Company's moneys were in a proper state of investment and that Nair being an undischarged insolvent should not have been allowed to take charge of the security deposits of the employees. The learned Judge held as a fact that respondents 2 and 4 had knowledge of Nair's insolvency, but he was not satisfied that respondent 1 had such knowledge. He however held that they were all liable as they took no steps to see that a responsible person was attending to the Company's finances. They had all failed to carry out their duties and were guilty of the grossest negligence. The position with regard to this sum of Rs. 4,988.7.2 is altogether different from the position with regard to the sum of Rs. 6,331.9.3, which I will deal with separately.

With regard to the first sum, the learned advocate for respondents 1 and 2 (appellants here) contends that the learned trial Judge has misconceived the law with regard to the duties of directors. He says that on the authorities it must be shown that the directors had knowledge of the facts and that they acted wilfully despite their knowledge. Before passing to the authorities, I should refer to Art. 95 of the Articles of Association. This article had been very badly drafted, but it is intended to comprise the usual indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, and it is accepted by both sides that it has this effect. The duties of directors and what is meant by wilful negligence were dealt with at length by Romer J. in (1925) 1 Ch 407[1] at p. 427. The learned Judge who discussed the authorities there pointed out that in order to ascertain the duties that a person appointed to the Board of an established Company undertakes to perform, it is necessary to consider not only the nature of the Company's business but also the manner in which the work of the Company is in fact distributed between the directors and the other officials of the Company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the Articles of Association. In discharging the duties of his position thus ascertained, a director must, of course, act honestly; and he must also exercise some degree of both skill and diligence. The learned Judge however pointed out that (1) a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; (2) he is not bound to give continuous attention to the affairs of the Company, his duties being of an intermittent nature to be performed at periodical meetings; and (3) in respect of all duties that having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. Dealing with the question of wilful negligence, the learned Judge observed (page 434 of the report):

> An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.

This view was affirmed by the Court of Appeal consisting of Pollock M. R., Warrington L. J. and Sargant L. J. With regard to the question whether a director is justified in trusting the officials of the Company, I would also refer to the obser-

1. In re City Equitable Fire Insurance Co. Ltd., (1925) 1 Ch 407 = 94 L J Ch 445 = 133 L T 520=40 T L R 853=19 Ll L Rep 225=1925 B & C R 109.

vations of Lindley M. R. in (1899) 2 Ch 629[2] at p. 673 :

> Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust ; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men.

This case was taken to the House of Lords : (1901) A C 477.[3] Lord Davey there said (page 492) :

> I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the Board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel, in *In re Hallmark's case*[4] and by Chitty J. in *In re Denham & Co.*,[5] that Directors are not bound to examine entries in the Company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the Board any matter requiring their consideration ; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the Board for reference.

Now what is the position here ? As I have pointed out, the matter of the appointment of the staff was in the hands of the chairman. It is not suggested that respondents 1 and 2 had any reason whatsoever to suspect the integrity of the chairman. It is also not suggested, apart from his insolvency, that they had any reason to suspect the integrity of Nair. It is true that Nair was an undischarged insolvent, but insolvency does not necessarily mean that a man is a dishonest man. There is here an entire absence of anything which would point the finger of suspicion to either the chairman or to Nair in the matter of these appointments. There was certainly no reason for any of the directors to suspect that Nair would utilise the security deposits for his own purposes, and there is no reason to suspect that the chairman knew that he was so doing. It is abundantly clear from the minutes that when it was discovered that Nair had utilised these security deposits for his own purposes, the matter was immediately taken up by the directors and he was called upon to repay. Nair appears to have utilised Rs. 4,500 of the deposits towards the Rs. 5,000 which was to be paid to him under the mortgage for the purposes of redeeming the assets of the Indian Law Times Limited, but instead of redeeming those assets he kept the money. But nobody knew about this until afterwards. The authorities show that where there is an indemnity clause of the kind we have here, not only must a director be guilty of negligence, but he must know that he is committing a breach of duty or is recklessly careless in the matter. Romer J. at p. 468 of the report in (1925) 1 Ch 427[1] emphasized this. It seems to us that respondents 1 and 2 were justified in trusting the chairman and Nair to deal properly with the employees and therefore it cannot be said that they were guilty of wilful negligence in so doing. In these circumstances we consider that the appeal so far as it relates to the sum of Rs. 4,988.7-2 must be allowed.

But entirely different considerations arise with regard to the sum of Rupees 6,331-9-3. In this connexion it is necessary to refer to S. 103, Companies Act. This section provides that a company shall not commence any business or exercise any borrowing powers unless (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minumum subscription ; and (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment of the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash ; and (c) there has been filed with the registrar a duly verified declaration by the Secretary or one of the Directors, in the prescribed form, that these conditions have been complied with. In this case the minimum subscrip-

---

2. In re National Bank of Wales Ltd., (1899) 2 Ch 629 = 68 L J Ch 634 = 81 L T 363 = 48 W R 99.
3. Dovey v. John Cory, (1901) A C 477 = 70 L J Ch 753=85 L T 257=50 W R 65=17 T L R 732.
4. (1878) 9 Ch D 329 = 47 L J Ch 868 = 38 L T 660=26 W R 824.
5. (1883) 25 Ch D 752=50 L T 523=32 W R 487.

tion had been subscribed, but the amounts due on them by the directors had not all been paid and the certificate permitting the Company to commence business had been obtained as the result of a false declaration made by Nair. The learned Judge found that all the respondents knew of the obtaining of this certificate and that they were fully aware that the company had started business on 7th September 1933. They therefore all wilfully permitted the Company to carry on business on the strength of a certificate obtained by a false declaration. We have no doubt that respondents 2, 6 and 7 had knowledge of the obtaining of the certificate and of the fact that business commenced on 7th September 1933. With regard to respondent 1 it is said that he was actually in Madras only on 26th, 27th and 28th of July and between 13th and 18th of August. But it is clear on his own evidence that he returned to Madras on 28th September. We have no doubt that he was fully aware by that date, if not before, that the certificate had been obtained and that business was being carried on. We are also satisfied that these 4 respondents were fully aware that the directors had not paid what was due in respect of their respective shares and that they knew that the Company had no right to commence business. In any event they must be deemed to know the law. In (1908) 2 Ch 240,[6] which was also a case of misfeasance, Neville J. remarked :

> I think it is immaterial whether the Director had knowledge of the law or not I think he is bound to know what the law is, and the only question is, did he know the facts which made the act complained of a contravention of the statute ?

In the present case the learned trial Judge has held that they did know and we are in entire agreement with him. This means that the directors allowed this Company to open its doors and keep them open for months knowing full well that S 103 had not been complied with, that the Company had no capital with which to carry on business and that deposits made by customers in current and other accounts were being utilised by the management for the payment of wages and current expenses without any likelihood of the Company being able to pay back such moneys. In other words they knew that the bank was utilising its customer's moneys dishonestly. As the result of the Company having obtained by means of a false declaration a certificate allowing it to carry on business and as the result of the respondents having allowed the Company to keep open its doors, the Company has suffered loss to the extent of Rs. 6,331.9.3. We are of opinion that respondents 1, 2, 6 and 7 have been guilty of wilful negligence and that they are liable to make re-payment under S. 235, Companies Act. We therefore agree with the finding of the learned trial Judge on the second part of the case.

We have been asked to relieve these respondents from the consequences of their wilful negligence, under the provisions of S. 281, Companies Act. That section provides that if in a proceeding for negligence, default, breach of duty or breach of trust it appears to the Court hearing the case that the person may be liable but has acted honestly and reasonably and ought fairly to be excused, the Court may relieve him wholly or in part from his liability. This power to relieve is placed in the hands of the Court when it is convinced that a person has acted honestly and reasonably. In this case even if it be said that these respondents acted honestly, it cannot be said that they acted reasonably and we are unable to grant them any relief under this section. The order of the learned Judge against respondents 1, 2, 6 and 7 in respect of item 2 of the claim will therefore stand. As the appellants have succeeded in part and failed in part, we do not propose to make any order as to costs. The liquidators will have their costs out of the assets of the Company.

O.R.K./D.S. *Appeal partly allowed.*

6. Burton v. Bevan, (1908) 2 Ch 240=77 L J Ch 591=99 L T 342=15 Manson 272.

A. I. R. 1938 Madras 128

NEWSAM J.

In re T. Tirumalai Mudaliar—Accused.

Criminal Revn. Case No. 576 and Case Ref. No. 29 of 1937, Decided on 7th October 1937, made by Dist. Magistrate, Chittoor, D/. 15th August 1937.

Motor Vehicles Act (1914), S. 16—Motorist from outside British India not evading licence fee but actually paying it on spot — Prosecution thereafter is illegal.

It is illegal to prosecute a motorist coming from outside British India who makes no attempt to

evade payment of British licence fee but offers to pay the entire quarterly tax on the spot and actually pays it to the Magistrate. [P 129 C 1]

Public Prosecutor — *for the Crown.*

Order. — The conviction and sentence are clearly illegal and must be set aside. The motorist in this case coming from Bangalore made no attempt to evade payment of the British licence fee. He offered to pay the entire quarterly tax on the spot and he did pay it to the Magistrate. To prosecute him thereafter was illegal, for as a matter of fact by rules framed under S. 11, Motor Vehicles Tax Act, the proper procedure was to serve a notice on the motorist calling upon him to pay the tax within seven days. G. O. No. 2464 dated 28th September 1936 allows a period of seven days' grace for payment of the tax.

Ignorance of the law is no defence for persons accused of breaking the law, but such ignorance on the part of those who have to administer the law is quite inexcusable. The prosecution was unimaginative in any case. I accept this reference and set aside the conviction. The fine if paid will be refunded.

C.R.K./S.C. *Conviction set aside.*

---

* A. I. R. 1938 Madras 129

NEWSAM J.

M. M. S. T. Chidambaram Chettiar — Petitioner.

v.

Shanmugham Pillai — Respondent.

Criminal Revn. No. 623 and Cr. R. P. No. 586 of 1937, Decided on 20th September 1937, from order of Stationary Sub-Magistrate, Tanjore, D/- 23rd August 1937.

*** (a) Criminal Trial—High Court—Inherent powers — Moral wrongs are not necessarily criminal offences—To attempt to create new offences in order to compel men to conform to high standard of morality, is abuse of process—High Court can in such cases interfere and set right abuse of process.**

The High Court has inherent jurisdiction under S. 561-A, Criminal P C., to pass any order necessary to prevent abuse of the process of any Court. In the world of business, things are often done which are betrayals of confidence and deceptions which arouse moral indignation, but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create a new crime in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises. And therefore the High Court, to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, has jurisdiction to interfere. [P 129 C 2]

*** (b) Penal Code (1860), S. 415—Two ingredients—Dishonest inducement and deception—Either by itself is not cheating—Further, damage or harm to body, mind, reputation or property must be established—Issuing post-dated cheque which was dishonoured held not cheating.**

In the offence of cheating there are two elements —deception and dishonest inducement to do or omit to do something. Mere deception is not a criminal offence. Mere dishonesty is not a criminal offence To establish an offence of cheating, the complainant would have to show not only that he was induced to do or to omit to do a certain act but that this induced commission or omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property, which are presumed to be the four cardinal assets of humanity. [P 130 C 1, 2]

A post-dated cheque in payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence, though it may amount in certain business relations to discreditable behaviour : *A I R 1936 Cal 324, Foll.* [P 130 C 2]

K. S. Jayarama Ayyar and C. K. Venkatanarasimham — *for Petitioner.*

M. Ranganatha Sastri — *for Respondent.*

Public Prosecutor — *for the Crown.*

Order.—This is a petition by a person accused of cheating praying this Court to quash the proceedings against him on the ground that the complaint discloses no offence. The inherent jurisdiction of this Court to pass any orders necessary to prevent abuse of the process of any Court is not questioned and indeed has been clearly expressed in S. 561-A, Criminal P. C. Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked. In the world of business things are often done which are betrayals of confidence and deceptions which arouse moral indignation but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create new crimes in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises.

The facts of this case are simple : The petitioner was an owner of motor buses plying for hire from Tanjore to other

places. He used to take petrol and oil on credit from the firm of A. S. Manickam & Co. By the beginning of 1937 he owed this firm over Rs. 3,000. The firm refused him further credit and threatened to sue him. On 23rd March 1937 the petitioner gave the firm a post-dated cheque for Rs. 3,250 (dated 2nd April 1937). He was not however afterwards allowed any further credit, and had to pay cash for everything. On 5th April 1937 the firm presented the cheque at the Bank for encashment, but the cheque was dishonoured. Nothing further happened until more than three months later, viz. on 12th July 1937, when a clerk of the firm filed a criminal complaint of cheating against the petitioner, setting out the above facts. The Sub-Divisional Magistrate, Tanjore, took this complaint on file under Ss. 415 and 417, I. P. C., and sent it to the Stationary Sub-Magistrate, Tanjore, for disposal, who ordered process to issue to the petitioner. On 9th August 1937, A. S. Manickam & Co. filed a suit against petitioner for the sum owed by him and applied for attachment before judgment of his motor buses. The petitioner on 20th August 1937 filed an application asking the Stationary Sub-Magistrate, Tanjore, not to proceed further with the criminal complaint since no offence was disclosed and since the complaint was filed to coerce, harass and humiliate him. This petition having been dismissed, the High Court has now been moved.

In my judgment the complaint in question does not on its face show that any criminal offence has been committed. In the offence of cheating (S. 415, I. P. C.) there are two elements—deception and dishonest inducement to do or omit to do something. Let it be assumed that petitioner deceived and was dishonest. Mere deception is not a criminal offence. Mere dishonesty is not a criminal offence. The crux of the question in this case is whether A. S. Manickam & Co. were induced by petitioner's dishonest deception not to file a suit at once against him. On the facts stated it is clear that they were not. The post-dated cheque was given on 23rd March 1937 and dishonoured on 5th April 1937 (an interval of 13 days), but no suit was filed until 9th August 1937 (a further delay of four months). Moreover, to establish the offence of cheating, the complainant would have to show not only that he was induced not to file a suit for 13 days but that this induced omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property—which are presumed to be the four cardinal assets of humanity. The complaint does not even assert that such harm or damage was caused or was likely to be caused, and it is obvious from the circumstances that no such harm or damage was or could have been caused. A post-dated cheque in payment of goods already received is a mere promise to pay on a future date: *see* A I R 1936 Cal 324,[1] and a broken promise is not a criminal offence, though it may amount in certain business relations discreditable behaviour. For these reasons, I allow this petition and quash the proceedings on the ground that no offence has been disclosed by the complaint as drafted but that it was filed *in terrorem*. The complaint in question is hereby dismissed under S. 203, Criminal P. C.

C.R.K./B.D. *Proceedings quashed.*

1. H. K Shaw v. Sureshchandra, (1936) 23 A I R Cal 324=1936 Cr C 579=163 I C 232=37 Cr L J 828=62 C L J 119=39 C W N 1182.

---

* * A. I. R. 1938 Madras 130

NEWSAM J.

In re Mallimoggala Venkataramiah and others — Petitioners.

Criminal Misc. Petn. No. 976 of 1937. Decided on 17th September 1937, from order of Stationary Sub-Magistrate, Ellore, D/- 31st July 1937.

(a) Criminal P. C. (1898), S. 196-A—Committal after full magisterial inquiry or conviction after full trial on charge of criminal conspiracy is proper even in absence of previous sanction if no prejudice is caused to accused (*Obiter*).

Section 196-A was designed to safeguard persons from frivolous accusations of criminal conspiracy, and if this safeguard is ignored by Magistrates, they should be suitably admonished; but it should not be used as a loophole of escape for persons committed after full magisterial inquiry or convicted after full trial of criminal conspiracy. Hence, such committal or conviction should be upheld even though previous sanction has not been obtained unless the accused was prejudiced by such formal defect. [P 131 C 1, 2]

*** * (b) Penal Code (1860), Ss. 120-A, 120-B—Actual offence committed—S. 120-A or S. 120-B is not applicable — Person committing offence should be tried for substantive offence — Persons in conspiracy to do that offence should be tried for abetment.**

Section 120-B only applies where no offence has been actually committed and it is only in the

latter rare cases where no crime has been committed in pursuance of a criminal conspiracy that sanction to initiate proceedings is necessary as some safeguard against frivolous prosecution. But where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, Ss. 120-A and 120-B are wholly irrelevant. Conspiracy is one form of abetment and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109.

[P 132 C 1]

K. S. Jayarama Iyer and G. Gopalaswami — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—This is an application to quash the committal of six persons to stand their trial at the Court of Session, West Godavari. Four of them have been committed on a charge of extortion by putting a person in fear of death (S. 386, I. P. C.) and all six of them on a charge of criminal conspiracy (S. 120-B). The point taken before me is that under S. 196-A, Criminal P. C., no Court shall take cognizance of the offence of criminal conspiracy where the object of the conspiracy is to commit a non-cognizable offence, unless the previous sanction of the Local Government or of the District Magistrate has been obtained. The offence punishable by S. 386, I. P. C., is (rather strangely) non-cognizable. Admittedly, no sanction to prosecute or to initiate these proceedings was obtained. Admittedly also, this objection to the Court's jurisdiction was not taken in the lower Court, but has been made for the first time in this petition.

Now it has been held in 62 Cal 749[1] that failure to comply strictly with S. 196-A, Criminal P. C., is not a sufficient ground for quashing proceedings. If proceedings are initiated without formal sanction and end in the conviction of certain persons for criminal conspiracy, the conviction should, it was said, be upheld unless it can be shown that any one of the persons convicted was prejudiced by the formal defect complained of. If I may say so with respect, this is a sound doctrine. The offence of criminal conspiracy is *sui generis*. No overt act need be proved. S. 120-A is a comparatively new section in the Penal Code and may be thus analysed. A conspiracy to commit a criminal offence is always a criminal conspiracy punishable as such under S. 120-B even though nothing is done in pursuance thereof. Conspiracy to do an illegal act (which by the definition of 'illegal' in S. 43 includes a tort) or a lawful act by illegal means only amounts to criminal conspiracy and is only punishable under S. 120-B when some act (not an offence by itself) is done by one of the parties to the conspiracy in pursuance thereof. Now there is an obvious danger that charges of criminal conspiracy might be lightly made, savouring of persecution rather than of prosecution. And it was with a view to safeguarding citizens against such persecution on frivolous charges of criminal conspiracy that S. 196-A, Criminal P. C., was enacted at the same time as S. 120-B, I. P. C., insisting upon the previous approval of Government or of some senior and specially empowered Magistrate before such proceedings can be even initiated. If this safeguard is ignored by Magistrates, they should be suitably admonished. But when a case has been initiated and has ended in conviction, it is obvious that there never was any innocent person to be protected from persecution. In other words, S. 196-A was designed to safeguard persons from frivolous accusations of criminal conspiracy, not as a loophole of escape for persons committed after full magisterial inquiry on a charge of criminal conspiracy or convicted after full trial of criminal conspiracy.

But it has been held in 42 Mad 885[2] by a Bench of this Court that a sanction to prosecute for criminal conspiracy, given after the filing of the complaint, does not fulfil the requirements of S. 196. This decision follows 37 Cal 467,[3] and is an authority for the position that a conviction for criminal conspiracy should be set aside in the absence of proof that prior sanction to initiate the proceedings had been obtained. This decision is binding upon me. But the facts of the present case allow of its disposal on another ground. In my judgment Ss. 120-A and 120-B have been quite wrongly applied to this case and have no bearing at all.

1. Abdul Rahaman v. Emperor, (1935) 22 A I R Cal 316=1935 Cr C 467 = 156 I C 678 = 36 Cr L J 982=62 Cal 749.

2. Varadarajulu Naidu v. Emperor, (1920) 7 A I R Mad 928=51 I C 343=42 Mad 885=20 Cr L J 455=37 M L J 81 (S B).

3. Barindra Kumar Ghose v. Emperor, (1910) 37 Cal 467=7 I C 359=11 Cr L J 453=14 C W N 1114.

Where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, these two sections are wholly irrelevant. Conspiracy, it should be borne in mind, is one form of abetment (see S. 107, I. P. C.) and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109, I. P. C. The Explanation to S. 109 makes this quite clear. An offence is said to be committed in consequence of abetment, when it is committed in pursuance of the conspiracy, and the abettor by conspiracy is made punishable (under S. 109) with the punishment provided for the actual offence.

The learned Magistrate has thus erred in applying S. 120-B to this case. He should properly have used S. 109, for, S. 120-B only applies where no offence has been actually committed and it is only in the latter rare cases where no crime has been committed in pursuance of a criminal conspiracy that sanction to initiate proceedings is necessary as some safeguard against frivolous prosecution. But the prosecution in this case alleges that an offence has been committed and further that it has been committed in pursuance of a conspiracy. No sanction to initiate prosecution for a substantive offence is ever required. That is an elementary rule of law. All that is necessary here is that the proper section (S. 109, I. P. C.) should be applied to the facts and that the misuse of S. 120-B should be pointed out. I dismiss this petition with a direction that the charge be now suitably amended.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1938 Madras 132

VARADACHARIAR J.

S. M. Chinnaswami Iyengar —

Petitioner.

v.

Kannia Naidu and others —

Respondents.

Civil Revn. Petn. No. 455 of 1936, Decided on 20th August 1937, from decree of Dist. Munsif, Chingleput, D/- 29th November 1935.

Transfer of Property Act (1882), S. 68 — Claim by mortgagee to money decree only on personal covenant — Court has no power to insist upon his filing mortgage suit.

Where a portion of the mortgaged property is sold in revenue sale by reason of the mortgagors' default and the mortgagee brings a suit for money decree on the personal covenant, the Court has no power to insist upon his filing a mortgage suit even when he does not wish to have a mortgage decree. [P 132 C 2]

D. Ramaswamy Iyengar —

for Petitioner.

V. S. Krishnaswamy Iyer —

for Respondents.

Order.—The order of the lower Court is obviously unsustainable. The plaintiff sued for money due on a hypothecation bond but he limited his claim to a money decree on the personal covenant, stating that as the mortgaged properties had been sold away in a revenue sale by reason of the mortgagors' default, he did not wish to take proceedings to enforce the security and was content with a money decree. The lower Court found that only one of the items had been sold but not the other items; in this view, it held that the proper course for the plaintiff was to file a suit to enforce the mortgage as against the other item. This view seems to me to have been proceeded on a misapprehension of the relevant provisions of the Transfer of Property Act.

If the case is viewed as one falling under Cl. (c) of S. 68, T. P. Act, the plaintiff will have an unconditional right to sue for money, but even taking it that the case falls either under Cl. (a) or Cl. (b) of S. 68, the second clause gives the power to the Court to stay a personal action only in the event of the mortgagee not abandoning his security. The Court has certainly no power to insist upon his filing a mortgage suit even when he does not wish to have a mortgage decree. The dismissal of the suit was therefore not warranted by law. I do not find that there is any other question remaining to be tried in the case, as the lower Court has held that the debt is binding on defendants 3 to 6 as a family debt.

The result will be that the decree of the lower Court is set aside and a decree passed in plaintiff's favour personally against defendant 2 (as defendant 1 is reported to have since died), also against the assets of defendant 1, if any, in the hands of defendant 3 and against the interests, if any, of defendants 3 to 6 in

the joint family properties belonging to themselves and to defendants 1 and 2 for the plaint amount with interest on Rupees 100 at 6 per cent. per annum from the date of plaint up to date of payment. Plaintiff will be entitled to his costs both here and in the Court below.

C.R.K./S.C. *Decree set aside.*

A. I. R. 1938 Madras 133

VARADACHARIAR J.

Panyam Thirumalappa — Appellant.

v.

Alasyam Ramappa and others — Respondents.

Second Appeal No. 722 of 1933, Decided on 27th April 1937, against decree of Dist. Court, Anantapur, in A. S. No. 28 of 1930.

(a) Evidence—Admission—Judge when considering weight of admission cannot ignore it merely on guess of his own.

A Judge when asked to consider the weight of an admission by a party cannot ignore it on some guess of his own without plea or explanation by the party making the admission. [P 134 C 1]

(b) Adverse Possession — Co-sharers — Co-sharer not asserting exclusive title in himself but claiming title only to his own share—No ouster of other co-sharer.

Where a co-sharer claiming adverse possession against other co-sharer has never asserted exclusive title in himself to the knowledge of the other co-sharer and has only claimed title to his own share in the property, there is no ouster of the other co-sharer and the plea of adverse possession cannot prevail. [P 134 C 2]

(c) Limitation Act (1908), Art. 106 — On dissolution partners settling accounts — Effect.

Where on a dissolution the partners settle the accounts of the partnership between themselves, there is no longer any question of a suit for dissolution and accounts within the meaning of Art. 106 : *A I R 1922 P C 115, Rel. on; 11 I C 288, Disting.* [P 135 C 1]

(d) Registration — Dissolution of partnership and division of immovable properties — Document evidencing it is not transfer from partnership to individual partners and does not require registration — Where however such document vests immovable properties in proportions different from interests held by partners during subsistence of partnership, it may require registration.

To speak of a transfer of title from the partnership to the partners individually as the reason for insisting upon the registration of a document evidencing dissolution and division of immovable properties, is not a correct way of putting it; because a partnership is not a legal entity like an incorporated body and during the subsistence of the partnership the title to immovable properties brought into the partnership or purchased with its funds vests in the partners and not in the partnership as such. It follows from the provisions in S. 253, Contract Act, that all immovable property purchased with partnership funds must be deemed to be held by the partners as joint owners. Though such document is not a transfer from the partnership to the individual partners, where a settlement arrived at on a dissolution vests the immovable properties of the partnership in the former partners in proportions very different from the interests held by them during the subsistence of the partnership, a question of registration may arise in such cases : *A I R 1931 Mad 580, Ref.* [P 135 C 2; P 136 C 1]

Ch. Raghava Rao — *for Appellant.*

Kasturi Seshagiri Rao—*for Respondents.*

Judgment.—This second appeal arises out of a suit for the recovery of the plaintiff's one-third share in certain items of immovable property and for incidental relief. It is the plaintiffs' case that his deceased brother Yerikalappan, defendant 2, and Nettekallappan, the father of defendant 1, were partners in an abkari business from 1892 to 1904, that out of the funds of that business they purchased the suit properties, that in 1904 there was a dissolution and settlement of accounts between them evidenced by Ex. A, that under that arrangement, provision was made for the discharge of debts and for division of the outstandings and that as regards the immovable properties which had been purchased with the funds of the partnership, the three partners agreed that they should be entitled to the same in equal shares. The plaint adds that for many years after the date of the Ex. A, Yerikalappa and after his death the plaintiff as his surviving brother were receiving his one-third share of the income of the suit properties. The plaint prayed for division of the immovable properties thus held in common. Defendant 1 who is the principal contesting defendant, pleaded ignorance of the alleged partnership and of all that is said to have happened in 1904, though in the written statement some kind of reference is made to a dissolution 25 years ago. The positive case put forward on behalf of defendant 1 was that the items now claimed by the plaintiff to be the common properties of the partners were the self acquisitions or separate properties of defendant 1's father and defendant 1 also raised pleas of limitation and adverse possession.

A number of issues were framed in the case and they were substantially decided in the plaintiffs' favour by the first Court which gave him a decree for partition. On appeal the learned District Judge reversed

the trial Court's decree and dismissed the suit partly on certain grounds of law and partly on what may best be described as a mixed finding. Hence this second appeal by the plaintiff. So far as the lower Appellate Court's judgment can be described as embodying a finding of fact, such finding is based on such an obviously erroneous approach to the case that I am unable to accept it as a finding binding on me.

The learned District Judge accepts the existence of the partnership alleged in the plaint and its dissolution in 1904 and also seems to agree with the trial Court's view that the items of immovable property now claimed were purchased with the funds of that partnership. Though with reference to Ex. A he makes some observations suggesting a feeling of distrust in his mind, I do not read them as throwing any doubt on the genuineness of Ex. A, because defendant 1 himself accepts its genuineness. What seems to have oppressed the learned Judge is that in spite of Ex. A defendant 1's father was allowed to have the properties registered in his own name during all the time that he lived, i. e. up to 1918 and that he was allowed to enjoy the properties exclusively. The strongest disproof of the exclusive enjoyment or exclusive title of defendant 1's family is the admitted partition deed Ex. D in that family which proceeds on the footing that the family had only a third share in these items; and without any conceivable reason or explanation the learned Judge brushes it aside with the remark that the recital in Ex. D that defendant 1's family was entitled only to a third share in those properties might be due to the ignorance of defendant 1 as to the exact properties to which he and his father are entitled. Defendant 1 never pleaded ignorance and till he came into the witness box he had never suggested that there has been any mistake in this respect in Ex. D. Even when he was put questions about Ex. D, he nonchalantly pretended ignorance that there was any such statement in Ex. D. It passes my comprehension how the learned Judge when asked to consider the weight of an admission of that kind by a party could ignore it on some guess of his own without any plea or explanation by the party making the admission.

If it were necessary for the case, I should be prepared to say that Ex. D is the strongest proof that defendant 1's family must have been giving to the other two sharers their shares of the income; but it is not necessary for the purpose of the case to come to any such finding. It is sufficient to rely upon Ex. D for two purposes (1) to repel all suspicion which the learned Judge gratuitously casts on Ex. A, because so late as in 1921 Ex. D asserts just the one-third right which Ex. A gave to defendant 1's family and (2) to negative the plea of adverse possession; defendant 1 candidly admits in the witness box that he never asserted any exclusive title in himself to the knowledge of the plaintiff and in the face of the claim of a title only to one-third in Ex. D it is impossible to hold that defendant 1 who was only a co-tenant could ever have proved ouster of the plaintiff.

The learned Judge's suspicion against Ex. A seems to have been excited by the disappearance of the later pages in Ex. A. No question has been put suggesting any particular hypothesis as to this disappearance. In the very nature of things, the book could not have been in the plaintiff's custody from the outset and so long as the genuineness of Ex. A is undisputed, it seems to me immaterial for the purpose of the decision of the questions raised in this case, what happened in the course of the later business said to have been carried on in partnership between the plaintiff and defendant 1's father. If defendant 1 had pleaded that in connexion with the later partnership the rights of the parties as settled at the time of Ex. A had been changed, I can understand a comment about the disappearance of the later pages in Ex. A or the non-production of the accounts relating to the later partnership. Neither in the written statement nor in his evidence did defendant 1 put forward any such case. His whole case was that the property was from the very beginning the separate property of his father except as regards a one-third in certain items in respect of which the case as put forward through D. W. 2 was that the plaintiff's brother gave it up some time in 1901. This last story is clearly disproved by Ex. A. In this state of the pleadings, I am unable to appreciate the learned Judge's criticism against the plaintiff's case on the ground that the Court has not been put in possession of any information as to what happened in connexion with the later partnership. Neither party made these later transactions any

part of the case and the plaintiff was therefore not called upon to adduce any information about what happened during that later partnership. Knowing something of the habits of the people of this country, I am unable to attach any importance to the registry in the revenue records in defendant 1's father's sole name or to the issue of patta in his name. In the face of Ex. D, these considerations seem to me very slender to base any argument upon. I have therefore no doubt that defendant 1, on whom the onus should properly be laid of disproving the continuance of the title evidenced by Ex. A, has wholly failed to discharge that onus and that on that ground the finding of the trial Court in plaintiff's favour on the question of title should be restored.

The learned District Judge has also decided against the plaintiff on two points of law (1) a question of limitation and (2) a point of registration. So far as the decision on the question of limitation is concerned, I am unable to accept the learned Judge's conclusion that Art. 106 is any bar to the maintainability of the present suit. In 45 Mad 378[1] the Privy Council recognize the possibility that on a dissolution the partners may settle the accounts of the partnership between themselves. If that has been done, there is no longer any question of a suit for dissolution and accounts within the meaning of Art. 106. That is just what happened in this case. Ex. A is admittedly a memorandum drawn up on the dissolution of the partnership and embodying the settlement between the partners as to their respective rights on settlement of the accounts of that partnership. I fail to see how any question of Art. 106 arises after that stage.

The decision in 11 I C 288[2] cited before me by the learned counsel for the respondent is clearly distinguishable. In that case, there had been no settlement of accounts between the partners after dissolution and the suit itself was brought as one for dissolution and taking of accounts. The Court however found that by reason of the death of one of the partners, the partnership had become dissolved in law more than three years before the institution of the suit. It was therefore obviously a case in which the accounts of a dissolved partnership had to be taken. To such a suit Art. 106 clearly applies. An attempt was then made to dissociate so much of the plaintiff's claim as related to certain items of immovable property from the bar under Art. 106. The learned Judges, if I may say so, rightly held that such a dissociation was impossible. It was not a suit governed by Art. 142 or Art. 144; the immovable properties were claimed on the very ground that they formed part of the partnership assets and where the accounts had not been taken, no Court could grant relief in respect of some items alone of the partnership without taking the accounts of the partnership as a whole. It is in those circumstances that the learned Judges observed that a right to a division of the house could not be established until after a full account had been taken of all the partnership assets and, as a suit for the latter purpose was barred, it was not possible to grant any independent relief in respect of the items of immovable properties alone.

The objection under the Registration Act has caused me greater difficulty, not on the particular ground adopted by the learned District Judge but on a somewhat different ground. The learned District Judge speaks of a transfer of title from the partnership to the partners individually as the reason for insisting upon the registration of Ex. A. That perhaps is not a correct way of putting it; because a partnership is not a legal entity like an incorporated body and during the subsistence of the partnership the title to immovable properties brought into the partnership or purchased with its funds vests in the partners and not in the partnership as such. As pointed out in 55 Mad 72[3], it follows from the provisions in S. 253, Contract Act, that all immovable property purchased with partnership funds must be deemed to be held by the partners as joint owners. Though Ex. A is therefore not a transfer from the partnership to the individual partners, there can be no doubt that a settlement arrived at on a dissolution might vest the immovable properties of the partnership in the former partners in proportions very different from the interests held by them during the subsistence of the partnership. S. 253 (1), Contract Act, provides that the share of

1. Gopal Chetty v. L. G. Vijayaraghava Chariar, A I R 1922 P C 115=74 I C 621=49 I A 181 =45 Mad 378 (P C).
2. Gobardhan v. Ganeshlal, (1911) 11 I C 288.
3. Samuvier v. Ramasubbier, A I R 1931 Mad 580=132 I C 305=55 Mad 72=60 M L J 527.

each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss.

It would thus follow that while partners may be joint owners of the partnership property, they need not necessarily be owners in equal shares. On a dissolution, when the partners settle their affairs, they may either allot to one or other of them particular items in entirety or in varying shares, not necessarily in the particular proportion of the share of each partner in the whole partnership property. There is much to be said in favour of the view taken in 55 Mad 72[3] that a question of registration may arise in such cases, though there is also authority to the contrary. If in the present case there was anything to suggest that the arrangement under Ex. A gave to various partners shares in immovable property different from the shares which they held prior to the dissolution, the question of registration of Ex. A might have been a more serious difficulty in the plaintiff's way. But there has been no suggestion anywhere that during the partnership stage the partners were not entitled to equal shares and if all that happened at the time of Ex. A was that their respective rights and the liabilities were fixed in particular ways as regards the moveable assets and that as regards the immovable property, they continued to hold the same shares in them as they had prior to the dissolution, I do not feel that I am bound to reject Ex. A on the ground of non-registration. Under S. 45, T. P. Act, the presumption in the case of the co-owners, in the absence of evidence to the contrary, is that they held the property in equal shares and that is just what Ex. A provides for. It is on this narrow ground that I have come to the conclusion that Ex. A is not inadmissible on the ground of want of registration.

I accordingly allow the second appeal and setting aside the decree of the lower Appellate Court restore the decree of the District Munsif with costs here and in the lower Appellate Court, payable by defendant 1. (Leave granted).

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 136

VARADACHARIAR AND HORWILL JJ.

Narayanaswami Mudaliar and others — *Defendants* — Appellants.

v.

Ratnasabapathy Mudali and another — *Plaintiffs* — Respondents.

Appeal No. 229 of 1932, Decided on 23rd April 1937, against decree of Sub-Judge, Salem, in O. S. No. 19 of 1930.

(a) Hindu Law—Joint family—Self acquisition—Self acquired property may become joint family property if thrown in common stock - Onus lies upon person pleading that separate property ceased to be so to prove it —Mere circumstance that there is no evidence to show how separate income and joint family income were dealt with by member is no ground to hold that property is not separate.

The property which was originally the separate self acquired property of a member of a Hindu joint family may become joint family property if it has been thrown by him into the common stock with the intention of abandoning all separate claims upon it. The onus lies on the person who pleads that such separate property of a member of a joint Hindu family has at some later stage ceased to be so, to establish that it has been so dealt with as to lose its separate character. The mere circumstance that it is not known how the separate income of the member and the income from the ancestral property were dealt with by the member of the joint Hindu family cannot be a ground on which it can be held that the properties are not his separate properties. To hold that because of that fact he must be presumed to have mingled the two incomes so as to lose his right over his own earnings will amount to practically throwing the onus on the wrong person: *A I R 1930 Lah 613, Dissent.; 25 Mad 351; A I R 1936 Mad 177; A I R 1927 Mad 676 and A. S. Nos. 363 of 1923 and 47 of 1925, Foll.; 10 Cal 324 (P C), Disting.* [P 138 C 2]

(b) Hindu Law—Joint family—Self acquisition—Blending of—There is no presumption in favour of 'blending'—Presumption if any can only be one of fact drawn from surrounding circumstances.

The Hindu law no doubt recognizes "blending' and attaches to such blending certain legal consequences. But there is no presumption in favour of "blending". The presumption if any can only be one of fact to be drawn in the light of all the surrounding circumstances and in accordance with what is described in S. 114, Evidence Act, as the common course of human conduct. [P 139 C 1]

(c) Hindu Law—Joint family—Self acquisition—Blending of—Trustee mixing his own funds with the funds of the cestui que trust and 'doctrine of blending' distinguished.

In the case of a trustee mixing his own funds with the funds of the cestui que trust, the law only casts upon the trustee the onus of proving what his own funds are and distinguishing them from the funds of the cestui que trust. It is only if he is unable to do so that a presumption in favour of the trust in respect of the whole fund is drawn. On the other hand, the result of the

doctrine of blending is that the whole property becomes as a matter of law impressed with the character of joint property. [P 139 C 2]

(d) Will—Validity—Presumption.

Every reasonable presumption must be made in favour of validating the will as far as possible rather than in favour of invalidating it. [P 140 C 1]

(e) Election—Minor—It is better that Court itself should hold enquiry as to what is beneficial to minor, following English practice.

Where minors have to elect either to stand by the will of their father or repudiate it on account of the fact that they are not entitled to certain benefits given to them if they should repudiate the will, it would be better, following the English practice, that the Court itself holds an enquiry as to what is most beneficial to the minors in the circumstances and decides accordingly : (*1866*) *2 Eq 481, Rel. on.* [P 140 C 2]

T. M. Krishnaswamy Iyer and M. R. Ramachandra Pant — *for Appellants.*

B. Sitarama Rao — *for Respondents.*

Varadachariar J.—This appeal arises out of a suit for partition of the estate of one Subbaraya Mudaliar, who died in December 1927. The minor plaintiffs are the sons of Subbaraya's third wife Defendant 1 is the son of his first wife and defendants 2 and 3 are the sons of his second wife. Subbaraya executed a will (Ex. 1) on 17th October 1927 whereby he disposed of all the properties, moveable and immovable which he then had, partly in favour of the plaintiffs and partly in favour of the defendants. It is sufficient to say that he allotted to the plaintiffs a house and Rs. 6,000 in cash. The plaintiffs' advisers apparently felt that there was an unequal division of the estate and thought fit to institute this suit for partition on the footing that all the properties in Subbaraya's possession were joint family properties and that the will was accordingly invalid. The learned Subordinate Judge has upheld the contention of the plaintiffs and decreed a general partition. Hence this appeal by the defendants.

A point was taken before the lower Court that Ex. 1 was not duly executed by Subbaraya. This formed the subject of Issue 2; the learned Subordinate Judge has found that the will was duly executed by Subbaraya in a sound disposing state of mind. The only question therefore that was argued before us is that raised by Issue 1, namely, "whether any of the plaint properties are the self acquisition of the deceased Subbaraya Mudaliar." On behalf of the appellants, Mr. Krishnaswami Iyer made a point that the lower Court had really proceeded on a theory of blending or throwing into the common stock which was not the case made in the plaint. Mr. Sitarama Rao pointed out in reply that no such objection had been raised in the grounds of appeal nor any surprise pleaded. Apart from this, however, we are not quite sure that the learned Subordinate Judge has proceeded on a theory of throwing into common stock. His observation in para. 17 of the judgment rather suggests that it was his view that Subbaraya's purchases and investments were never his self acquisitions, because he never kept his earnings separate from the income derived from the joint family properties. As we have however heard the case fully on the merits, it does not seem to us necessary to consider whether really there has been any departure from the case made on the pleadings.

In the plaint it was alleged in para. 4 that at a partition made 12 years before, there was a division of moveables, cash, money lending etc., and that some time later, that is in February 1920, there was a partition of immovable properties between Subbaraya and his father and his brother. The obvious intention of this paragraph when taken with para. 5 was to suggest that the outstandings which belonged to Subbaraya's estate at the time of his death really represented the development of the money lending business which came to Subbaraya at the partition. The plaint makes no reference anywhere to Subbaraya having had any substantial earnings of his own apart from the income yielded by the immovable properties or any other properties that came to him at the partition.

The learned Subordinate Judge has found that Subbaraya was making a very substantial income from his profession as a native medical practitioner and that finding has not been challenged before us. He has also found that at the partition between Subbaraya and his coparceners, Subbaraya obtained only certain immovable properties and did not obtain any cash or share in the money lending business. The evidence also shows that the annual income from the immovable properties which Subbaraya got at the partition was somewhere below Rs. 200 per annum. It is not disputed that Subbaraya married three wives and had a large family to maintain. He had at least five sons and a daughter and two of his wives were alive for a long

time. There can be little doubt that the maintenance of the family alone must have cost a great deal more than the income derived from what may be described as the ancestral properties that came to Subbaraya at the partition. The learned Subordinate Judge therefore rightly holds that Subbaraya's income from his profession as a native physician must have contributed largely to the accumulation of wealth. He nevertheless held that as Subbaraya maintained no accounts and it did not appear that even otherwise he made any distinction between his self acquisitions and the joint family properties or between the income derived from the joint family properties and the income derived from the practice of his own profession, he must have confused or blended the two incomes so as to make the two indistinguishable from each other with the result that all his properties must be held to be joint family properties.

The above conclusion has been attacked before us by the learned counsel for the appellants. It does not seem to us necessary to refer at length to the relevant authorities because many of them have been referred to and discussed in recent judgments of this Court, particularly in 43 M L W 302[1] and 50 Mad 582,[2] and the unreported judgment of Ramesam and Jackson JJ. in A. S. Nos. 363 of 1923 and 47 of 1925. We may take the statement of the law in para. 227 of Mulla's book as representing the result of the authorities, namely that:

> Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it.

The author adds that a clear intention to waive his separate rights must be established. It has been suggested by Mr. Sitarama Rao that the present case is not exactly the one covered by this rule, because he argues that he does not concede that any of the suit properties was at any time the self acquired property of Subbaraya. We do not think that that way of stating the question really solves the problem. It cannot be denied that Subbaraya's earnings at the moment they came into his hands were his separate property and that he had absolute power of disposal over them. That is certainly a stage which the plaintiffs must admit. No doubt they tried to avoid even that problem by suggesting in the plaint that all that Subbaraya possessed at his death must have come out of the immovable properties and the cash and money lending business that he got for his share at a partition and, as we have already said, the plaint wholly ignored Subbaraya's independent earnings. But on the facts as now found the plaintiffs cannot get away from the fact that Subbaraya starts with a large amount of money in his hands which at the initial stage were undoubtedly at his absolute disposal and were not derived from the joint property. It is true that he had a small income every year from the ancestral properties as well. It is also true that Subbaraya kept no accounts and we are not therefore in a position to say either that he brought both sets of income into one account or that he did not. If, as the authorities suggest, the onus lies upon the person who pleads that what was at any particular moment the separate property of a member of the joint Hindu family has at some later stage ceased to be so to establish that it has been so dealt with as to lose its separate character, it does not appear to us that the plaintiffs can succeed merely upon the circumstances that we do not know how Subbaraya dealt with the two sets of income. It will be practically throwing the onus on the wrong person to hold that because we do not know how he dealt with the two sets of income, he must be presumed to have mingled them so as to lose his rights over his own earnings. Our attention has been drawn to the observations of the Lahore High Court in A I R 1930 Lah 613[3] at p. 617, to the following effect:

> In the absence of any evidence that he was keeping his self acquisitions strictly separate, the presumption is that the whole income of the family from whatever source derived went into the common chest out of which the family was maintained and some of the members were married.

We are, with great respect, unable to accept this presumption as well founded. The expression "the whole income of the family" used by the learned Judges in the passage above quoted is somewhat ambiguous. It looks as if the learned Judges meant what each member of the family

1. Naina Pillai v. Daivanai Ammal, A I R 1936 Mad 177=162 I C 23=43 M L W 302.
2. Periakaruppan Chetty v. Arunachalam Chetty, A I R 1927 Mad 676=102 I C 290=50 Mad 582=52 M L J 571.
3. Bali Ram v. Sardari Lal, A I R 1930 Lah 613 =128 I C 81.

or any member of the family was earning. If so, we are not aware of any warrant for laying down a general presumption in the form enunciated by the learned Judges. It is not contended by Mr. Sitarama Rao that there is any presumption of Hindu law to that effect. It is one thing to say that the Hindu law recognizes 'blending' and attaches to such blending certain legal consequences, but it is another thing to say that there is any presumption in favour of blending. We would respectfully say that we are aware of no authority in favour of such a presumption. The presumption, if any, can only be one of fact to be drawn in the light of all surrounding circumstances and in accordance with what is described in S. 114, Evidence Act, as the common course of human conduct. Dealing with the income derived by a Hindu widow from her husband's estate, it was laid down as early as 25 Mad 351[4] that the reasonable presumption to make in respect of any person having income at his or her absolute disposal is that he or she intended to reserve to himself or herself that power of disposal unless there is evidence to the contrary. This aspect of the matter has been emphasised in the unreported judgment of Ramesam and Jackson JJ., already referred to and we need not labour it.

A decision of a Bench of this Court in A I R 1928 Mad 561,[5] may perhaps be said to state the position in terms somewhat favourable to Mr. Sitarama Rao's contention. The learned Judges in that case were prepared to draw an inference that a brother-in-law who had earnings of his own intended to throw his earnings into the stock from the fact that he was contributing to the maintenance of his deceased's brother's widow not merely from the income of the admitted joint family property but even from his own earnings. It is not for us to say whether as an inference of fact the learned Judges were justified in drawing such an inference or not, but it seems to us to put the matter too high to say, as the learned Offg. C. J. said, that mingling a portion of one fund with another fund raises a presumption not merely in respect of the portions mixed but also in respect of the balance of the earnings in the hands of the acquirer. We venture to think that the presumption to be drawn in the circumstances of the present case do not warrant the necessary inference which the learned Subordinate Judge felt obliged to draw from the absence of accounts showing that Subbaraya kept his earning separate from the income derived by him from the joint family property.

Mr. Sitarama Rao called in aid the analogy of a trustee mixing his own funds with the funds of the cestui que trust; we do not think that that is a true analogy. In those cases the law only casts upon the trustee the onus of proving what his own funds are and distinguishing them from the funds of the cestui que trust. It is only if he is unable to do so that a presumption in favour of the trust in respect of the whole fund is drawn. On the other hand, the result of the doctrine of blending is that the whole property becomes as a matter of law impressed with the character of joint property. It was also suggested that as Subbaraya must have been receiving something like Rs. 200 every year from the joint family property, that amount might have gone into some of the assets that existed at his death. But if he has been spending very much more than that amount on the maintenance of the joint family, there is no reason to presume that his separate moneys were spent on the maintenance of the family and that the income from the joint family went into the investments. Whatever may be the position, when the income from joint funds might have left a surplus over the requirements of the joint family, it does not seem to us necessary or reasonable to draw the inference, even where the income from the joint property is far below the requirements of the family, that the investments made by the earning member were made in whole or in part out of the joint income. If the matter rested on presumptions alone, we should have held that the plaintiffs had not made out that the subsequent acquisitions of Subbaraya were either joint property or had been thrown into the joint stock.

Mr. Sitarama Rao however relied on two items of conduct (1) that Subbaraya had dealt with both sets of properties on the same footing in his will and (2) that one item of immovable property which Subbaraya got at the partition had been sold by him in 1926 under Ex. 9 for Rs. 1,000 out of which Rs. 300 is admit-

4. Akkanna v. Venkayya, (1902) 25 Mad 351=12 M L J 5.
5. Krishnamacharlar v. Chellammal, A I R 1928 Mad 561=107 I C 641.

tedly traceable to a hypothecation bond now in existence and nothing is known of the balance of Rs. 700. So far as the circumstances first mentioned are concerned, the vakil who drafted Ex. 1 has spoken to the conversation between himself and Subbaraya in connection with the inclusion of the ancestral properties in the will. They are undoubtedly of very small value as compared to Subbaraya's acquisitions and we see no reason to think that the explanation given by the witness does not represent the truth. Even otherwise the mere fact that Subbaraya might have made a mistake in assuming that he could dispose of the joint family properties by a will when he was giving them to his own sons does not justify the inference that he intended to lose his power even over his self acquired properties. Every reasonable presumption must be made in favour of validating the will as far as possible rather than in favour of invalidating it. We are therefore not prepared to draw an inference adverse to the appellants from the manner in which Subbaraya dealt with the two sets of properties in his will. The observations in 10 Cal 324[6] at p. 337 which Mr. Sitarama Rao relied on in this connection must be read in the light of the facts found in that case and with due regard to the circumstance that at that time the prevailing view in respect of a Hindu widow's savings and investments was more strongly in favour of the theory of "accretion" to the husband's estate than has been laid down in later authorities. The decisive facts in that case were that the widow's purchases consisted of "shares of lands in which the husband was a share holder to a larger extent" and the purchases were made within a short time after the husband's death.

As regards the proceeds of the sale under Ex. 9, the plaintiffs are no doubt entitled to contend that the hypothecation for Rs. 300 must be treated as joint family property But we do not think that the inability of defendant 1 to explain what Subbaraya did with the remaining Rs. 700 can be used against the defendants. Defendant 1 was not a party to Ex. 9 and there is nothing to suggest that he has kept back any information in his possession. The plaintiffs' advisers are aware of Subbaraya's investments as they are specified in the will, and if by proximity of time or by other means it had been possible to suggest any connection between this sum of Rs. 700 and any of Subbaraya's investments, the position might have been different. For aught we know, Subbaraya might have spent away the said sum of Rs. 700. We do not think therefore that that circumstance suggests any inference in plaintiff's favour.

The result is that the decree of the lower Court cannot be sustained in the form in which it has been passed. Likewise, the claim for partition of all the properties left by the deceased Subbaraya is not maintainable. As Subbaraya's will comprises joint family properties as well as properties which we have held to be self-acquired, and as the plaintiffs have under that will been given certain benefits which they may not be entitled to retain if they prefer to repudiate the will, they must elect either to stand by the will or to repudiate it. We allowed the matter to stand over for some time to see if the plaintiffs' next friend is able to do anything in the matter. But their learned counsel represents that as the next friend is a woman, it will be better, if following the English practice, the Court itself holds an enquiry as to what is most beneficial to the minors in the circumstances and decides accordingly : *see* (1866) 2 Eq 481,[7] and also the passage in Mulla's Transfer of Property Act, p. 157. We must accordingly call upon the lower Court to make an enquiry after giving notice to both parties and ascertain whether it will be more advantageous for the plaintiffs to confirm the will and take the benefits conferred upon them by the will or to repudiate the will and limit their claim to a partition of such of the properties as according to the directions above contained must be held to be joint family properties. The report will be submitted before 10th January 1937, 10 days for objections. (The report and the final judgment are not necessary for purposes of this report.)

S.C./R.K. *Order accordingly.*

6. Ishri Dut Koer v. Hunsbutti Koerain, (1884) 10 Cal 324=10 I A 150=13 C L R 418=4 Sar 459 (P C).

7. Brown v. Brown, (1866) 2 Eq 481=14 L T 694.

A. I. R. 1938 Madras 141

LEACH C. J. AND VARADACHARIAR J.

Rahiman Bibi Saheba—Appellant.

v.

Mahboob Bi Bi Saheba and others—Respondents.

Appeal No. 52 of 1935, Decided on 1st September 1937, against decree of City Civil Judge, Madras, in O. S. No. 169 of 1933.

Mahomedan Law—Legitimacy — Marriage with living wife's sister—Children of such marriage are legitimate.

Marriage by a Mahomedan with his living wife's sister is invalid and not void. If such a marriage is consummated, the children born of such marriage are legitimate : *A I R 1917 Bom 211, Rel. on ; 23 Cal 130, Dissent.* [P 141 C 2 ; P 142 C 1]

C. Sarangarajan — *for Appellant.*

A. B. Nambiar and Rafiuddin Ahmed — *for Respondents.*

Leach C. J. — This appeal raises the question whether a child of a marriage contracted by Mahomedan with his wife's sister, the wife being alive, is legitimate. It also raises questions with regard to the right of certain parties to payments on account of mahr. The suit was filed by the appellant for the administration of the estate of her deceased father, Syed Mahomed Saheb, a Sunni Mahomedan, who died in Madras on 17th July 1930. There were ten defendants, a widow and the sons and daughters of the deceased. Respondent 1 is the widow. The appellant and respondent 3 are the children of the deceased's first wife, who predeceased him. Respondents 2, 5, 6, 8 and 10 are the sons and daughters of respondent 1 by the deceased. Respondents 4 and 9 are the children of the third wife, who also predeceased her husband. Respondent 7 is the son of the fifth wife, who survived the husband, but died before the suit was instituted. Respondent 1 was his fourth wife, and she and the fifth wife were sisters. It is contended by the appellant that respondent 7, who is the son of the younger sister, is illegitimate, his mother having married the deceased while her sister was alive. It is said that the Mahomedan law prohibits a Mahomedan marrying his wife's sister and if he does take her as a wife her children have no share in the inheritance. Defendant 7 denies that he is illegitimate and therefore claims to be entitled to share in the estate of his deceased father. The learned trial Judge held that the marriage was irregular, but that this did not affect the legitimacy of defendant 7. With regard to the matter of mahr, the claimants are respondents 1 and 7, respondent 1 claiming in her own right and respondent 7 as his mother's heir. The learned Judge held that they were each entitled to a sum of Rs. 585 by way of mahr. The appellant says that they are entitled to nothing.

The question whether a Mahomedan may marry the wife's sister during the lifetime of his wife has been considered by the Calcutta High Court and by the Bombay High Court and they have arrived at different conclusions. The Calcutta case is that in 23 Cal 130,[1] and the Bombay case, that in 41 Bom 485.[2] The Calcutta decision stands alone, but the Bombay decision has the support of all the principal modern works on Mahomedan Law. The Calcutta High Court holds that a Mahomedan cannot lawfully marry his wife's sister, and that if he has marital relations with his sister-in-law during his wife's lifetime, the children born of the union are illegitimate. This decision is largely based on a passage from the Koran. The Koran does prohibit a man marrying his wife's sister, as it prohibits a man marrying his wife's daughter. The Bombay High Court considers that Mahomedan law recognizes a difference between a marriage which is void from the beginning and can never become lawful and a marriage with a person who may later become a lawful wife. In the case of a marriage with a wife's sister, the marriage would become lawful on the divorce or death of the wife. This view finds acceptance in the Fatwa-i-Alamgiri, which is of undoubted authority. It dates from about the middle of 17th century. Beaman J. in 41 Bom 485[2] gives it the place in the Mahomedan law which the Institutes of Justinian occupy in Roman law and points out that it was written when Mahomedanism was at the height of its power in this country. Modern text books, as I have indicated, are unanimous on the question. In Edition 2 of Baillie's Digest, the following passage appears at p. 157 of Part 1 :

An invalid marriage has no legal effect before consummation ; so that if a man should marry a

1. Aizunnissa Khatoon v. Karimunnissa Khatoon, (1896) 23 Cal 130.
2. Tajbi Abalal v. Mowla Khan Alikan, (1917) 4 A I R Bom 211=39 I C 603=41 Bom 485= 19 Bom L R 300.

woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then relinquish the wife, he might lawfully marry the mother. But after consummation it is joined to valid marriages as to its effects, one of which is the establishment of nusub or the child's paternity, as already mentioned.

The editor of Edn. 5 of "Wilson's Anglo-Mahomedan Law" accepts the Bombay decision although Sir Roland Wilson himself favoured the contrary opinion. Ameer Ali states the position as follows (Edn. 4, Vol. 2, p. 326) :

Thus a man may not marry two sisters or a woman and her niece by the same contract or one after another whilst the previous marriage is subsisting. But if such a marriage is contracted in fact, it is invalid (fasid) but not void (batil), for the prior marriage may become dissolved at any time by the death or divorce of one of them and thus validate the second union. Accordingly, although the Judge may separate the parties on the ground of the invalidity of the marriage, if it is consummated the issue would be affiliated to the father, in other words they would be his legitimate children.

This opinion is emphasised at p. 391. In Edn. 10 of Mulla (p. 179) it is said that the bar of unlawful conjunction renders a marriage irregular, not void, and at p. 180 there is express dissent from the Calcutta decision. In view of this weight of authority, we feel bound to accept the Bombay decision as being correct. While it is true that the Koran does prohibit a man marrying the sister of his wife during her lifetime, it is clear that this passage in the Koran has never been read as declaring the children of such a marriage to be illegitimate. In fact no writer on Mahomedan law has ever suggested that in the case of an invalid marriage, as opposed to a void marriage, the children are illegitimate. Of course where a Mahomedan marries a person contrary to law, and it is not possible in any set of circumstances for that union to become regular, the issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as respondent 7 is concerned. For these reasons we consider that the decision of the learned trial Judge on the question of legitimacy of respondent 7 was correct.

With regard to the question of mahr the position is very unsatisfactory. It is impossible on the evidence to say whether anything is due. Respondent 7 in fact made no claim in his written statement to his mother's mahr ; but he was allowed to raise the question in the course of argument. We consider that as this question of mahr was not dealt with adequately by the learned advocates in the Court below, it will be better to send the case back for further evidence on the question whether respondents 1 and 7 are entitled to payments on account of mahr and on the question of the amounts. Accordingly the decree of the lower Court will, so far as it affects the matter of mahr, be set aside and the case remanded for re-trial on this question. Leave will be granted to defendant 7 to amend his written statement so as to make it quite clear that he is claiming to have paid out to him the money which he says was due to his mother on account of mahr. As the appeal has succeeded in part and has failed in part, we propose to make no order as to costs.

C.R.K./S.C. *Appeal partly allowed.*

A. I. R. 1938 Madras 142

BEASLEY C. J.

Velagaleti Veerayya — Petitioner.

v.

Kandepu Narasimharao and another— Respondents.

Civil Revn. Petn. No. 1509 of 1935, Decided on 20th January 1937, from decree of Sub.Judge, Tenali, D/. 18th April 1935.

Provincial Insolvency Act (5 of 1920), S. 78 — 'Proved debt' — Inclusion of debt by insolvent in his petition of insolvency does not make it proved.

Mere inclusion of a debt by the insolvent in the schedule of debts filed by him along with the insolvency petition does not make the debt 'proved'; it is at the most a debt 'provable': *AIR 1934 Mad 465, Foll.* [P 143 C 1]

G. Chandrasekhara Sastry — *for Petitioner.*

V. Viswanatha Sastry — *for Respondents.*

Order.—Section 78 (2), Provincial Insolvency Act only applies to debts "proved" under the Act, and not to debts "provable". The facts of the case here as I understand them are that the defendant filed an insolvency petition on 5th March 1930 and was adjudicated on 5th September 1930. Subsequently the adjudication was annulled on 31st August 1932. The date of the promissory note is 4th Novem-

ber 1928. Therefore unless S. 78 (2) can be relied upon by the creditor, the claim in the suit was barred by limitation. The facts appear to be that all that was done with regard to the suit debt was that it was included by the insolvent in his schedule and nothing more. The learned Subordinate Judge holds that the debt was thereby "proved" relying on a Calcutta decision and overlooking the decision in 57 Mad 767.[1] He also adds in further support of his view that he cannot imagine any better proof of the debt than its admission by the insolvent by his including it in his schedule of debts. That no doubt is some evidence of the existence of the debt, but nevertheless the question still remains as to whether or not the debt has been "proved" under the Act. In my view the debt is not proved under the Act by its mere inclusion in the schedule of the insolvent. The matter has been fully dealt with in my own judgment in 57 Mad 767[1] and it is quite clear from it that such a debt as this is at the most debt "provable" in the insolvency and not a debt "proved". The lower Court was therefore wrong in its conclusion and the decree of the lower Court is therefore reversed and the suit dismissed as being barred by limitation. The C. R. P. is allowed with costs here and in the lower Court.

C.R.K./B.D. *Revision allowed.*

1. Lakshmi Bai v. Rukmaji Rao, (1934) 21 A I R Mad 465 = 151 I C 284 = 57 Mad 767 = 67 M L J 45.

---

* A. I. R. 1938 Madras 143

WADSWORTH J.

In re S. T. Nambi Chetty — Insolvent.

Petition No. 453 of 1936, Decided on 6th September 1937.

*** Presidency Towns Insolvency Act (1909), S. 49 (3)—Proposal of Official Assignee to pay financing creditor 25 % of net realizations from litigation as purchase price and to treat such price as 'costs in administration' is neither against law nor impracticable.**

It is lawful for the trustee in bankruptcy (in India the Official Assignee or Receiver) to buy the financial guarantee of one of the creditors by promising him a proportion of the net realisations as the price of his services and to treat the expenditure as a legitimate part of the cost of getting in the assets of the estate. [P 144 C 1]

The proposal of the Official Assignee that the indemnifying creditor shall be promised 25 % of the net realisations to the estate from a certain litigation as the purchase price for his assistance and that this price shall be treated as "costs of administration" under S. 49 (3) and that all the creditors including the indemnifying creditor shall share rateably in the balance of the realisations, is in effect a scheme whereby the Official Assignee, just as he buys the services of an advocate and debits the estate, may buy the services of guarantor and debit the estate. There is neither legal nor practical objection to such proposal nor is there an offence against the principle of equality of distribution of assets : (*1889*) *40 Ch D 481, Applied ; A I R 1929 Mad 385, Ref.* [P 144 C 1]

Official Assignee in person.

Order.—This application by the Official Assignee relates to a difficult and important question which is constantly arising in insolvency work, namely, how is an individual creditor, who is willing for a consideration to finance and indemnify the Official Assignee in an attack on an alleged fraudulent alienation, to be compensated for the risk which he runs, without offending against the principles on which the insolvency law is based. A former proposal that the financing creditor should be rewarded by having his debt paid in full in priority to the other creditors out of any amount that might be recovered, was disapproved by Venkatasubba Rao J. in 55 M L J 657[1] as being opposed to the policy of equal distribution of assets, though the then Chief Justice in the appeal from that decision (O. S. A. Nos. 100 of 1927 and 5 of 1928) observes that such an arrangement might be unobjectionable if the other creditors consented to it.

In his present report, the Official Assignee suggests another way of attaining the same end and asks for the Court's directions. He desires to attack a purchase by the insolvent in the name of his wife as fraudulent. The creditors as a body are not willing to act and no individual creditor is prepared to run the risk of indemnifying the Official Assignee unless he gets some substantial benefit (in addition to his rateable dividend) out of the proceeds in case of success. This seems to me perfectly reasonable—the creditor who risks having to pay all the costs of failure naturally looks for something more than those who have refused to bear their share of the risk in case of success. All that he will get by way of preferential rights under the Insolvency Rules (O. 6, R. 9) is a first charge on the realisations for any actual disbursements with interest thereon.

1. In re Purushothamdas and Bros., (1929) 16 A I R Mad 385=116 I C 125=55 M L J 657.

Obviously this is not a very powerful inducement to altruistic action. The Official Assignee therefore proposes that the indemnifying creditor shall be promised 25 per cent of the net realisations to the estate from this litigation as the purchase price for his assistance, that this price shall be treated as "costs of administration" under S. 49 (3), Presidency Towns Insolvency Act, and that all the creditors (including, of course, the indemnifying creditor) shall share rateably in the balance of the realisations.

I can see no legal nor practical objection to this proposal. It is in effect a scheme whereby the Official Assignee, just as he buys the services of an advocate and debits the estate, may buy the services of a guarantor and debit the estate. There is no offence against the principle of equality of distribution of assets; all that is proposed is to treat as a legitimate expense to the estate the cost of procuring for the Official Assignee an insurance against the consequences of failure. The scheme is, in fact, very similar to that approved in (1889) 40 Ch D 481,[2] whereby when bankruptcy intervened in the middle of an action by the bankrupt and the trustee was unwilling to incur the risk of continuing it, one of the creditors was permitted to do so at his own expense and risk in return for $\frac{3}{4}$th of the net realisations from the action. It was held that this arrangement offended neither against the law of maintenance nor against the law of bankruptcy.

The only difference between that case and the present proposal is that we are now concerned with a new litigation, not with the continuance of a pending action. This difference does not affect the recognition of the principle, viz. that it is lawful for the trustee in bankruptcy to buy the financial guarantee of one of the creditors by promising him a proportion of the net realisations as the price of his services and to treat this expenditure as a legitimate part of the cost of getting in the assets of the estate. I therefore approve of the Official Assignee's recommendation.

C.R.K./S.C. *Application allowed.*

2. Guy v. Churchill, (1889) 40 Ch D 481=58 L J Ch 345=60 L T 473=37 W R 504.

A. I. R. 1938 Madras 144

BURN AND LAKSHMANA RAO JJ.

Pola Venkatarama Sastri — Appellant.

v.

Kakumanu Venkatanarasimham and another — Respondents.

Appeal No. 84 of 1936, Decided on 26th August 1937.

Limitation Act (1908), Art. 182—Application for execution without copy of decree—Such application is 'in accordance with law' and saves limitation.

Under O. 21, R. 11, Civil P. C., there is no obligation on the decree-holder to produce a copy of the decree along with the application for execution. An application therefore made without a copy of the decree is "in accordance with law" even if it is rejected for non-production of a copy of the decree required by the Court under O. 21, R. 11 (3), and saves limitation. [P 144 C 2]

Ch. Raghava Rao and Kothandarama Nainar — *for Appellant.*

M. Sriramamurthi — *for Respondents.*

Judgment.—We are unable to support the order of the learned Subordinate Judge in this case. The final decree in O. S. No. 15 of 1926 expressly provides for sale of item 6 to discharge the debt due to defendant 2 (appellant) under his prior mortgage. This is in pursuance of the provision in the preliminary decree declaring that he should be at liberty to apply for the sale of the mortgaged property (item 6). Whether that direction is right or wrong is not a question which can be discussed by a Court executing the decree. It is quite impossible to hold that the decree is merely declaratory of the rights of defendant 2.

As for the point of limitation, it cannot be said that the appellant's application of 21st September 1932 was not an application in accordance with law. There was no obligation on him, under O. 21, R. 11, Civil P. C., to produce a copy of the decree with the application. Under O. 21, R. 11 (3), Civil P. C., the Court required him to produce a copy of the decree. He failed to do so and his application was accordingly rejected on 10th March 1933. His application when made was perfectly "in accordance with law" and the order of 10th March 1933 was the final order on it. His present application dated 16th April 1934 was therefore clearly in time. The appeal is accordingly allowed. The execution application must be restored to file and disposed of according to law. The contesting respondent, the plaintiff, will pay the appellant's costs in both Courts.

C.R.K./S.C. *Appeal allowed.*

*** A. I. R. 1938 Madras 145**

SPECIAL BENCH

LEACH C. J., VARADACHARIAR AND KING JJ.

Commissioner of Income-tax, Madras.

v.

Andhra Insurance Co. Ltd., Masulipatam.

O. P. No. 34 of 1937, Decided on 22nd October 1937.

*** (a) Income-tax Act (1922), Ss. 22 and 59 —Rules under S. 59, R. 25—Expression 'last preceding valuation' means last preceding valuation at the time of return.**

The expression 'last preceding valuation' in R. 25 means the last preceding valuation at the time of return and does not mean the valuation covering the last valuation period terminating before 1st April of the year of assessment. [P 146 C 1]

An insurance company made valuation of its profits every four years. The first valuation was made in December 1930 and was for the period 1926-1929. The next valuation took place in December 1934 and was for the period 1930-1933. The company made return of its income in June 1934 based on the valuation covering the period 1926-1929 :

***Held* that as the last preceding valuation when the return was submitted was the valuation covering the period 1926-1929, the return was on the proper basis.** [P 145 C 2; P 146 C 1]

(b) Income-tax Act (1922), Ss. 34 and 59—Rules under S. 59, R. 25 – Income-tax Officer cannot depart from provisions of R. 25 and reopen assessment under S. 34.

Rule 25 is of a mandatory character and provides the only manner in which the income, profits and gains of life assurance companies can be ascertained and it is not open to an Income-tax Officer to depart from its provisions and to reopen assessment under S. 34 : *A I R 1931 Lah 441, Approved.* [P 146 C 1]

M. Patanjali Sastri — *for I. T. Commr.*

N. Rama Rao — *for Assessee.*

Leach C. J.—The assessee in this case is a life insurance company carrying on business at Masulipatam, having been incorporated in the year 1925. Under the provisions of S. 8, Life Assurance Companies Act, 1912, a life assurance company is required once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or by laws, to cause an investigation to be made by an actuary into its financial condition, including a valuation of its liabilities. This company decided that the valuation should take place every four years. The first valuation was made in December 1930 and was for the period ended 31st December 1929. The next valuation took place in December 1934 and this was for the four years ended 31st December 1933. Under S. 22, Income-tax Act, the principal officer of every company shall prepare and on or before 15th June in each year, furnish to the Income-tax Officer a return in the prescribed form and verified in the prescribed manner of the total income of the company during the previous year. On 30th June 1934, the secretary of the company furnished the return contemplated by this section. It was 15 days late, but the Income-tax Officer accepted it and assessed the company to income-tax on the basis of the return. R. 25 of the Income-tax Rules provides that in the case of life assurance companies incorporated in British India, whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation. This Rule was framed under the provisions of S. 59 of the Act and has effect as if enacted in the Act.

The return which the secretary furnished to the Income-tax Officer on 30th June 1934 was based on the valuation for the period ended 31st December 1929 and on this basis the income of the company for the account year 1933 was Rs. 8294. The company paid the amount of the tax; but when the valuation for the four years ended 31st December 1933 was published in December 1934 it was found that the profits had greatly increased. If the assessment had been based on this return, the amount of the income would have been Rs. 39,755 instead of Rs 8294. When this was discovered by the Income-tax Officer, he issued a notice under S. 34 of the Act intimating his intention to assess the company in respect of the year 1933 on the further sum of Rupees 31,461 (the difference between Rs 39,755 and Rs. 8294) on the ground that this was income which had escaped assessment. The company objected and asked the Commissioner of Income-tax to refer the matter to this Court under the provisions of S. 66 (2). The Commissioner has accordingly referred the following question :

Whether the 'last preceding valuation' of the surplus of the company for the purposes of the assessment to be made for the year of assessment 1934-35 was in the circumstances of the case that

covering the years 1926-29 or that covering the years 1930-33 ?

The Income-tax Commissioner in his reference has expressed the opinion that the Income-tax Officer is entitled to re-open the assessment under S. 34, notwithstanding the wording of R. 25. He contends that the expression 'the last preceding valuation' must be taken to mean the valuation covering the last valuation period terminating before 1st April of the year of assessment. This contention ignores the wording of R. 25. The wording is perfectly clear, and says that the income of a life assurance company shall be the average annual net profits disclosed by the last preceding valuation, that is the last preceding valuation at the time of the return. The return must be made by 15th June after the end of the year of account, unless the Income-tax Officer extends the time at the instance of the assessee. In this case the last preceding valuation when the return was submitted was the valuation made in December 1930 for the period ended 31st December 1929. As I have said, the words of the Rule are perfectly clear and they must be given their plain meaning. Giving them their plain meaning, the return made in June 1934 was made on the proper basis.

In these circumstances the Income-tax authorities had no right to serve a notice under S. 34 of the Act, as no income had escaped assessment. The return had been made in accordance with the statute and the tax had been paid. In 12 Lah 757[1] it was pointed out that R. 25 is of a mandatory character and provides the only manner in which the income, profits and gains of life assurance companies can be ascertained and that it is not open to an Income-tax Officer to depart from its provisions. With this opinion we are in entire agreement. It follows that the answer to the reference is that the last preceding valuation of the surplus of the company for the purposes of the assessment for the year 1934-35 was that covering the years 1926-29. As the company has succeeded, it will be entitled to its costs which we fix at Rs. 250.

C.R.K./D.S. *Answer accordingly.*

1. Laxmi Insurance Co. Ltd. Lahore v. Commissioner of Income-tax, (1931) 18 A I R 441=136 I C 725=12 Lah 757=33 P L R 367.

*** A. I. R. 1938 Madras 146**

MADHAVAN NAIR J.

Mookan Servai — Appellant.

v.

Muthayya Servai and another — Respondents.

Second Appeal No. 372 of 1933, Decided on 24th September 1937, against decree of Sub-Judge, Sivaganga, in A. S. No. 107 of 1932.

*** Principal and agent — Contract by elder brother to mortgage his sister's property — Contract signed by brother in his own name without any qualification — But in body of document, brother described as authorized agent of sister—This description held excluded personal liability of person signing contract.**

Where a person signs a contract in his own name without any qualification, he is prima facie to be deemed to be contracting personally; and in order to prevent the liability from attaching to himself, it must appear from the document that he did not intend to bind himself as principal.

[P 147 C 1]

A contract by an elder brother to mortgage his sister's property to another in consideration of certain sum was signed by him in his own name without any qualification. But in the body of the document the person signing the document was described as 'an authorised agent and elder brother of his sister' :

Held* that the description 'authorized agent of his sister' should be held to exclude the personal liability of the person signing the document and the description 'elder brother' did not militate against this view : *(1876) 1 Ex D 357, Foll.*; *Case law discussed. **[P 148 C 1, 2]**

V. Ramaswamy Aiyar—*for Appellant.*

S. Parthasarathy and V. K. Thiruvengadachariar — *for Respondents.*

Judgment.—Plaintiff is the appellant. The defendant, holding a power of attorney from his sister Muthathal, executed in favour of the plaintiff an agreement to give an othi in respect of his sister's property, in consideration of Rs. 240 received by him (defendant) on the date of the agreement. The defendant not having executed the othi, the plaintiff brought a suit for specific performance against the defendant, or, in the alternative, for the recovery of the money paid by him to the defendant. It is not now disputed that the defendant received the money. Both the Courts held that the suit for specific performance will not lie. The only question for decision in the second appeal is, whether the defendant is personally liable to pay the money received by him. On this point the first Court held that he was personally liable, but this decision was reversed by the Appellate Court. In the

second appeal it is argued that the lower Court's decision is wrong and that it should be held that the defendant is personally liable and should repay the money received by him. The contract between the parties is contained in Ex. A. The relevant portion of it is as follows :

> Varthamanam letter executed . . . . in favour of Mookkan Servai . . . . by M. Muthaya Servai, the authorized agent and elder brother of Muthathal, daughter of Muthuswami Servai . . . .

After describing the terms and the land, Muthaya Servai signs it thus :

> M. Muthaya Servai, in his own handwriting.

The question is purely one of law and there are very many decisions bearing on the point. All of them were brought to my notice; but in this judgment I propose to examine only a few of them which I consider very important. The principle to be applied seems to be clear. Where a person signs a contract in his own name without any qualification, he is prima facie to be deemed to be contracting personally; and in order to prevent the liability from attaching to himself, it must appear from the document that he did not intend to bind himself as principal. In this case the defendant has put his signature to Ex. A, without any qualification; prima facie, therefore, he is personally liable. It is argued on behalf of the appellant that there is nothing in the body of the document to detract from the personal liability arising from the fact that the defendant has signed the document without any qualification. It is said that the description 'authorised agent' appearing in para. 1 is only descriptive of the position of the defendant and does not show that he makes the contract as the agent of Muthathal. One of the two important cases relied on in support of this contention was (1825) 28 R R 797.[1] In that case a man describing himself as agent went on to agree to lease a property in his own name. It was held that he was personally liable. In (1870) 5 Ex 173,[2] the contract was signed 'Walker and Strange' without any qualification. In the body of the document the words 'as agents for John Schemidt & Co., of Danzig' appeared. It was held that the defendants were personally liable upon the contract and that the words 'as agents for John Schemidt & Co.,' did not relieve the defendants from their personal liability. These two decisions clearly support the contention of the appellant. Other cases relied on by him were 119 E R 217,[3] 119 E R 1497,[4] (1871) 6 Q B 361,[5] (1879) 4 Ex D 104[6] and (1884) 13 Q B D 861.[7]

The respondents' learned counsel argues that the decision in (1870) 5 Ex 173[2] must be considered to have been practically overruled by the decision in (1876) 1 Ex D 357[8] and that this decision is a surer guide than any of the decisions cited by the appellant's counsel in deciding cases of this description. In (1876) 1 Ex D 357,[8] the signature in the document was without any qualification, but in the body of the document it appeared that the sale was 'on account of James Morand & Co.' It was held that this put the matter beyond any doubt and that the brokers who signed the document were not personally liable upon the contract. The decision in (1870) 5 Ex 173,[2] was commented upon and distinguished in this decision. In (1879) 4 Ex D 104,[6] Pollock B. made the following remark about these two decisions :

> In (1870) 5 Ex 173,[2] the words 'as agents for' a named foreign principal were held to be a mere description of the defendants, and not to free them from liability. In (1876) 1 Ex D 357,[8] which was tried before me at Liverpool, the words were 'on account of' a foreign principal. In that case I held that the defendants were not liable and this judgment, though overruled by the Exchequer Division, was upheld in the Court of Appeal. James L. J. based his decision on the difference between the expressions 'as agents for' and 'on account of', a distinction I confess I cannot appreciate, but which leaves (1870) 5 Ex 173,[2] an authority binding on me here . . .

The learned counsel for the respondent argues that the decision in (1876) 1 Ex D 357,[8] must be understood as overruling the decision in (1870) 5 Ex 173,[2] and that the words 'authorized agent' appearing in Ex. A in the present case exclude the personal liability of the defendant imported

1. Norton v. Herron, (1825) 1 Car & P 648=R & M 229=28 R R 797.
2. Paice v. Walker, (1870) 5 Ex 173=39 L J Ex 109=22 L T 547=18 W R 789.
3. Tanner v. Christian, (1855) 4 El & Bl 591=24 L J Q B 91=1 Jur (N S) 519=3 W R 204=99 R R 687=119 E R 217.
4. Parker v. Winlow, (1857) 7 El & Bl 942=27 L J Q B 49=4 Jur (N S) 584=110 R R 904=119 E R 1497.
5. Dutton v. Marsh, (1871) 6 Q B 361=40 L J Q B 175=24 L T 470=19 W R 754.
6. Hough v. Manyanos, (1879) 4 Ex D 104=48 L J Ex 398=27 W R 536.
7. Hutchinson v. Eaton, (1884) 13 Q B D 861=51 L T 846.
8. Gadd v. Houghton, (1876) 1 Ex D 357=46 L J Ex 71=35 L T 222=24 W R 975.

by the signature without any qualification. In (1923) A C 492,[9] their Lordships of the House of Lords seem to uphold the correctness of the decision in (1876) 1 Ex D 357[8]. Lord Parmoor says :

> The authorities have not been consistent but I agree that (1876) 1 Ex D 357[8] should be followed.

The case before the House of Lords was a clear one as the agent in that case had excluded his personal liability by adding the words 'as agent' to the signature itself. In our own Court, in 27 Mad 315[10] at p. 325, Benson and Bhashyam Ayyangar JJ. pointed out that the decision in (1870) 5 Ex 173[2] has been practically overruled by the decision in (1876) 1 Ex D 357.[8] They state thus :

> But the defendants in the present case having signed as 'managing agents' they cannot be held personally liable even according to that decision, (1870) 5 Ex 173,[2] which has however been practically overruled by the decision in (1876) 1 Ex D 357.[8]

On the strength of the decision in (1876) 1 Ex D 357,[8] the learned counsel for the respondents says that the description 'authorized agent of Muthathal' should be understood to exclude the personal liability of Muthayya Servai. The learned counsel also referred to the following decisions of the Indian Courts in the course of his arguments : 5 Cal 71,[11] 5 Bom 584,[12] A I R 1928 Cal 123[13] and A I R 1930 Bom 569.[14] It is not necessary to discuss them. How is the contract Ex. A to be interpreted in the light of the above decisions ? There is no doubt, as I said at the beginning, about the principle that should be applied. The question is what was the real intention of the parties ? Is the personal liability imported by the mere signature without any qualification intended to be excluded by the terms of the document ? If I follow the decision in (1876) 1 Ex D 357,[8] in preference to (1870) 5 Ex 173,[2] as I think I should, then the description 'authorized agent of Muthathal' should be held to exclude the personal liability of the defendant. There are other circumstances also appearing in the document to support the view that the parties did not intend to bind the defendant personally. These circumstances are mentioned in para. 8 of the appellate judgment :

> The defendant admittedly had no right to the land. The contract itself describes the property as belonging to the sister. The consideration was required to be applied for payment towards a decree which directed the sister to make it. This also is found expressly stated in the agreement. In the plaint it is distinctly alleged, without any equivocation, that the defendant as the agent of his sister contracted to mortgage the sister's land to the plaintiff : *vide* para. 3 . . . Unless the defendant executed the othi on behalf of his sister and as her agent, the plaintiff could derive no right to the enjoyment of the property.

I think the statement in the plaint explains what the plaintiff himself thought about the liability of the defendant. It is true that the defendant describes himself as the authorized agent and also the elder brother of Muthathal. I agree with the learned Judge in holding that the description 'elder brother'

> does not appear to militate against the view that in agreeing to give a mortgage of his sister's property for money which he received for the purpose of paying for a decree under which the sister had to pay money, he acted only as the agent of that sister and not in his personal capacity.

In view of the decision in (1876) 1 Ex D 357[8] and the circumstances of the case, which I cannot overlook in interpreting the document on this point, I agree with the decision of the lower Court that the defendant is not personally liable on the contract Ex. A. The second appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

---

9. Universal Steam Navigation Co. v. James Mckelvie & Co., (1923) A C 492=92 L J K B 647=129 L T 395=28 Com Cas 353=67 S J 593=39 T L R 480.
10. Tutika Basavaraju v. Parrey & Co., (1904) 27 Mad 315.
11. Soopromonian Setti v. Heilgers, (1880) 5 Cal 71=4 C L R 377.
12. Mackinnon Makenzie & Co. v. Lang Moir & Co., (1880) 5 Bom 584.
13. Shyam Sundar v. Titaghar Paper Mills Co. Ltd., (1928) 15 A I R Cal 123=106 I C 848=32 C W N 125=46 C L J 566.
14. Ganpat v. Forbes, Forbes Campbell & Co., (1930) 17 A I R Bom 569=128 I C 550=32 Bom L R 1336.

* A. I. R. 1938 Madras 148

SPECIAL BENCH

LEACH C. J., VARADACHARIAR AND KING JJ.

Trichinopoly Tennore Hindu Permanent Fund Ltd.

v.

Commissioner of Income-tax, Madras.

O. P. No. 173 of 1936, Decided on 22nd October 1937.

* (a) Income-tax — Company formed to enable members to save money and to enable members to secure loans — Loans granted to

nominal members — Nominal members not allowed to share in profits of company — Company held not mutual benefit society and its income held taxable.

A company was formed to enable its members to save money and to enable the members to secure loans at a favourable rate of interest on sufficient securities. Persons who wanted loans could obtain them from the company by becoming nominal members by paying one rupee which could be withdrawn after two years. Thus these nominal members, who had taken one rupee shares, invested practically nothing. By borrowing from the company they made for the company large profits in which they were not allowed to share. Besides this the company obtained considerable income from loans to non-members :

Held that in these circumstances the company could not be said to be mutual benefit society and hence its income was taxable : (*1897*) *2 Q B 402*, *Ref.*; *A I R 1923 Mad 684* (*F B*), *Disting.*

[P 150 C 2]

(b) Income-tax Act (1922), S. 10 (2) (iii) — Dividends paid by company to its members are not interest on borrowed capital.

Where a company did not pay interest to share-holders or subscribers on the capital subscribed by them but paid dividends to the members, the sums so paid are not in the nature of interest on borrowed capital, which is allowable under S. 10 (2) (iii). The company is therefore not entitled to claim a deduction in respect of these sums. [P 151 C 1]

(c) Income-tax—Res judicata — Doctrine of res judicata is inapplicable to assessment made by Income-tax Officer.

The doctrine of res judicata does not operate in respect of an assessment made by an Income-tax Officer. The Income-tax Officer does not constitute a Court, and therefore the doctrine can have no application. His assessments are final, unless they can be re-opened under some provision of the Income-tax Act. [P 151 C 1, 2]

K. S. Krishnaswami Ayyangar and N. Srinivasa Ayyangar—*for Petitioners.*

M. Patanjali Sastri — *for Respondent.*

Leach C. J.—The real question involved in this reference is whether the Trichinopoly Tennore Hindu Permanent Fund Ltd., a company registered under the Indian Companies Act, is a banking concern or a mutual benefit society. The question was raised on a former occasion, namely in respect of the income-tax year 1925-26. The income-tax authorities then treated the company as an ordinary banking concern and taxed it on that basis. At the instance of the company, the question was referred by the Commissioner of Income-tax to this Court which decided that the income-tax authorities had taken the correct view: 2 I T C 386.[1] After this decision had been given, the company took steps to alter its memorandum and articles of association. In the original memorandum the objects of the company were stated to be

(a) To enable persons to save money ; (b) to enable persons to secure loans at favourable rates of interest on sufficient securities and (c) to do all such other things as are incidental or conducive to the attainment of the above objects.

For the word 'persons' the word 'members' was substituted. The company had made considerable profits out of lending money to non-members and this was the reason for the decision that the company was a banking concern and not a mutual benefit society. The nominal capital was originally Rs. 2,99,970 made up as follows: (1) 1800 fully paid-up permanent shares of Rs. 50 each amounting to Rs. 90,000 ; (2) 2333 term shares of Rs. 90 each payable in 45 monthly instalments of Rs. 2 amounting to Rs. 2,09,970. After the alteration of the memorandum and the articles of association, the nominal capital of the company was Rs. 9,90,000 divided into seven classes of shares, namely :

(a) 1800 fully paid up 'Permanent' shares of Rs. 50 each, amounting to ...	...	Rs. 90,000
(b) 2120 'Original' term shares of Rs. 90, each payable in 45 consecutive monthly calls of Rs. 2, amounting to	...	Rs. 1,90,800
(c) 400 'A' class term shares of Rs. 93, each payable in 31 consecutive monthly calls of Rs. 3, amounting to	...	Rs. 37,200
(d) 2880 'B' class term shares of Rs. 90, each payable in 45 consecutive monthly calls of Rs. 2, amounting to	...	Rs. 2,59,000
(e) 4600 'C' class term shares of Rs. 83, each payable in 83 consecutive monthly calls of Re. 1, amounting to	...	Rs. 3,81,800
(f) 500 'Reserve' shares of Rs. 50, each payable in 10 calls of Rs. 5 each, Rs. 5 on application and the remaining calls whenever required on not less than one month's notice, amounting to ...	...	Rs. 25,000
and		
(g) 6000 'Ordinary' shares of Re. 1, each fully paid up amounting to	...	Rs. 6,000
		Rs. 9,90,000

A person who required a loan had under the altered articles to become a member, but he could become a member on payment of one rupee, which he was entitled to withdraw at the end of two years. In passing, I should mention that it is con-

1. Trichinopoly Tennore Hindu Permanent Fund Ltd. v. Commissioner of Income-tax, Madras, (1927) 14 A I R Mad 1078 = 107 I C 291=53 M L J 881=2 I T C 386 (S B).

ceded that the ordinary shares have been issued to persons who under the former scheme would have been non-member borrowers. After the memorandum and the articles had been altered, the company contended that it was in fact a mutual benefit society, and therefore its income was not taxable. The contention was accepted for the years 1928-29, 1929-30 and 1930-31 but in respect of the 1931-32 assessment, the income-tax authorities reconsidered the question and came to the conclusion that the company was in reality still a banking concern. In accordance with this decision, they re-opened the assessment for the year 1930-31. In respect of the year 1930-31 Income-tax Officer assessed the company on an income of Rs. 24,458 which was subsequently enhanced to Rs. 24,995. Thereupon the company asked the Commissioner of Income-tax to state a case to this Court under the provisions of S. 66 of the Act, but the Commissioner declined to do so. An application was then made under S. 66 (3) of the Act to this Court and the Commissioner was directed to state a case on the following questions :

(i) Whether the assessment of the petitioner to income-tax upon a sum of Rs. 24,995 for the year 1930-31 is valid and maintainable? (ii) Whether the present case is not governed by the decision in 47 Mad 1[2] and whether the petitioner is not therefore liable to pay income-tax? (iii) Whether the petitioner is not entitled to claim in computing the assessable income a deduction of the amount paid to the share-holders and subscribers in excess of their contribution as being interest on borrowed capital within S. 10 (2) (iii) of the Act? (iv) Whether the income-tax authorities are precluded in law from levying income-tax on the petitioner, having regard to the fact that the petitioner was recognized and treated by them as mutual benefit society and exempted from payment of income-tax since the year 1927? (v) Whether the assessment of the petitioner for the year 1930-31 under S. 34 of the Act is valid and maintainable?

It will be convenient to take questions (i) and (ii) together. The case referred to in 47 Mad 1 is that of *Board of Revenue v. Mylapore Hindu Permanent Fund Ltd.*[2] There the capital of the society was made up solely of periodical investments by its members and the income of the society was mainly derived from interest on loans given to its members, every one of whom was by the rules eligible to take loans. It was held that such income did not constitute "profits" within the meaning of the Income-tax Act, 1918. The Trichinopoly Tennore Hindu Permanent Fund Ltd. however, differs in material respects from the Mylapore Hindu Permanent Fund Ltd. In the case of the Trichinopoly Tennore Hindu Permanent Fund Ltd. the company obtained, as I have already mentioned, considerable income from loans to non-members. No doubt it now only gives loans to persons who become "members", but it is said that the membership is in many cases merely nominal and that the company carries on in reality the same business as it did before the memorandum and the articles of association were altered. It appears to us that there is much substance in this contention.

A person who wants a loan can obtain one from this company, if he pays one rupee for a share, and he is entitled to have that one rupee paid back to him at the end of two years. Out of a gross income of Rs. 33,954-7-8 for the nine months ended 31st March 1930, a sum of Rupees 14,217-13-9 represented interest on loans granted to persons who had each acquired an ordinary share of one rupee and only Rs. 139-11-4 was paid to these persons by way of dividend. The holders of permanent shares received in dividends Rs. 6542-2-6, the holders of original term shares Rupees 5550-9-5, the holders of "B" class term shares Rs. 3660-5-9, and the holders of "C" class term shares Rs. 3338-9-5. In other words, the large profits which the company made were distributed to its real share-holders. The nominal members, those who had taken one rupee shares, invested practically nothing and consequently nothing was paid to them out of the profits either by way of dividend or in reduction of interest. By borrowing from the company, they made for the company large profits, in which they were not allowed to share. In the circumstances, it is impossible for the company to contend that it is a mutual benefit society and its income is not taxable.

A very similar question to the one which arises here was dealt with in the

2. Secy. of Board of Revenue, Income-tax Madras v. Mylapore Hindu Permanent Fund Ltd., (1923) 10 A I R Mad 684=76 I C 833=47 Mad 1 (F B).

case in (1897) 2 Q B 402.[3] This society consisted of members who held one or more shares or one or more fifth parts of a share and the shares were divided into two classes : (i) investors' shares and (ii) borrowers' shares. The members were divided into classes according to the shares they held. The society lent money to its members at a fixed rate of interest. The re-payment of the loans was by weekly payments of a fixed sum, which covered both principal and interest. No deduction was allowed by the income-tax authorities to be made by the borrower in respect of income-tax and the society was assessed on the interest it received as being interest of money within S. 2, Income-tax Act, 1853. On a case being stated, it was held that the expression "interest of money" in S. 2 of that Act was not restricted to annual interest and that the interest received by the society was not in respect of a loan on land, but of a contract relating to the interest of money lent, and was, therefore, assessable in their hands to income-tax. In the case before us, likewise, borrowers become members, but the holders of ordinary shares are members in name only. Their membership does not in any sense give them the benefits of membership of a mutual benefit society. Therefore, we consider that the answer to question (i) should be in the affirmative and the answer to question (ii) should be that it is not governed by the *Mylapore Fund case.*[2]

The answer to question (iii) has been correctly stated by the Commissioner of Income-tax in his reference. He points out that there is no payment of interest to share-holders or subscribers on the capital subscribed by them. The company pays dividends to its members and these are dependent on the earning of profits. The sums so paid are not in the nature of interest on borrowed capital, which is allowable under S. 10 (2) (iii) of the Act. The company is, therefore, not entitled to claim a deduction in respect of these sums. Questions (iv) and (v) can also be taken together. What is really contended for here is that the doctrine of res judicata operates in respect of an assessment made by an Income-tax Officer. This is clearly erroneous. The Income-tax Officer does not constitute a Court, and therefore the doctrine can have no application. But his assessments are final, unless they can be re-opened under some provision of the Act. Consequently the answer to question (iv) is in the negative and the answer to question (v) is in the affirmative. As the reference has been answered in favour of the Commissioner of Income-tax, he will be entitled to costs which we fix at Rs. 250.

C.R.K./D.S. *Answers accordingly.*

3. Leeds Permanent Benefit Building Society v. Mallandaine, (1897) 2 Q B 402=66 L J Q B 813=77 L T 122=61 J P 675.

---

* A. I. R. 1938 Madras 151

HORWILL J.

S. Parasurama Iyer — Appellant.

v.

R. V. Subburamachari and others — Respondents.

Second Appeal No. 237 of 1933, Decided on 27th September 1937, against decree of Dist. Court, Madura, in A. S. No. 132 of 1931.

*** Partnership—*A* becoming partner—Number of partners increasing beyond 20 without *A*'s knowledge — Partnership subsequently converted into joint stock company, *A* being given no share—Suit by *A* for dissolution and for share of his profits in partnership—*A* held entitled to share but suit without impleading all partners held not maintainable.**

A became a partner in a firm. In course of time, the number of partners went beyond 20 without *A*'s knowledge. The partnership then became converted into a joint stock company. *A*, though one of the partners, was not allotted any share in the new company. He therefore brought a suit for declaration that there had been a dissolution of the partnership and for the recovery of his capital and share of profits. *A* did not implead all the partners :

Held that if *A* was entitled to a share of the profits of the firm when the membership was below 20, he was not to lose that right because the members had increased beyond 20 without his knowledge : (*1926*) *Ch 657, Rel. on.* [P 152 C 1]

Held further that the suit without impleading all the partners was not maintainable as the liability was the liability of the individual partners and of the partnership and not jointly of the various members constituting the partnership : *A I R 1930 Bom 5 and A I R 1925 Mad 237, Disting.*; (*1828*) *38 E R 917* ; (*1876*) *2 Ch D 768 and* (*1865*) *1 Q B 77, Expl.* [P 153 C 1]

K. Venkateswaran—*for Appellant.*

O. V. Baluswami—*for Respondents.*

Judgment. — The plaintiff became a partner in the firm of the defendants and in course of time the number of partners increased until, at the time of bringing the suit in 1924, the number of partners was

96. The partnership then became converted into a joint stock company. The plaintiff, though one of the partners, was not allotted any shares in the newly formed company. He therefore brought a suit for a declaration that there had been a dissolution of the partnership, for the taking of accounts, and for recovery of his share capital and his share of the profits with interest thereon. The trial Court went into all the matters raised very fully and decided against the plaintiff. In appeal, the lower Appellate Court decided against the plaintiff on two technical grounds, without considering the allegations made by the plaintiff. It found that as the number of partners was more than 20, no suit could be filed and secondly, that in any event the suit could not be maintained as all the partners had not been brought on record. The plaintiff appeals and contends that both the findings of the lower Appellate Court are wrong. If, as the plaintiff alleges, he was nothing more than the manager of the restaurant kitchen and one who had contributed Rs. 1000 to the business to become a partner, and that thereafter he had no knowledge of what took place and was unaware of the fact that the number of partners had increased beyond 20, then clearly the plaintiff should not be without a remedy of some sort. As was said in (1926) Ch 657,[1] where two persons, as secretary and treasurer, collected sums of money from various persons to form a club and the members themselves had no knowledge of what the secretary and treasurer had done, the law is not so powerless that when the money is in the hands of persons who have received it for application for an illegal purpose, it cannot protect the contributors or enable them to recover it before it has been applied for this illegal purpose.

If the plaintiff was entitled to a share of the profits of the firm when the membership was below 20, surely he was not to lose that right because the number of partners had increased beyond 20 without his knowledge. The appeal however has to be dismissed on the other ground, i. e. that the plaintiff should have impleaded all the partners as defendants. It may be true that at the time of filing the suit he was not aware of the number of partners; but he could readily have ascertained that because an objection to the maintainability of the suit on the ground of non-joinder was taken in the written statement itself. The learned advocate for the appellant has cited certain cases as instances where it was not thought necessary to implead every member of the partnership or firm. According to certain provisions of English Company law, the managing director or some other director is authorized to bring suits on behalf of the company and the question arose in (1828) 38 E R 917,[2] whether a suit brought by three share-holders purporting to sue on behalf of the general body of share-holders was maintainable against the directors, who were accused of misusing the share-holders' money. It was held that the nature of the case precluded the possibility of the directors joining in the suit as plaintiffs and that as the directors, who were ordinarily empowered to bring a suit, were themselves the defendants, they could not represent in a suit of that nature the general body of share-holders. Another case relied on by the appellant is (1876) 2 Ch D 763,[3] which was a suit for dissolution of a partnership where the membership was very large. A meeting was held in which a large majority of members of all classes were in favour of dissolution, and a suit was brought by representatives of all classes. It was held that some representatives of all classes could bring a suit on behalf of the general body of members. A third case is (1865) 1 Q B 77.[4] That was an ordinary representative suit in which a provision similar to O. 1, R. 8, Civil P. C., was invoked. In 53 Bom 652[5] a creditor brought a suit against certain prominent members of the company who had induced him to trade with the company. It was held that the suit was maintainable against the defendants because the liability of all the defendants was joint, as well as several, and that those defendants who were responsible for the creditors dealing with the company were liable. Similarly in 47 M L J 871[6] it was held that it was not necessary to implead all the partners in appeal because the

1. Greenberg v. Cooperstein, (1926) Ch 657=9 L J Ch 466=135 L T 663.

2. Hichens v. Congreve, (1828) 38 E R 917=4 Russ 562=1 Russ & My 150*n*=6 L J Ch 167 =32 R R 178.

3. In re South Wales Atlantic Steamship Co., (1876) 2 Ch D 763.

4. Wood v. Dun, (1865) 1 Q B 77.

5. Appa Dada v. Ramkrishna Vasudeo, (1930) 17 A I R Bom 5=121 I C 587=53 Bom 652=31 Bom L R 1187.

6. Gangulu Naidu v. Chengama Naidu, (1925) 12 A I R Mad 287=85 I C 897=47 M L J 871.

liability of the defendants was joint as well as several. The liability in the present case is the liability of the individual partners and of the partnership and not jointly of the various members constituting the partnership. No suit is therefore maintainable without impleading all the partners and the lower Appellate Court was right in dismissing the appeal on this ground.

As soon as the written statement was filed, the plaintiff was aware of the existence of other partners and could have impleaded them. Instead of doing this, he obstinately contested the suit on this issue and so was prepared to have the suit dismissed on this technical ground. Even in the Appellate Court, he made no attempt to amend the plaint. Nor has he made such a request in this Court. The plaintiff has only to thank himself for having this suit dismissed on this technical ground. The appeal is therefore dismissed with costs. Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 153

ABDUR RAHMAN J.

Sivarama Aiyar — Petitioner.

v.

Ahilambal Ammal — Respondent.

Civil Revn. Petn. No. 986 of 1936, Decided on 1st September 1937, from order of Sub-Judge, Trichinopoly, D/-15th August 1936.

Civil P. C. (1908), O. 33, R. 9 — Provisions of O. 33 are for benefit of bona fide litigants only — Pauper entering into agreement with another to repay money advanced and to be advanced — In default agreement to sell portion of property in suit—Such agreement held was coverd by R. 9 and such person should be dispaupered.

The provisions contained in O. 33 were designed in aid of bona fide litigants and must be strictly confined to them : *A I R 1919 Pat 58, Rel. on.* [P 154 C 1]

Where a person suing as pauper entered into an agreement with another agreeing that he would repay that person the sums advanced and to be advanced by him with interest for the conduct of the litigation or in default would sell a share of the property which was the subject matter of the litigation :

***Held* that the interest created by such agreement was covered by O. 33, R. 9 and as such the person suing as pauper should be dispaupered.** [P 154 C 1]

T. S. Venkatesa Ayyar — *for Petitioner.*

T. R. Srinivasan — *for Respondent.*

Order. — This is a civil revision petition against an order of the Principal Subordinate Judge of Trichinopoly dispaupering the plaintiff, under O. 33, R. 9, Civil P. C., on the ground of his having entered into an agreement with one Manickam Pillai with reference to the subject matter of the suit. The execution of the agreement was admitted, but it was alleged that the agreement was neither in respect of the subject matter of the suit, nor had any person obtained an interest in such subject matter. After the agreement was produced by Manickam Pillai, the plaintiff alleged subsequently that the agreement was altered in material particulars after its execution, and that he did not know of such alteration until it was produced in Court. After recording evidence in the proceedings, the learned Subordinate Judge found it as a fact that the agreement was not altered. The petitioner now asked me to interfere with this finding on the ground that it is erroneous. After hearing his counsel's arguments, who led me through the evidence, I find myself in agreement with the finding of the Court below. Even if I had not arrived at the same conclusion, I would not have been entitled to interfere with it. The lower Court was entitled to come to a finding, and having determined the question of fact against the petitioner, it cannot be said to have acted either illegally or with any material irregularity. It is thus clear that this ground is neither correct nor open to the petitioner in revision.

It was then contended on behalf of the petitioner that even if the agreement was accepted as genuine, it did not create any right in the subject matter of the suit. A reference was made by his counsel to S. 54, T. P. Act, and S. 17, Registration Act, which was in my opinion wholly irrelevant in this case. Under the terms of the present agreement, Manickam Pillai had advanced a sum of Rs. 500 to the petitioner towards the expenses already incurred by him in conducting the suit till then and had also agreed to advance another sum of Rs. 500 "for taking steps and for the expenses that may be necessary hereafter till the disposal of the suit in the Sub-Court, Trichinopoly." The petitioner had in consideration of the advances so made, and promised to be made subsequently, agreed to repay the amount of Rs. 1000 with interest within

three months of the disposal of the suit. He had further undertaken to sell one-fourth share of the properties to which he might be held entitled if he failed to repay the money due from him within the time mentioned above.

An agreement of this nature does fall in my opinion within the language of O. 33, R. 9 (c) which is wide enough to cover such an interest as was created by the petitioner in Manickam Pillai's favour. Moreover, as observed by Mullick J in 50 I C 520,[1] the provisions contained in O. 33, Civil P. C., were designed in aid of bona fide litigants and must be strictly confined to them. With this observation of the learned Judge I respectfully agree. I would therefore reject the petition for revision with costs. The petitioner's counsel asked me in the end that if his petition was not to be accepted, I might grant him further time to pay the necessary court-fees. The Court has power to do so under S. 149, Civil P. C., and in view of the fact that the lower Court had also granted him a month to pay the requisite court-fees of which he could not avail himself on account of this petition having been filed and admitted, I would accede to this request and order the petitioner to pay the necessary court-fee within a fortnight from this date.

C.R.K./B.D. *Petition rejected.*

1. Charu Sila Dasi v. Haran Chandra Mukherjee, (1919) 6 A I R Pat 58=50 I C 520.

---

* A. I. R. 1938 Madras 154

LEACH C. J. AND MADHAVAN NAIR J.

(*C. Thiruvenkatachariar, Official Liquidator of*) *National Live Stock Registration Bank Ltd.* — Appellant.

v.

A. T. Velu Mudaliar and another — Respondents.

Appeal No. 47 of 1937, Decided on 28th September 1937, from judgment of Gentle J., D/- 28th April 1937.

(a) Companies Act (1913), S. 235 — Promoter—Person not taking any steps to bring company into being, but merely signing memorandum of association and subscribing for certain shares — Fact that money so subscribed had been utilized in paying part of expenses of formation does not make him promoter.

Section 235 only applies to a person who has taken part in the formation or promotion of the company, to a past or present director, manager or liquidator or to an officer of the company. [P 155 C 2]

There was no evidence showing that a person took any part in discussing the formation of the company or in taking any steps to bring the company into being apart from the fact that he signed the memorandum of association and paid for certain shares and the money subscribed by him for his shares was utilised in defraying part of the expenses of forming the company :

Held that the application of the money which he paid for his shares was a matter over which he had no control, and the fact that the money was utilised in paying the expenses of formation could not make him a promoter. [P 156 C 1,2]

*** (b) Companies Act (1913), S. 235—Share broker of company is not officer for purpose of S. 235.**

There is no difference in the position of a broker to a company whose duties are confined to dealing with the shares of the company and the position of the banker who has to deal with the moneys of the company. A broker has nothing to do with the management of the company, and may have no knowledge of what is being done inside company's office. Therefore, to classify him as an officer of the company, within the meaning of S. 235 would be putting too great a strain on the wording of the section. If moneys had been wrongly paid to the brokers, the Official Liquidator has, subject to the law of limitation, other means of recovering them, but he is not entitled to use S. 235 for the purpose. [P 156 C 2; P 157 C 1]

C. Narasimhachariar — *for Appellant.*

T. D. Srinivasachariar — *for Respondents.*

Leach C. J.—This appeal arises out of a misfeasance summons taken out by the Official Liquidator of the National Live Stock Registration Bank Ltd. against the respondents who were the brokers of the company. The company was registered on 2nd July 1927 with a nominal capital of Rs. 5,00,000 divided into 50,000 shares of Rs. 10 each, of which 40,500 were preferred and 9500 ordinary shares. The certificate permitting the company to carry on the business was issued by the Registrar of Joint Stock Companies on 1st August 1927. The company was unsuccessful in its operations and went into voluntary liquidation on 11th December 1930. The voluntary liquidation was turned into a compulsory liquidation by order of this Court, dated 13th October 1932. The Official Liquidator sought to make the respondents liable to repay a sum of Rupees 8865.11.3, which they had received as share brokers of the company. The respondents are partners of a firm of provision dealers carrying on business under the name of A. T. Velu Mudaliar & Company. They had no previous experience as

share brokers and it is obvious that they owed their appointment to their relationship to V. K. Lakshmana Mudaliar one of the promoters of the company, who is the son of the second respondent and the brother-in-law of the first respondent. A draft of the agreement under which the respondents were to act as brokers of the company was drawn up in the month of May 1927 and although the company had not then been registered, it was signed on 31st May 1927. Under it, the respondents were to receive a very high commission, Re. 1-8-0, for every share of the company sold through them, and eight-annas in respect of every share sold through other agencies. Article 9 of the articles of association which came into force at a later date stated that the respondents' firm should be the sole selling brokers of the company and under it they were to receive a commission of five per cent. on the amount subscribed, but the document of 31st May 1927 purported to fix the commission at 15 per cent. After the formation of the company, the matter was discussed by the directors and on 22nd October 1927, they passed a resolution agreeing to ratify the arrangement, subject to an alteration which amounted to very little. The respondents accepted the modification and were paid on the basis of the modified agreement notwithstanding that the directors had exceeded their powers in ratifying it. The appeal is not, however, concerned with the liability of the directors in this respect.

The amount paid to the respondents was, as I have already indicated, the sum of Rs. 8865-11-3, which the Official Liquidator desired to recover from them on the ground that the agreement was ultra vires. Accordingly he took out a summons under S. 235, Companies Act 1913, and the matter in due course came before Stone J. who referred the question of what was due under the agreement to the Official Referee. After holding an inquiry, the Official Referee reported that the respondents were not entitled to retain the Rs. 8865-11-3. The Official Referee's report came before Gentle J. when it was contended on behalf of the respondents that all remedy against the respondents had become time-barred. It was said that the Article which applied to the case was Art. 36, Limitation Act, which allows only a period of two years. The Official Liquidator urged that the Article which applied was Art. 120, which allows a period of six years. The learned Judge found that Art. 36 applied and this appeal has been filed to challenge the finding. The Court is however not called upon to decide the question as it is manifest that for other reasons, the Official Liquidator is not entitled to ask for an order against the respondents under S. 235, Companies Act 1913. That section only applies to a person who has taken part in the formation or promotion of the company, to a past or present director, manager or liquidator or to an officer of the company. Neither respondent was ever a director, manager or liquidator of the company, and for reasons which I shall indicate, I do not think that either can be deemed to be a promoter or officer. As a matter of fact, so far as respondent 2 is concerned, the Court is not asked to hold that he was a promoter.

I will first discuss the question whether respondent 1 can be deemed to be a promoter. In (1877) 2 C P D 469,[1] Cookburn C. J. defined the word "promoter" as being one who undertakes to form a company with reference to a given project and to set it going and to take the necessary steps to accomplish that purpose. Other definitions have been given by the learned Judges from time to time, but it is impossible to define accurately what is meant by the word "promoter". The difficulty is discussed at length by the learned author of Palmer's Company Precedents at pp. 103 to 109. After referring to a number of the more prominent cases, the learned author observes at p. 106:

> It is obvious therefore that a person who originates the scheme for the formation of the company, has the memorandum and articles prepared, executed and registered, and finds the first directors, settles the terms (if any), and makes arrangements for advertising and circulating the prospectus and placing the capital, is emphatically a promoter in the fullest sense. He controls the formation and future of the company, and it is this control which lies at the root of the fiduciary relation of the promoter to the company. Nor is he the less a promoter if all or most of these activities are performed nominally by a company which he controls. But a person who has done much less than this—takes a much less prominent part—may bring himself within the meaning of the term and may be held liable as a promoter.

Each case must be decided according to the evidence. If it is clear that the persons charged were merely servants or

1. Twycross v. Grant, (1877) 2 C P D 469 = 46 L J C P 636=36 L T 812=25 W R 701.

agents of the promoters or servants or agents of the company, they cannot be classified as promoters, and in this connexion the learned author makes mention of brokers, bankers and solicitors. Of course, brokers, bankers and solicitors could put themselves in the position of being promoters, but in order to do so they would have to travel outside their ordinary spheres. Now, what are the facts here? As I have indicated, the question of promotion only applies to respondent 1. It is said that he must be deemed to have taken part in the formation of the company and to be a promoter, because he signed the memorandum and articles of association and subscribed for 100 shares. There is no evidence showing that he took any part in discussing the formation of the company or in taking any steps to bring the company into being, apart from the fact that he signed the memorandum of association and paid for 100 shares. It is not even suggested that he had anything to do with the drawing up of the memorandum and articles of association. There is no suggestion that respondent 1 had anything to do with the selection of the directors or the settlement of any contract, except the contract under which his firm was to act as brokers. After the company had been formed and had started business, respondent 1's firm induced certain people to subscribe for shares, but it is not alleged that they did anything before the company was launched. The minimum subscription was fixed at 500 shares and the signatories to the memorandum of association themselves subscribed for 1200 shares. In the memorandum of association the only persons referred to as promoters are V. K. Lakshmanan Mudaliar and J. W. Samuel. It comes to this. The Court is asked to hold respondent 1 to be a promoter because his signature appears at the foot of the memorandum and he took 100 shares of the 1200 initially subscribed.

This is a contention which I am unable to accept. The law requires that there shall be seven signatories to the memorandum of association of a public company. A person who has taken no part in the formation or promotion of the company may be asked to sign the memorandum as a subscriber for one or more shares, and this usually happens. It was mentioned in the course of the argument that the money subscribed by respondent 1 for his 100 shares was utilized in defraying part of the expenses of forming the company. That may be, but it was a matter which concerned the directors. The application of the money which respondent 1 paid for his shares was a matter over which he had no control, and the fact that the money was utilized in paying the expenses of formation cannot make him a promoter. The agreement with the respondents was an agreement which conscientious directors ought never to have entered into, and in doing so the directors deliberately exceeded their powers. But this, of course, has nothing to do with the question whether respondent 1 is to be deemed to be a person who took part in the formation and promotion of the company. For the reasons indicated, it must be held that the Official Liquidator was not entitled to take out a summons against respondent 1 on the ground that he was a promoter.

Can the respondents be deemed to be officers of the company? S. 2 of the Act defines the word "officer" as including "any director, manager or secretary, but, save in Ss. 235, 236 and 237, does not include an auditor." The definition is therefore not exhaustive. The inclusion of the auditor for the purposes of Ss. 235, 236 and 237 follows the course adopted in England and avoids the discussion which had taken place in the Courts there with regard to the position of the auditor. But it does not follow because the auditor is an officer for the purposes of S. 235, the company's share broker is in the same position. In (1894) 71 L T 406,[2] where the question was whether a person who was appointed to act as solicitor to the society was an officer of the society, Cave J. observed:

> It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society. All these persons render services to the society, but they cannot be said to be in the employment of the society so as to make them officials.

I can see no difference in the position of a broker to a company whose duties are confined to dealing with the shares of the company and the position of the banker who has to deal with the moneys of the

2. In re, The Liberator Permanent Benefit Building Society, (1894) 71 L T 406.

company. A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside company's office. Therefore, to classify him as an officer of the company, within the meaning of S. 235 of the Act, would in my opinion be putting too great a strain on the wording of the section. If moneys had been wrongly paid to the brokers, the Official Liquidator had, subject to the law of limitation, other means of recovering them, but he is not entitled to use S. 235 for the purpose. For these reasons the appeal fails and must be dismissed with costs which will be paid out of the assets of the company. The Official Liquidator will be allowed his costs out of the assets.

Madhavan Nair J.—I entirely agree and have nothing to add.

C.R.K./D.S. *Appeal dismissed.*

---

* A. I. R. 1938 Madras 157

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Sivasankara Mudaliar and another — Appellants.

v.

Amaravathi Ammal and another — Respondents.

Appeal No. 182 of 1936, Decided on 22nd September 1937, against decree of Sub-Judge, Chingleput, in O. S. No. 37 of 1931.

*** (a) Will—Executors appointed under will declining to accept office — Heir-at-law of testator can maintain action to recover possession of estate left by testator.**

In India there is no distinction made between realty and personalty, and therefore the entire estate, both moveable and immovable property, left by the deceased must be deemed to vest in the heir-at-law until an administrator is duly constituted. A legatee does not represent the estate and he has no direct right of action against the person who is claiming adversely to the estate. Therefore to preserve and safeguard the estate, a right of action must vest in some body to prevent an adverse claim against the estate and the heir-at-law is the person in whom the law vests the estate whether he will or not even under Hindu law. Therefore where executors decline to accept office, there is nothing to preclude an heir-at-law to maintain an action in ejectment or otherwise recover possession of the estate left by testator. The heir-at-law, if he likes, can get himself appointed administrator but he is not bound to do so. It is open to legatees to have an administrator duly constituted. As soon as such an administrator is constituted, the estate would be divested from the heir-at-law and the person competent to maintain a suit on behalf of the estate will be such administrator: *Case law discussed.* [P 159 C 2; P 160 C 1]

(b) Limitation Act (1908), S. 17 — 'Legal representative' includes heir-at-law.

The expression 'legal representative' in S. 17 is not intended to be confined to an executor or administrator but includes heir-at-law also: *20 Bom 15, Rel. on.* [P 160 C 1]

T. M. Krishnaswami Aiyar, S. Panchapagesa Sastri and K. R. Krishnaswamy — *for Appellants.*

P. S. Narayanaswami Aiyar — *for Respondents.*

Venkataramana Rao J.—This appeal raises a question of some importance. It relates to the rights of an heir-at-law with reference to an estate left by a testator where the executors appointed under his will decline to accept office. The facts necessary for the disposal of the exact point in controversy in the suit may be briefly stated. The plaintiff—respondent 1—Amaravathi Ammal was the widow of one Balasundara Mudali. He died on 9th February 1919, leaving him surviving his widow and his last will and testament dated 19th November 1918. In the said will, he said that he became divided in status from his brother—defendant 1—appellant 1 Sivasankara Mudali, that some properties were divided and as regards the other properties, he had been getting equally the income derived from them. He made several dispositions in the said will and among others bequeathed certain immovable properties and moneys to his widow Amaravathi. He also provided for certain charities and appointed one Ratna Mudali and Jagannatha Mudali as his executors. Subsequent to the execution of the said will, through the intervention of the mediators, some of the immovable properties of the family were divided and two lists were drawn up specifying separately the properties that fell to each and the two lists were signed by both the brothers. The date of the lists is 30th December 1918.

The case of the plaintiff is that in pursuance of the said division the said Balasundara Mudali was in possession and enjoyment of the said properties. Immediately after the death of Balasundara, appellant 1, Sivasankara Mudali, began to set up that his brother died undivided and disputed the possession of Balasundra with reference to the properties that fell to his share. Thereupon the plaintiff presented for registration the said two lists, but it

was opposed by Sivasankara and this led to a litigation which lasted till 1931, and was finally disposed of by a judgment in a Letters Patent appeal dated 20th October 1931 in her favour. Before the close of this litigation, as 12 years from her husband's death were about to expire, she filed the present suit on 19th November 1930, for recovery of possession of the properties left by her husband. She recited the said will and the bequests in her favour and also the fact that the executors did not accept office. She therefore alleged that as heir and legatee, she is entitled to sue and recover the properties left by her husband for the purpose of carrying out all the directions in his will, and she also further stated that she was willing to carry out the charities in accordance therewith. She set out in the several schedules to the plaint the properties whereof she sought possession. In Sch. 1 she specified the immovable properties which fell to the share of Balasundara at the division of 30th December 1918. In Sch. 2 she specified the properties still to be divided between Balasundara and appellant 1 and claimed a half share therein. In Sch. 3 she specified the businesses wherein Balasundara and appellant 1 were partners and claimed half a share in the moneys and profits due therefrom. Appellant 2, defendant 2 in the suit, is the undivided son of appellant 1. Both of them denied the will and also pleaded that the deceased Balasundara died undivided and that the will left by him was inoperative. They further pleaded that the suit as laid was incompetent as she was neither the executrix nor the duly constituted administratrix under the law; that, if at all, she could only recover the properties specifically bequeathed to her under the will. They also raised the plea of limitation.

As already stated, the two executors Ratna Mudali and Jagannatha Mudali did not accept office and by the date of the suit Ratna Mudali was dead and Jagannatha, who was alive, was made defendant 3 in the suit. On 30th January 1935 before the trial began, he was transposed as plaintiff 2. The learned Subordinate Judge held that Balasundara died divided in status leaving a will, that the suit was competent and that she (plaintiff) could recover possession of the estate left by her husband and further any defect that there was in the original frame of the suit was cured by the transposition of Jagannatha as plaintiff 2. He held that so far as the immovable properties left by the testator were concerned, there was no question of limitation, but in regard to the claim for the profits of the businesses specified in Sch. 3, the suit was barred by limitation. He accordingly gave a decree for the immovable properties as claimed in Schs. 1 and 2 and also a specific sum of Rs. 500 which was claimed in Sch. 6 as being a certain sum of money deposited with a certain Nidhi, empowering her to draw that amount. This appeal has been preferred by defendants 1 and 2.

The main argument addressed by the learned counsel for the appellants, Mr. T. M. Krishnaswami Aiyar, related to the competency of the suit by the plaintiff, respondent 1. His contention is briefly this. Where the executors failed to accept office, in the absence of a duly constituted administrator, the plaintiff cannot recover possession of any properties left by the testator save those which were specifically bequeathed to her under the will and the decree in so far as it directed delivery of possession of properties other than those to which she was entitled is wrong. The question is, is the contention tenable? If this case were governed by English law, there can be no question that the suit would be competent so far as the immovable property is concerned. Before Lord Birkenhead's Act, where an executor dies or fails to accept office, the legal position was that so far as realty is concerned, it vested in the heir until a legal representative was duly constituted. As observed by Williams in his book on Real Property:

> An heir-at-law is the only person in whom the law of England vested property whether he would or not. As the estate cannot therefore remain in abeyance, 'where there is no executor, the estate descended to the heir pending the appointment of an administrator': Williams' Real Property, Edn. 24, pp. 101 and 102.

This position was made clear by Lord North in (1898) 2 Ch 573[1] where the learned Judge at p. 576 pointed out that until probate was taken, the estate remained

> where the law makes the legal estate go when a man died intestate, i. e. in the heir-at-law."

In a later case, (1914) 2 Ch 547[2] at p. 552, Lord Cozens-Hardy M. R. observed:

1. John v. John, (1898) 2 Ch 573=67 L J Ch 616=79 L T 362=47 W R 52=14 T L R 583.
2. In re Griggs; Ex parte School Board for London, (1914) 2 Ch 547=111 L T 931=83 L J Ch 835=13 L G R 27=58 S J 796.

Until there is a personal representative, the property vests in the heir. He could recover the rents and maintain actions for trespass.

This statement of the law has been always accepted to be correct and has been recently affirmed by the Privy Council in (1937) A C 626[3] where Lord Blanesburgh at pp. 641 and 642 remarked thus:

Under S. 6 (of the New Zealand Act of 1879) the vesting of the real estate of a deceased person in the executor is, as will have been seen, to take effect immediately upon 'the granting of probate of the will or administration of the estate or an order to administer the estate' of the deceased. But not before. And in Victoria, under the Administration Act, 1872, of that State, No. 427, S 6 —a section admittedly indistinguishable from this S. 6 of the New Zealand Act of 1879—it was held as long ago as 1875 in (1875) 1 V L R (L) 164[4] at p. 166, that there was in that section nothing to destroy the status of the old heir-at-law between the death of the deceased and grant of administration to his estate, and an action of ejectment brought during that interval by the heir-at-law in respect of the property of the deceased was accordingly there sustained. The correctness of the principle enunciated in (1875) 1 V L R (L) 164[4] at p. 166 was not canvassed by the respondents here. Nor could it well have been; it is fundamental; it has been applied in England in analogous circumstances under the Land Transfer Act, 1897, when in (1914) 2 Ch 540[2] Lord Cozens Hardy M. R. observed: "Until there is a personal representative, the property vests in the heir."

The question is, is there anything to preclude the applicability of that doctrine in this country to a mofussal will such as the one now in question? Whatever may be the state of the Indian law, before the enactment of the Hindu Wills Act and Probate and Administration Act which were intended to embody the principles of English Jurisprudence, at any rate after the said enactments, there is nothing to preclude the applicability of the principles of English law. The principle that until an administrator is duly constituted an heir-at-law can recover the estate, has been applied by the Indian High Courts. In 46 Mad 190[5] at page 226 Kumaraswami Sastri J. observed thus:

In cases where probate is not necessary, there should be some indication that the person appointed executor is willing to accept office and perform the duties of the executor. In cases where he does not accept office, I think, the estate must vest in the legal representative until an application is made by some person competent to obtain a grant under the Probate and Administration Act.

It is an instructive case. A testatrix died leaving a will appointing an executor. On the date of the will the property which she left thereunder was the subject matter of a pending litigation wherein she was the plaintiff. The executor did not accept office. The heirs-at-law brought themselves on record as the legal representatives at the same time alleging that in case the will left by the testatrix was found to be true, they would deliver possession of the properties to the legatees just as the plaintiff in this case said that she would carry out the directions in the will. They continued the litigation and brought it to a successful termination and recovered the property which she disposed of under the will. After such recovery, the legatees under the will sued the heirs-at-law for recovery of possession of the estate and the suit was held to be in time. One of the arguments advanced by the heirs-at-law in that case was that inasmuch as there was a will they were not the legal representatives of the testatrix and the recovery by them could not be deemed to be on behalf of the legatees and it was the duty of the legatees to have themselves brought on the record or got a duly constituted administrator appointed to carry on the litigation and therefore they must be deemed to have been in possession of the estate adversely to the estate. It was in combating this argument Kumaraswami Sastri J. made the observations cited above and held that as the executor did not accept office, the heir-at-law was the proper person to come on the record and continue the litigation.

The same view was taken in the Calcutta High Court in 18 C W N 1136.[6] It was held in that case that it is competent to a legal heir to maintain a suit for the benefit of the estate so long as any other claimant does not establish his rights to the same under the will. This view has been again affirmed in a recent decision in 59 Cal 911,[7] where the legal heirs were held competent to maintain a suit on a mortgage in the name of the deceased testator until an administrator was duly constituted (p. 916). In this country there is no distinction made between realty and personalty and therefore the entire estate both moveable and immovable property left by the deceased must be deemed to

3. Macleay v. Treadwell, (1937) A C 626.
4. Larkin v. Drysdale, (1875) 1 V L R (L) 164.
5. Parthasarathy Appa Rao v. Venkatadri Appa Rao, (1922) 9 A I R Mad 457=70 I C 689=46 Mad 190=43 M L J 486 (F B).
6. Basuntakumar v. Gopal Chunder, (1915) 2 A I R Cal 207=26 I C 21=18 C W N 1136.
7. Gopal Lal Chandra v. Amulyakumar, (1933) 20 A I R Cal 234=142 I C 747=59 Cal 911.

vest in the heir-at-law until an administrator is duly constituted : *vide* 34 Mad 395.[8] A legatee does not represent the estate and he has no direct right of action against the person who is claiming adversely to the estate. Therefore to preserve and safeguard the estate, a right of action must vest in somebody to prevent an adverse claim against the estate and the heir-at-law is the person in whom the law vests the estate whether he will or not even under Hindu law. Therefore there is nothing to preclude an heir-at-law to maintain an action in ejectment or otherwise recover possession of the estate left by testator. The heir-at-law, if he likes, can get himself appointed administrator but he is not bound to do so. It is open to legatees to have an administrator duly constituted. As soon as such an administrator is constituted, the estate would be divested from the heir-at-law and the person competent to maintain a suit on behalf of the estate will be such administrator.

An argument has been advanced by Mr. Krishnaswami Iyer based on S. 17, Limitation Act. He contends that S. 17 uses the expression "legal representative" which must be deemed to connote an executor or an administrator and this is a clear indication of the intention of the Legistature that in cases where a testator dies leaving a will, the heir-at-law could not be the person in whom the law would vest the estate. It seems to us that S. 17 does not throw any light on the question in issue as it does not say who a "legal representative" within the meaning of the section is. Again the argument in our opinion proceeds upon a misconception of the true meaning of the expression "legal representative" in the section. There is no definition of the expression "legal representative" in the Limitation Act. According to the plain language of S. 17, legal representative would also include an heir. Legal representative is one who represents in law the estate of the deceased and in whom the legal personalty of the deceased is deemed to continue. He may be an heir, executor or administrator. Where a person died intestate, it cannot be said that the legal representative of the deceased in S. 17 would not include an heir and that no limitation would run if there was an heir capable of suing. Herein must be noted the distinction between English and Indian law. Under the English law,

> If the statute has not begun to run during the lifetime of an intestate, then it does not begin to run until letters of administration to his estate have been taken out : *vide* (1870) 5 Ch 238[9] at p. 241.

This is because the personalty did not vest in the next of kin under the early English law and later in the Court of Probate until an administrator is constituted, but under the Indian law the moveable property vests in the heir-at-law. All that S. 17 contemplates is that if there is no legal representative who is capable of suing, the statute of of limitation would not run. The heir-at-law may be a minor in which case limitation would not run by virtue of S. 6 but as soon as an administrator of the estate is constituted, limitation would begin to run against him and the fact that there is an heir-at-law who is a minor would not prevent the operation of the law of limitation. This position is made clear by S. 17, Clause 2, which deals with a suit against a legal representative of a deceased person. There is no qualification to the effect that he must be capable of being sued, because an heir-at-law whether a minor or not, an executor or administrator all of them are capable of being sued. That the expression "legal representative" is not intended to be confined to an executor or administrator seems to be clear from the decision in 20 Bom 15[10] which has been affirmed by the Privy Council in 23 Bom 544.[11] That was a case of dissolution of partnership. The suit was by the administrator of a deceased partner claiming the assets of partnership for recovery of amount due to him. The partner died in 1889 having dissolved the partnership. The suit was instituted in 1894. Prima facie, the suit would be barred by limitation under Art. 106, Limitation Act. It was contended that as the letters of administration were granted to the estate of the deceased partner and an administrator was duly constituted only in March 1894 under S. 17, Limitation Act, the time could only be deemed to have run from this date.

8. Antony Cruz Gonzalves v. Mathes Boopalrayan, (1911) 34 Mad 395=7 I C 242=20 M L J 984.

9. Burdick v. Garrick, (1870) 5 Ch 233=39 L J Ch 369=18 W R 387.

10. Rivett Carnac v. Gocouldas Sobhanmull, (1896) 20 Bom 15.

11. Bhagavandas v. Rivett Carnac, (1899) 23 Bom 544=26 I A 32 (P C).

Candy J. before whom the case came on for trial, took the view that though after the grant of the letters no person other than the administrator can act as the representative of the deceased partner, there was no reason why a person claiming to be the heir of the deceased partner should not have filed the suit and he therefore held that the suit was barred. In that case the heir-at-law was a minor; when the matter came up on appeal, the learned Judges who heard the appeal took the view that as the heir-at-law was a minor, there was no legal representative capable of suing until letters of administration were granted and therefore the suit must be deemed to be in time. They interpreted the words "capable of suing" as meaning not under a disability to sue and infancy would be such a disability. It is thus clear that the learned Judge would have upheld Candy J's decision if it were not for the fact that the heir-at-law was a minor. This view was affirmed by the Privy Council : *vide* 23 Bom 544[10] at p. 549. It seems to us therefore that the argument based on S. 17, Limitation Act, is not a tenable one.

We are therefore of the opinion that the suit by the plaintiff was competent. There is no other point of substance in the appeal and none has been pressed before us in the view we have taken of the competency of the suit. In the result, the appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

*** A. I. R. 1938 Madras 161**

LEACH C. J. AND VARADACHARIAR J.

Oonamalai Ammal and another — Appellants.

v.

K. V. L. Narasimha Rao Naidu and others — Respondents.

Appeals Nos. 80 of 1935 and 13 of 1936, Decided on 17th August 1937, against decree of City Civil Judge, Madras, D/- 11th September 1935.

*** Mortgage — Subrogation — Priority — *A* advancing money to *B* to pay off mortgage decree against *B* on understanding that *B* would execute mortgage deed in favour of *A* to secure repayment — Deed not executed — Subsequently *B* executing deed of settlement in favour of *Z* — *C* advancing money to *Z* in ignorance of *A*'s rights — Title deed lying in Court and not with *A* — *A* held entitled to equitable subrogation but his claim should be postponed to that of *C*.**

A advanced money to *B* in order to pay off a mortgage decree against *B*. The advance was made on the express understanding that *B* would execute a mortgage deed in favour of *A* in order to secure repayment. But for some reason, the deed was not executed. In the meanwhile *B* executed a deed of settlement in favour of *Z* wherein no mention was made of the amount due to *A*. Subsequently *C* advanced money to *Z* who executed a mortgage deed in favour of *C*. The title deeds of the property were all along in Court and *C* had no knowledge of *A*'s rights :

Held that notwithstanding the non-execution of the formal mortgage deed as originally contemplated by the parties, *A* was entitled to invoke the doctrine of subrogation : *29 Cal 154 (P C), Foll.*; *(1910) 2 Ch 277, Ref.* [P 163 C 1]

Held also that *Z* was not entitled to set up against *A* his title under the deed of settlement. [P 163 C 1]

Held further that *A* could claim an equitable right of subrogation. *C* being a bona fide lender, *A*'s claim would be postponed to that of *C* and as the title deeds were in the possession of the Court and not in the possession of *A*, the doctrine of constructive notice on the ground of the omission of *C* to call for the title deeds could not be invoked in favour of *A*. [P 163 C 2 ; P 164 C 1]

K. Rajah Ayyar and V. Srinivasan — *for Appellants.*

S. Panchapakesa Sastry, K. R. Krishnaswami Ayyar and M. Ramchandra Rao — *for Respondents.*

Varadachariar J.—This appeal arises out of a suit for the recovery of a sum of money. The plaint also claimed that the amount should be recovered by sale of the suit property on the footing of a charge on the property. Defendant 1, who was admittedly the owner of the property at one time, is the mother of defendants 2 and 3. It is common ground that in 1924 this property had been given as security to one Kuppu Rao. In 1926 a suit was instituted by Kuppu Rao for the recovery of the amount due to him. He died pending that suit and the Administrator-General who took charge of his estate continued the suit and obtained a decree. In execution of that decree, the property was advertised for sale on 25th January 1928. The documentary evidence in the case, read in the light of the oral evidence, establishes that some days before the sale, attempts were made by defendants 1 and 2 to raise money to pay off the mortgage decree and prevent the sale of the property. It is the plaintiff's case that his money was advanced for this purpose, through his cousin P. W. 6, and that the understanding, as evidenced by Ex. A, was

that defendant 1 was to execute a hypothecation bond for the entire amount advanced by the plaintiff. As the defendants impeached the genuineness of Ex. A and of some of the other documents produced on the plaintiff's side, it will be convenient to refer in the first instance to documents which have not been impeached. It is sufficient at this stage to state that no mortgage was in fact executed; but the plaintiff claims a charge on the principle of subrogation as his money had been utilized to pay off the mortgage decree in favour of Kuppu Row's estate. The contesting defendants deny even the fact that plaintiff's moneys went to pay off that decree and they contend that the plaintiff is not entitled to invoke the principle of subrogation.

P. W. 6 was the proprietor of Dowden & Co., and there are in the record certain letters that passed between him and the Administrator-General, and as their genuineness has not been challenged their contents may be taken as fairly true; their truth has also been sworn to by P. W. 6. These letters make it clear that the money which was paid to satisfy Kuppu Rao's decree was paid to the Administrator-General by Dowden & Co., on behalf of the present plaintiff who was the cousin of P. W. 6. It is also significant that in one of them there is express reference to the intention to take necessary documents from the defendants before paying the balance due under the mortgage decree. A short time was obtained to make payment of the balance and the decree amount was finally discharged by a further deposit by Dowden & Co. made in the name of the plaintiff. Though the execution records relating to that mortgage suit were not exhibited in the lower Court, we have, with the consent of the advocates on both sides, inspected them here. They only show that the decree was reported satisfied and that the sale warrant was accordingly returned unexecuted. Barring a passing reference in one petition to a payment having been made by one Narasimha Rao on behalf of the defendants, there is nothing further in the records of that case to show that the decree was discharged by the present plaintiff or that there was any arrangement between the present plaintiff and the defendants in that suit in respect of their executing a security bond in favour of the plaintiff to secure repayment of the sum advanced by him. The admitted documents, taken with the evidence of P. Ws. 6 and 7 suffice, in our opinion, to show that the present version of defendants 1 and 3 that it is they who found the money to pay off Kuppu Rao's mortgage decree and that they had no transaction whatever with the plaintiff in that connexion cannot be true. It has not been suggested what motive P. W. 6 had in 1928 to make a reference to the present plaintiff as the person whose money was being paid to the Administrator-General in satisfaction of the mortgage decree unless the statement represented the truth. Nor is it easy to understand why there should be any reference to documents being taken from the defendants in that suit, if it was the defendants' money which was being paid in discharge of that decree.

If, as seems to follow from the above facts, it was plaintiff's money which was in fact paid to discharge Kuppu Rao's decree and there was an intention to take formal documents from the defendants in due course to secure repayment thereof, there is little force in the objection raised on behalf of the defendants to the genuineness of the letters, Exs. A, Y and Z on which the claim in the present suit is founded. These letters show that the money was lent on the express understanding that its repayment should be secured by a hypothecation bond to be executed by defendants 1 and 2. But as the parties hoped that they might sell the property privately and pay off the amount due to the plaintiff, there was considerable delay in the execution of the hypothecation bond. On a notice, Ex. J, being sent by an advocate on behalf of the plaintiff to the defendants, bringing these facts to their notice, Exs. Y and Z were executed by defendants 1 and 2, and in these documents they reiterated their promise to execute a formal mortgage deed within 15 days if by that time they were not able to pay up the money by the sale of the property. These documents are formally proved by persons who were present at their execution by defendants 1 and 2, and we see no reason to differ from the view of the learned trial Judge that they are genuine documents executed by defendants 1 and 2. If matters stood there, there can be little doubt that notwithstanding the non-execution of a formal mortgage deed, as originally contemplated by the parties, the plaintiff will be entitled to invoke the doctrine of subrogation. The case is clearly

governed by the principle of the decision in 29 Cal 154,[1] and the mere fact that at the time when the money was lent by the plaintiff to P. W. 6, no deed of mortgage had really been executed or that the parties intended to secure repayment by a formal deed of mortgage will not affect the applicability of the rule of subrogation to the case : *cf.* (1910) 2 Ch 277.[2]

Towards the end of 1931 it unfortunately happened that defendants 1 and 2 fell out, and defendant 1 who seems to have been dissatisfied with the conduct of defendant 2, who had become an insolvent and had incurred considerable losses in business, thought fit to settle the suit property on defendant 3, her younger son. This was carried out by a deed of settlement dated 19th November 1931. The settlement deed makes no reference to the arrangement with the plaintiff, nor does it make any provision for payment of the money due to the plaintiff under Exs. A, Y and Z. Whether even at that time the mother and the younger son had the fraudulent intention of cheating the plaintiff out of his money it is not easy to say, though the attitude taken up by them during the trial of the suit in totally denying the plaintiff's claim makes one suspicious whether it was not their deliberate object to defeat the transaction which had been brought about by defendant 2. Anyhow, as defendant 3's claim is only under a deed of settlement, he cannot set up his title thereunder against the plaintiff's claim unless the defence that the plaintiff never paid any money or that plaintiff has at best only a personal claim and not a right to a charge on the suit property is made out. In the view we have already expressed both these defences fail and the plaintiff will undoubtedly be entitled to a decree in enforcement of a charge on the suit property against defendants 1 and 3.

The claim of defendant 4 has, as the learned trial Judge points out, given rise to greater difficulty. She claims to have lent money to defendant 3 in ignorance of plaintiff's rights and has obtained a mortgage over the suit property. The plaintiff's case is that the mortgage deed, Ex. 6, executed by defendant 3 in favour of defendant 4 on 23rd December 1931, is a sham transaction and does not represent any real loan. Alternatively the plaintiff has also suggested that defendant 4 must have had notice of the plaintiff's claim and can at best rank only as a puisne mortgagee. The learned trial Judge has accepted defendant 4's case to this extent that he has found that defendant 4 was an innocent mortgagee who has advanced money. But he postponed defendant 4's claim to that of the plaintiff on the ground that defendant 4 has been negligent in lending the money without calling for the title deeds relating to the mortgaged property. It is now clear that these title deeds which were produced into Court during the pendency of Kuppu Rao's suit have remained in Court and were not taken possession of by any of the parties. The circumstance that in some notice given by a lawyer on behalf of defendants 1 to 3 an attempt was made to explain away plaintiff's possible possession of title deeds on a wrong assumption of plaintiff being in possession thereof cannot have much significance in face of this proved fact. On behalf of defendant 4 it has been contended that even on the footing that the plaintiff is entitled to claim to be subrogated to the position of Kuppu Rao, plaintiff must be postponed to defendant 4 on the ground of gross negligence in not taking active steps to have a legal mortgage executed in due course as contemplated by Exs. A and Y.

That the plaintiff had been very unbusinesslike in securing his rights cannot be denied. It is however not clear whether the case is directly within the terms of S. 78, T. P. Act. Plaintiff can only claim an equitable right of subrogation and cannot claim to be a mortgagee in whose favour a mortgage deed as contemplated by the Transfer of Property Act has been executed. Even if the case should be held to be governed by S. 78, there is a considerable force in the contention advanced on behalf of defendant 4 that if defendant 4 was really a bona fide lender, she has been misled into lending her money in ignorance of the plaintiff's right, as the plaintiff had not taken diligent steps to have a legal mortgage executed in his favour. The argument of the learned Judge that defendant 4's failure to call for the title deeds is sufficient to postpone her claim to the plaintiff's does not seem to us sustainable. It may be well founded if the plaintiff had the custody of the title deeds, because it is only in favour of the person in posses-

1. Dinobundhu Shaw Chodhry v. Jogmayya Dasi, (1902) 29 Cal 154=29 I A 9=6 C W N 209 (P C).
2. Butler v. Rice, (1910) 2 Ch 277=79 L J Ch 652=103 L T 94.

sion of the title deeds that the doctrine of constructive notice can be invoked on the ground of the omission of the other party to call for them. It being established in this case that the title deeds remained in Court, there is no basis for a finding against defendant 4 as a question of law merely on the ground of her failure to call for the title deeds. This failure however will have a material bearing in determining the question whether defendant 4 was in fact an honest lender.

Looking at the matter from another point of view, the plaintiff must be regarded as a person who had an agreement in his favour for the execution of a formal deed of mortgage. If defendant 4 was not a transferee for value without notice of the agreement in plaintiff's favour, plaintiff will undoubtedly be entitled in a suit for specific performance to get a security which will have precedence over defendant 4's claim. There is no reason why that consideration should not be kept in view in dealing with the relative rights of parties even on the footing that the plaintiff has become a mortgagee by subrogation. The question therefore that arises for decision from either point of view is whether defendant 4 was a bona fide lender without notice of the plaintiff's claim. The only relevant evidence on that point is that of her husband, D. W. 3. I am free to admit that his evidence is far from convincing, and on several matters it is undoubtedly open to criticizm. There is however one consideration which defendant 4 is entitled to urge, namely that there is on record no suggestion of any reason or motive for defendant 4 or her husband to get mixed up in any fraudulent scheme of defendants 1 and 3 to cheat the plaintiff's claim and much less of any reason for D. W. 3 to perjure himself to support such a scheme. Notwithstanding the defects in the evidence of D. W. 3, the learned trial Judge seems to have been prepared to accept his evidence and has found in positive terms that defendant 4 was an innocent lender. The circumstances of the case are not in our opinion such as to justify our dissenting from that finding of fact. The result is that while the plaintiff will be entitled to a decree as on a charge against the suit property, his claim will be postponed to that of defendant 4 under Ex. 6. The decree of the lower Court will be modified accordingly. Appeal No. 80 is allowed to this extent : the appellant will be entitled to the costs of the appeal from the plaintiff. Appeal No. 13 is dismissed with costs of the plaintiff. The appellant in Appeal No. 13 will pay the court-fee due to Government on the memorandum of appeal.

Leach C. J.—I agree with the judgment of my learned brother and I have nothing to add.

C.R.K./D.S. *Decree modified.*

---

* * **A. I. R. 1938 Madras 164**

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

Balammal — Appellant.

v.

Palandi Naidu and others —
Respondents.

Appeal No. 500 of 1931, Decided on 7th September 1937, against decree of Dist. Court, Chingleput, in O. S. No. 9 of 1928.

* * **(a) Defamation — Communication by client to pleader not in connexion with any judicial proceeding or step thereto is not absolutely privileged—Such communication, when false, intended to be published to certain party and actuated by malice will not be protected.**

The doctrine of absolute privilege is based on the fact that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not ; it is a right of the public, the theory being "public advantage almost amounting to public necessity." That is why a party communicating any matter to a solicitor in connexion with any judicial proceeding or in connexion with any necessary step preliminary thereto is absolutely immune from an action. But unless the communication is in any of these connexions, it would not be absolutely privileged. Every client in seeking legal advice is expected to put before his legal adviser the true and correct facts on which legal advice is sought. If the facts are known to be false to the knowledge of the client, he is not really seeking or expecting any proper legal advice at all but is attempting to make an improper use of the confidential relationship for purposes of his own. And there is neither reason for, nor public necessity nor public benefit in, according absolute immunity from liability to action to such communications. This is why the law has always classed such communications under the head of qualified privilege. [P 167 C 2; P 168 C 1; P 169 C 1, 2]

Where therefore a false communication is made by a client to his pleader, not in connexion with any judicial proceeding but is intended to be published to a party and is actuated by malice, such communication will not be protected and party responsible for the communication will be liable in damages. [P 170 C 2]

(b) Common Law—Applicability — Where Common law is uncertain, Indian High Court can apply law which is equitable.

Where the principles of Common law in England are in a state of uncertainty, there is nothing to preclude High Courts in India applying that view of the law which is essentially just and equitable. [P 170 C 1]

K. Rajah Ayyar, G. N. Thirumalachari and G. N. Rangaswami — *for Appellant.*

K. Krishnaswamy Iyengar, P. Krishnamachari and P. Venkatachari — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the decree of the learned District Judge of Chingleput dismissing an action for damages for defamation instituted by plaintiffs 1 and 2. The defamatory matter complained of was a communication made by defendants 1 and 2 to one Mr. G. Krishnamachari, a vakil at Chingleput and repeated by the said vakil in a letter dated 9th May 1927 addressed to plaintiff 1. Plaintiff 2 is the daughter of plaintiff 1 and the wife of defendant 2. Defendant 1 is the father of defendant 2. The matter complained of was concerning plaintiff 2 in the letter addressed as aforesaid to plaintiff 1 by the said Krishnamachari to the following effect :

On or about 7th January 1927, your daughter Balambal ran away with one Manika Asari from her husband clandestinely and was staying with him at Kadambathur for two days.

Plaintiff 2 was married to defendant 2 in or about 1925 and was living with her husband till about March 1927. Some time towards the latter part of 1926, misunderstandings seemed to have arisen between plaintiff 2 and the defendants in regard to the kasimalai worn by plaintiff 2 and alleged to have been taken away from her by her husband, defendant 2, and not returned in spite of demand. As a result of this misunderstanding, plaintiff 2 had to leave her husband's home and go to her parents' house in or about March 1927. On 25th April 1927, plaintiff 1 addressed a letter to his son-in-law, defendant 2, complaining about the ill-treatment accorded to his daughter during her stay in his house in consequence of the misunderstandings, and requesting him to take his wife and live with her. In answer to the said letter, defendants 1 and 2 instructed their vakil, Mr. Krishnamachari, to issue the letter dated 9th May 1927. On receipt thereof, plaintiff 1 through his vakil, Mr. Nageswara Iyer, complained of the defamatory character of the communication contained in the letter of 9th May 1927 and called upon them to unconditionally withdraw the same and apologize for the wrongful act. The defendants having failed and neglected to comply with the said request, plaintiff 1 instituted a complaint of defamation under S. 500, Penal Code. The Joint Magistrate of Chingleput found that the defamatory matter complained of, namely the running away of plaintiff 2 with Manika Asari, was false and convicted them of the offence charged. The present suit was instituted for recovery of damages. The material allegations are contained in paras. 4, 5 and 9 of the plaint and they are as follows :

(4). Subsequently, on 25th April 1927, plaintiff 1 gave a registered notice to defendant 2 requesting him to take back plaintiff 2 to his house and the defendants sent a reply dated 9th May 1927 accusing plaintiff 2 of having run away with one Manika Asari and having lived with him for two days at Kadambathur. (5). The allegation is absolutely false and was made quite maliciously and recklessly and was intended not only to ruin the character of plaintiff 2 but also to ruin her for life and brand her as an unchaste woman. (9). The defendants are therefore liable in damages to the plaintiffs for having unnecessarily defamed plaintiff 2 . . . Plaintiff 1 is also damnified by the false allegations against his daughter and is also entitled to damages.

Before the filing of the written statement, defendant 1 seemed to have asked for particulars of the precise words complained of as being defamatory and the dates when and the persons to whom and the place where the defamatory matter was published by the defendants. In answer thereto, the plaintiffs gave particulars wherein the plaintiffs distinctly stated that they sued in respect of the statement contained in the notice of the defendants dated 9th May 1927 which has been already quoted above. In regard to the publication complained of, it was stated to be at Chingleput and in regard to the person complained of it was alleged thus :

The publication was made to defendant 1 by defendant 2 in the first instance, then by both, to the vakil who gave the reply notice, and again was repeated in the Court of the joint Magistrate, Chingleput.

In regard to the damages claimed, the plaintiffs contented themselves with the claim for damages on behalf of plaintiff 2. After the receipt of particulars, the defendants filed a written statement. Their main pleas were two-fold: (1) justification of the matter complained of, and (2) privilege. This second plea is worded thus :

They claim absolute immunity or absolute privilege and if not, in any event, on account of a

defeasible immunity or qualified privilege attaching to the alleged defamation by reason of the occasion of the publication by defendant 1 to defendant 2 and by both to their vakil.

The learned District Judge found that the defamatory matter was in substance true and that the evidence established that plaintiff 2 ran away with Manika Asari from her husband clandestinely, but she did not live with him for two days and that portion of the matter must be found to be false. He further held that, even assuming the plea of justification could not be made out, the defendants were absolutely privileged in making the statement by reason of the fact that the communication was made to Mr. G. Krishnamachari, their legal adviser. He thought that in view of his finding as to the absolute privilege, the issue as to qualified privilege did not arise; however he was inclined to think that the plaintiffs have not proved that the defendants were actuated by malice in making and publishing such a statement. As a result of these findings, the learned District Judge dismissed the plaintiffs' suit.

This appeal is preferred by plaintiff 2 and the findings of the learned District Judge both on questions of fact and law have been canvassed by her counsel, Mr. Rajah Iyer. On the admitted facts one thing seems to be clear. If the plea of justification is found against, there was the admitted publication of the defamatory matter to plaintiff 1 which would sustain a cause of action in favour of plaintiff 2 for damages, and the defendants cannot escape liability therefor unless they are able to sustain and prove that they were not actuated by malice in making the said statement. But it is rather curious that this seems to have escaped the notice and attention of the counsel on behalf of the plaintiffs as well as the Court below, and the case seems to have been fought out on the question whether there was absolute privilege by reason of the communication by the defendants to their legal adviser, assuming the plea of justification was found against. So, before dealing with the question of privilege, if plaintiff 2 is to succeed, she has to displace the finding in regard to justification. Mr. Rajah Iyer therefore first took up that point and proceeded to canvass the finding of the learned District Judge in regard thereto. (After discussing the evidence his Lordship proceeded further.) Thus the evidence and probabilities completely establish that the case set up by the defendants that plaintiff 2 eloped with Manika Asari and lived for two days with him is false. There can be no doubt—and it is not denied that the matter complained of is per se defamatory—that the said statement is untrue, malicious and has been made deliberately with a view to escape the possibility of any claim on the part of plaintiff 2. The plea of justification cannot therefore prevail and must be rejected.

The next question is, is the plea of privilege sustainable? Under the English law from the earliest times for the discharge of public duties and for due administration of law and for the welfare and convenience of society and for the transaction of the affairs of society in the ordinary course of daily life, it was thought necessary there should be freedom of speech and freedom of communication; and for that purpose the law has always recognized certain occasions as privileged conferring immunity from liability to an action either absolutely or conditionally, and commonly known as absolute privilege, and qualified privilege. Where the plea is sought on the ground of absolute privilege the Courts are precluded from discussing the good faith of the party who utters or publishes the defamatory statement. If the plea relied on is one of qualified privilege, the immunity the law confers is destroyed by proof of malice. Among the recognized classes of cases to which the doctrine of absolute privilege is held to apply are statements made in the course of judicial proceedings. The reason of the rule is thus stated by Folkard on the Law of Slander and Libel at pp. 88 and 89:

> And the reason is founded on the principle that 'the law will rather suffer a private mischief than a public inconvenience"; and that persons engaged in the administration of the law, and those who seek justice in respect of wrongs or injuries suffered or give evidence as to any such, or make defence thereto, may not be deterred from so doing by the fear of being harassed by actions or prosecutions for defamation in respect thereof. And accordingly the law, without regard to the question of intention and on grounds of obvious policy, repels the claim to damages in respect of any publication, whether oral or written, made in the ordinary course of a judicial proceeding civil or criminal. And this rule applies to Judges, juries, witnesses, suitors and parties, in respect of anything stated by them in the course of any such proceeding.

As Brett J. observed in (1883) 11 Q B D 588,[1] it does not matter whether the defendants spoke the words maliciously or with-

1. Munster v. Lamb, (1883) 11 Q B D 588=52 L J Q B 726=49 L T 252=32 W R 248=47 J P 805.

out any justification and whether the words spoken were irrelevant. It is not necessary to refer to many cases and it is sufficient if I should refer to (1859) 4 H & N 569=157 E R 964,[2] where Earle C. J. observed thus:

> An action will not lie for defamatory words spoken in the course of litigation which are relevant to that litigation. The authorities are collected in the note to 1 Wms. Saund, 131b, Note 1,[3] and the general rule is there stated: "No false or scandalous matter contained in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular course of justice, will make it libellous". Several authorities are cited; they extend over many centuries down to the time when the learned annotator collected them. In (1759) 2 Burr 807,[4] where such an action was brought in the Court of King's Bench in Lord Mansfield's time, that learned Judge endeavoured to stop the counsel by saying, "shew that a matter given in evidence in a Court of justice may be prosecuted in a civil action as a libel. The Court, indeed before which such evidence is given may censure it". The party may be punished, and the abuse repressed by a prosecution for perjury the result of which is to make the defendant infamous if he is convicted. It is said that the civil remedy should be allowed for the purpose of indemnifying the party injured. But the balance of inconvenience is strong against such an action: (1859) 157 E R 964[2] at p. 967.

The principle was applied to a case from India by their Lordships of the Privy Council in 11 Beng L R 321.[5] Speaking with reference to the privilege of a witness, their Lordships observed thus at page 328:

> Their Lordships hold this maxim which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this: that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury.

There is sense and reason in the rule that was adopted by the English Courts. The Court has superintendence over what happens before it and can, as Earle C. J. points out in (1859) 4 H & N 569[2], prevent reckless utterances defaming or slandering others by either censuring the party or the witness or by taking proceedings for perjury: *vide* Folkard on Libel and Slander p. 97. But it will be seen that two conditions are necessary in order that a party may avail himself of this privilege: (1) the proceeding must be judicial and (2) the utterance must have been made in the capacity of a suitor or a litigant in the course of and with reference to such proceeding. Odgers on Libel and Slander (1905 Edn.) at p. 230 puts it thus:

> But the proceeding must be in its nature judicial, that is, it must be either the adjudication and determination by a competent tribunal of the legal rights of the parties before it, or some necessary step preliminary thereto.

As an illustration to this rule, Odgers relies on (1876) 1 A C 307[6] and states the effect of that decision thus:

> The service on a debtor of a notice under the Canadian Insolvent Act of 1869, demanding payment of a debt, though an important piece of evidence should bankruptcy proceedings follow, is not in itself a judicial proceeding; and the delivery of such a notice to lawyer's clerk for service is privileged, but not an absolutely privileged publication.

It is on this principle that statements in pleadings, affidavits or applications made to Court have been held to be absolutely privileged and the principle is extended to cases where instructions are given to a legal adviser for the preparation of a proof before trial, (1905) A C 480,[7] but the rule of public policy does not extend the protection any further. Spencer Bower in his book on Actionable Defamation, at p. 92, explains the scope of the privilege thus:

> Such expression (published in the course and for the purpose of any judicial proceeding) does not apply to or include any publication of defamatory matter before the commencement or after the termination of the judicial proceeding unless such publication is an act incidental to the proper initiation thereof, or the giving of legal effect thereto; nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceeding.

Unless therefore a communication is made to a solicitor in connexion with a judicial proceeding or in connexion with a necessary step preliminary thereto or with reference to an act incidental to the proper initiation thereof, (1908) 1 K B 584[8] at pp. 588 and 589, it would not be

2. Henderson v. Broomhead, (1859) 4 H & N 569 =157 E R 964=28 L J Ex 360=5 Jur (N S) 1175=7 W R 492.
3. Lake v. King, 1 Wms. Saund 131b, Note 1=85 E R 137.
4. Astley v. Young, (1759) 2 Burr 807=97 E R 572.
5. Baboo Gunnesh Dutt Singh v. Mugneeram Chowdury, (1873) 11 Beng L R 321=17 W R 283 (P C).
6. Bank of British North America v. Samuel Strong, (1876) 1 A C 307=34 L T 627.
7. Watson v. Jones or M'Ewan, (1905) A C 480 =74 L J P C 151=93 L T 489.
8. Bottomley v. Brougham, (1908) 1 K B 584= 77 L J K B 311=99 L T 111=24 T L R 262= 52 S J 225.

absolutely privileged and therefore prima facie the communication made by defendants 1 and 2 to Mr. Krishnamachari in connexion with the reply notice dated 9th of May would not be protected by the absolute immunity from liability to an action. But in 1928 the Court of Appeal in England seems to have extended the doctrine of absolute privilege even to communications between a solicitor and a client though not connected with any judicial proceeding or a necessary step preliminary thereto. In (1928) 2 K B 520[9], Scrutton L. J. enunciated this view of the law relying on the observations of Lord Herschell and Lord Bowen in (1893) 6 Rep 67,[10] and on a passage from Fraser on Libel and Slander and differing from the view of Darling J. in (1917) 33 T L R 495.[11] If the case in (1893) 6 Rep 67[10] is examined, it does not seem to support the view of Scrutton L. J. The defamatory matter complained of was a statement taken by a solicitor from a client for the purpose of obtaining an authority to take proceedings against the plaintiff, who brought an action for defamation against the solicitor. What Lord Herschell said was :

> When communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of the communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged.

But he in more than one place points out that there was no evidence of malice in that case, and throughout, his discussion was to establish that the defendant was not actuated by malice in uttering or publishing the defamatory matter. Bowen L. J., while affirming the view taken by Lord Herschell in regard to the communication as falling within the category of professional privilege, observed that he very much doubted whether malice destroyed that kind of privilege, unless it was shown that what had passed was not germane to the occasion. He more than once stated that that point was not necessary to be decided and that he would desire to keep it open. The observations in this case were never understood by the leading text writers on the law on libel and slander, except Fraser, as establishing that communications between a solicitor and a client, once the relationship is established, are absolutely privileged. For example, Odgers at p. 246 (4th Edn. 1905) cites (1893) 6 Rep 67,[10] under the head of qualified privilege. This question of absolute privilege came up for discussion before the House of Lords in the case in (1930) A C 558,[12] where every Law Lord expressed the opinion that the case in (1928) 2 K B 520,[9] required reconsideration. Lord Buckmaster there observed :

> I only desire to add without decision that it does not follow that when once the privilege due to the relationship is waived, the privilege of the occasion is absolute.

Viscount Dunedin remarked thus :

> It must be admitted that the older authorities point rather the other way, and that the privilege of solicitor and client has been generally dealt with in the books as qualified privilege.

Later Lord Atkin also remarked thus :

> The decision considerably extends the protection which up to its date had been confined to communications made by Judge, counsel and witnesses in the course of judicial proceedings, and is based upon a view of public policy which appears to be somewhat widely stated and is certainly not the view accepted in Scotland. I prefer to leave the correctness of the decision entirely open for consideration hereafter in this House.

It will be seen that the view of Viscount Dunedin is that the older authorities are the other way. A confidential communication between a solicitor and client has always been treated under the head of qualified privilege because the communication is supposed to have been made in the protection of self-interest or by reason of common interest existing between the party communicating and the party communicated to. The rule is that for the welfare and convenience of society, the occasion must be deemed to be prima facie privileged unless it is shown that the communication was made with an improper motive. Street, in his book on the Foundations of Legal Liability, Vol. 1, observes thus at page 311 :

> One of the most extensive heads of qualified privilege is found in connexion with communications between individuals concerning matters that are of moment to one or both of the parties. Communications between parties occupying confidential relations, as between principal and agent, master and servant, physician and patient, attorney and client, clergyman and parishioner,

9. More v. Weaver, (1928) 2 K B 520=97 L J K B 721=72 S J 556=44 T L R 710=140 L T 15.
10. Browne v. Dunn, (1893) 6 Rep 67.
11. Morgan v. Wallis, (1917) 33 T L R 495.
12. Minter v. Priest, (1930) A C 558=99 L J K B 391=143 L T 57=46 T L R 301.

parent and child, are privileged so far as the substance of such communications pertains to matters about which the relation of confidence exists. Here the parties have a common interest in the subject matter of the communication.

Odgers in his book (4th Edn. 1905) at p. 230, expresses the opinion that "a case laid before counsel for his opinion is not absolutely privileged at all events, if no writ yet issued", and cites an unreported case, *Minter v. Brockman*. If the reason of the rule is examined, this view seems to be sound. The doctrine of absolute privilege is, as pointed out by Channel J. in (1908) 1 K B 584,[8] based on the fact that in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not; he would prefer to call it a right of the public, the theory being "public advantage almost amounting to public necessity." That is why, as already pointed out, a party communicating any matter to a solicitor in connexion with any judicial proceeding or in connexion with any necessary step preliminary thereto is absolutely immune from an action. Moreover, the Court in the exercise of its supervision over the judicial proceeding has got the means, as already pointed out, to censure or punish the party. But no such safeguard is available in the case of communications where the matter does not come to Court. The privilege relating to a communication between a solicitor and client is a very ancient head of privilege in order to encourage free intercourse between them and this is the foundation of the principle that communications between a lawyer and client should not be disclosed without the permission of the client. Therefore the law does give an adequate safeguard in protecting such communications from disclosure. There is no reason why, having this protection, they should also be immune from liability to an action, when the said protection is not availed of and the communications are made, not with a view to being kept confidential but intended to be published to a party. Every client in seeking legal advice is expected to put before his legal adviser the true and correct facts on which legal advice is sought. If the facts are known to be false to the knowledge of the client, he is not really seeking or expecting any proper legal advice at all, but is attempting to make an improper use of the confidential relationship for purposes of his own. And there is neither reason for nor public necessity nor public benefit in according absolute immunity from liability to action to such communications. That is why the law has always classed such communications, until the decision of the Court of Appeal, under the head of qualified privilege, so that if the communication was not made from an indirect motive or actuated by any malice, the law gave such communications the protection. The Courts have also dealt with the matter under the head of qualified privilege. In (1917) 33 T L R 495[11] a defamatory matter uttered by a solicitor in delivering a bill of costs to his client was held not to be absolutely privileged. Justice Darling in that case observed thus :

> Mr. Lewis Thomas contended that the occasion was absolutely privileged, which means that it is like the reports of what passes in these Courts or what is in a legal document issued by authority. I cannot see any reason to suppose that a solicitor is endowed with the right to publish whatever he likes about everybody provided that it is in a bill of costs . . . . . if a solicitor puts into his bill of costs matters not necessary for the information of the client in order that he may know for what he is paying, or that he may get the bill properly taxed, if there is evidence that he put them in out of malice, then the privilege would be destroyed. I know that I am perhaps giving a decision on the point of law to which Lord Bowen referred. I must give it. That is my view about it.

I may say that this view is in consonance with that of Bramwell J. in a very early decision, (1858-67) 1 F & F 668= 175 E R 899,[13] and this case has been cited with approval by Folkard in his book on 'Law of Slander and Libel' at p. 98 (also Odgers, 4th Edition, 231; 6th Edition 202). It may be observed that in the article on Libel and Slander by Vaughan Williams L. J. in Vol. 18, Halsbury's Laws of England (1st Edition), para. 1254, absolute privilege in connexion with judicial proceedings is limited to proceedings at the trial and to the proceedings which are essentially steps in judicial proceedings; but Lord Hewart C. J. in the Hailsham Edition, para. 465, seems to extend this by including under this head not only statements in pleadings but also communications passing between a solicitor and client, relying on (1928) 2 K B 520.[9] The editor of Salmond on Torts in the latest edition observes that it is uncertain whether the privilege is absolute or qualified. This is the state of the English law at present.

18. Bruton v. Downes, (1858-1867) 1 F & F 668= 175 E R 899.

If the view which prevailed before the decision of the Court of Appeal in (1928) 2 K B 520[9] is taken, there can be no doubt that the communication made by the defendants to Mr. Krishnamachari on 9th May 1927 would come only under the head of qualified privilege.

Coming to the Indian decisions, a distinction is drawn between an action for defamation in a Civil Court and a criminal prosecution for defamation. In regard to the latter, it has been held that the absolute privilege accorded in England to a party or a witness or an advocate in connexion with judicial proceedings cannot apply; it is only qualified privilege and it must come within one of the exceptions of S 499, I. P. C. : *vide* 49 Mad 728;[14] 48 Cal 388[15] and 50 Bom 162.[16] The reason given is that the law having been codified by statute, the latter must prevail. But for civil wrongs there has been no such codification and the rule of law that is applicable is justice, equity and good conscience. It is no doubt anomalous that in connexion with the same matter one principle of law should apply for the purpose of a criminal case and another for the purpose of a civil action. But the anomaly is there, and until the Legislature intervenes it must be recognized. However, the rule which is now to be applied for the case on hand is the rule of justice, equity and good conscience, which has been generally understood to be the principles of Common law in England so far as they are applicable to Indian society having regard to the circumstances of the case. But where the principles of Common law in England are in a state of uncertainty, there is nothing to preclude us applying that view of the law which is essentially just and equitable, *cf.* 8 Mad 175,[17] and which is in consonance with the principle on which the doctrine of privilege is based. In our opinion, the older view of treating communications like the one in question under the head of qualified privilege ought to be the rule of justice, equity and good conscience. Even in England authority is not wanting for the view that the doctrine of absolute privilege should not be extended: *vide* Lopes L. J. in (1892) 1 Q B 431[18] at p. 451. And where the Indian Legislature has chosen to depart for the purpose of criminal law from the doctrine of absolute privilege as applied by the Common law of England, it seems to us that the extension made in (1928) 2 K B 520[9] should not be adopted here. Therefore the defendants cannot escape liability for their wrongful act, unless it is proved that in so doing they were not actuated by malice. We have already found that the words spoken concerning plaintiff 2 were false and made from an improper motive. As observed by Lord Esher in (1892) 1 Q B 431[18] at page 443 :

> If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion.

Lord Justice Lopes in the same case said :

> If it be proved that out of anger or for some other wrong motive the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive.

Applying these principles to this case, we have no hesitation in finding that the defendants were actuated by malice in uttering and publishing the matter complained of. In this view it is unnecessary to deal with the application for amendment of the plaint made by Mr. Rajah Iyer requesting leave to amend by claiming damages for the publication of the defamatory matter to plaintiff 1. The only question that remains for consideration is the question of damages. We think in the circumstances of this case an award of Rs. 500 would meet the ends of justice. We therefore reverse the decision of the learned District Judge and pass a decree in favour of the appellant (plaintiff 2) for the sum of Rs. 500 with interest at 6 per cent. from the date of plaint. The appellant will have her costs both here and in the Court below.

C.R.K./D.S. *Decree reversed.*

14. Tiruvengada Mudali v. Tripurasundariammal, (1926) 13 A I R Mad 906=96 I C 978=27 Cr L J 1026=49 Mad 728=51 M L J 112 (F B).
15. Satish Chandra v. Ram Dayal, (1921) 8 A I R Cal 1=59 I C 143=22 Cr L J 31=48 Cal 388 =32 C L J 94=24 C W N 982 (S B).
16. Bai Shanta v. Umrao Amir, (1926) 13 A I R Bom 141=93 I C 151=27 Cr L J 423=50 Bom 162=28 Bom L R 1 (F B).
17. Parvathi v. Mannar, (1885) 8 Mad 175.
18. Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson, (1892) 1 Q B 431=61 L J Q B 409=66 L T 518=40 W R 450=56 J P 404.

A. I. R. 1938 Madras 171

VENKATASUBBA RAO AND HORWILL JJ.

S. H. Badsha Sahib & Co. — Appellant.

v.

Thaliyil Vettath Lakshmi Kutti Kovilamma and others — Respondents.

Appeal No. 367 of 1933, Decided on 6th October 1937, against decree of Sub-Judge, South Malabar at Calicut, in O. S. No. 35 of 1932.

Malabar Compensation for Tenants Improvements Act (1 of 1900) — Benefit conferred by Act does not extend to lessees of buildings or houses or shops.

The definition of the word 'tenant' in the Act is a clear indication that the Legislature did not intend that buildings or houses or shops should come within the purview of the Act. Hence the benefit conferred by the Act does not extend to tenants of buildings, houses or of shops: *A I R 1927 Mad 776 and L. P. As. Nos. 17 to 22 of 1925, Approved.*; *A I R 1928 Mad 929, Expl.*; *A I R 1931 Mad 363 and A I R 1932 Mad 8, Disting.* [P 171 C 2]

C. Unikanda Menon and K. Kunhikrishnan Nair — *for Appellant.*

P. Govinda Menon and T. N. Ravivarma Tirumalpad — *for Respondents.*

Venkatasubba Rao J.—There was a mortgage granted on 1st July 1923 by defendant 1 and his deceased brother in favour of plaintiffs 1 to 3 and another, which comprised 27 items. The transaction, we understand, was one of simple mortgage in respect of 23 out of them and in regard to the remaining four items, what was created was a usufructuary mortgage, which was to subsist for nine years. On the same date, the aforesaid four items were taken back by the mortgagors on lease for a period of five years. This suit has been brought to recover the items comprised in the lease with arrears of rent. The appellant before us is defendant 36, claiming under an alleged lease from the mortgagors, who complains that the lower Court has wrongly disallowed his claim to improvements.

Turning first to the pleadings, it is noticeable that in the written statement filed by the appellant no such claim was made. There it is stated that he lent large sums to the mortgagors, who further caused him to expend moneys for improving or altering the property, that it was found upon a settlement with them that Rs. 3000 was due to him and that provision was made for its repayment in the rental agreement executed by defendant 1 in his favour on 16th May 1931. Then he goes on to describe how by means of some kind of adjustment spread over six years, the period of the lease, the full amount was to be paid back to him. It is impossible to read into this written statement a claim to improvements. Then at the trial, no serious attempt seems to have been made to adduce evidence on the question of improvements. Indeed, it has not even been proved that defendant 36 was a lessee for six years, or that he was in possession even previous to the date of the mortgage as suggested. Neither the original lease deed nor the rental agreement of 1931 was produced or filed. Apart from these matters, there is an objection, which in our opinion is fatal to his claim. In the written statement it is alleged (there is no reason why he should not be held bound by his own admission) that the lease was in respect of a shop and not, as now suggested, a shop and a paramba.

On the footing then that what was leased to defendant 36 was a shop pure and simple, the question arises whether he can claim the benefit conferred upon tenants by Act 1 of 1900 (the Malabar Compensation for Tenants Improvements Act). The word "tenant" is defined as including a person, who as lessee, etc. "of land, is in possession thereof." Here is a clear indication that the Legislature did not intend that buildings or houses or shops should come within the purview of the Act, and the argument is fanciful that because a building must necessarily stand upon land, therefore it comes within the scope of the Act. The expression in the Act must receive its natural meaning and we are not prepared to hold that the benefit conferred by it extends to tenants of buildings. In 50 Mad 813,[1] there is a judgment of Jackson J. where this view has been taken, and with that we respectfully agree. It was held that whereas the Act applies to agricultural holdings and kudiyiruppus (vacant sites available for buildings), it does not apply to houses or shops. In subsequent decisions, this case has been referred to but never dissented from. In A I R 1928 Mad 929,[2] the facts are these. What was "entrusted" to the defendants was a hut, but the new house

1. Chathukutti v. Kunhappan, (1927) 14 A I R Mad 776=103 I C 677=50 Mad 813=53 M L J 224.
2. Pathumma Umma v. Mohideen, (1928) 15 A I R Mad 929=110 I C 752.

which they built covered a considerably larger area than the site of the hut. Reilly J. held that even if the defendants were tenants of the hut, they were not tenants of the area outside the site of the hut, and from this it followed that the new house did not constitute a tenant's improvement. But Srinivasa Aiyangar J. bases his decision expressly on the ground, following the case just cited, that the lease was of a building. The suggestion that Reilly J. in this case casts a doubt on the correctness in 50 Mad 813[1] is not well founded. Nor has it been called in question in either of the two later decisions, 60 M L J 214[3] or 55 Mad 151,[4] to which our attention has been called, although in the former case there are observations to the effect that it was unnecessary to express any opinion on the question whether the Act applies to lease of buildings or shops. Now turning to the actual decisions in these two cases, in 60 M L J 214,[3] "what was let was a compound or paramba or kudiyiruppu" (see p. 216) and it was held that the lessee was entitled to compensation in respect of the house which he constructed on the vacant site: In 55 Mad 151,[4]

> the appellant obtained the property, which was a vacant site, on lease for erecting a house for residential purposes, (p. 152)

and he was held entitled to the value of the house which he built. The present case differs from them and resembles 50 Mad 813,[1] where, as here, the lease was of a building which case, we may note, has been followed without discussion by a Bench of this Court (Wallace and Thiruvenkatachariar JJ.) in L. P. As. Nos. 17 to 22 of 1925. This lends support to our view of the section. In the result the appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

3. P. C. George v. T. Umma, (1931) 18 A I R Mad 363=131 I C 641=60 M L J 214.
4. Avaru v. Asi Bai, (1932) 19 A I R Mad 8=135 I C 897=55 Mad 151=61 M L J 462.

A. I. R. 1938 Madras 172

NEWSAM J.

In re Ramakkal and others
Petitioners.

Criminal Revn. Case No. 296 and Petn. No. 272 of 1937, Decided on 23rd September 1937, from order of Stationary Sub-Magistrate, Gobichettipalayam, D/- 5th April 1937.

(a) Criminal Misappropriation—Actual conversion or appropriation is necessary — Mere intention or preparation is not sufficient.

Before a Court frames a charge of criminal misappropriation, it must satisfy itself that actual conversion or appropriation has taken place, because mere intention to misappropriate or even preparation to that end are not sufficient to constitute the offence. [P 173 C 1, 2]

(b) Criminal Misappropriation—High standard of honesty of persons finding property is expected — What a person coming across property should do, explained (*Obiter*).

A very high standard of honesty is demanded of the finders of lost property. Before appropriating it, they must attempt to find the owner, if they have means of so doing. If there is no clue to the owner, the finder must use all reasonable means to find the owner and must wait a reasonable time to allow the owner to claim the property before he appropriates it. [P 173 C 1]

(c) Penal Code (1860), S. 411 — Lost currency note found by child—Possession traced to accused and recovery made — No offence under S. 411 held proved.

A person lost his currency notes. They were found by a child in street from whom they came into possession of accused, to whom those notes were traced after a short time and were ultimately recovered after a certain amount of denial :

Held that the facts did not constitute any offence under S. 411. [P 173 C 2]

K. S. Jayarama Ayyer and C. K. Venkata Narasimham — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—This is a revision petition asking the Court to quash a charge framed under S. 411, I. P. C., against three persons. The facts appear to be as follows : P. W. 2, while waiting to deposit money into the bank at Gobichettipalayam lost from his shirt pocket four currency notes of the value of one hundred rupees each. He noticed this loss at about 10 A. M. The four notes were picked up in the street by P. W. 6, a child of 6. P. W. 6 gave a young friend of his (P. W. 7) one note, but P. W. 7 was insisting on getting two. Their wrangles attracted the attention of a passing barber (P. W. 4) who snatched all four notes from them. The children clamoured for the return of the notes and held his coat, but the barber took them with him to hand them and the money over to P. W. 6's father, whom he knew. On the way he met P. W. 6's grandmother (accused 1). She asked where he was taking P. W. 6 and on being told the facts, she claimed a prior right to these notes. So P. W. 4 handed over the four notes to her, but he went on and told P. W. 6's father (accused 2) what had happened.

Accused 2's employer (accused 3) also heard the story from the barber. It appears that accused 2 and 3 then sent for accused 1 and each of them took one one-hundred rupee note from her. P. W. 4 came back later to accused 3's shop in which accused 2 is employed and was paid Rs. 20 by accused 3 as a reward for his pains and as an inducement to keep his mouth shut. Meantime, the owner of the notes (P. W. 2) was making inquiries and had got a policeman to help him in his search. Some people fortunately for the owner had seen the barber (P. W. 4) take the notes from the children. The barber (P. W. 4) was soon found and he referred the policeman to the boy's grandmother. When first questioned P. W. 6's grandmother (accused 1) denied all knowledge, but later she produced two currency notes of one hundred rupees each. Accused 2 (P. W. 6's father) produced one one hundred rupee note and also a ten rupee note. These notes were recovered by 12 noon, that is, within two hours. At 3 P. M. accused 3 was questioned and at first he denied all knowledge, but as soon as he was arrested produced the last of the hundred rupee notes. The last note was recovered by 3 P. M.

Assuming these facts to be true, the question arises what if any offence has been committed. Expln. 2 to S. 403, I. P. C., lays down the law in regard to property found. A very high standard of honesty is demanded of the finders of lost property. Before appropriating it, they must attempt to find the owner, if they have means of so doing. If there is no clue to the owner, the finder must use all reasonable means to find the owner and must wait a reasonable time to allow the owner to claim the property before he appropriates it. Now it is clear, if the facts stated above are proved, that there was a dishonest intention to appropriate the notes, an intention shared by all three accused, just as the notes were shared. The difficulty is to say whether appropriation or conversion to their own use had actually taken place, whether the matter went beyond the stage of intention and preparation. I must leave this difficult question to the learned Magistrate to decide for himself after hearing all the evidence. Perhaps the best defence to a charge of criminal misappropriation in these circumstances would be to admit dishonest intention and even preparation to commit criminal misappropriation, but to deny actual appropriation or conversion, and to plead in extenuation that the standard set for the finders of money is much above the standard of popular opinion.

I must dismiss this revision petition with the remark that the charge framed under S. 411, I. P. C., is inapplicable to the facts and tends to obscure the real issue. If the prosecution satisfactorily proves the facts extracted above, and if the learned Magistrate is able to find after hearing the defence case that actual appropriation of the notes was complete or that the accused actually converted the notes to their own use, then the offence committed by all three accused is clearly the offence of criminal misappropriation. The charge under S. 411, I. P. C., is hereby quashed and the Magistrate is directed to make further inquiry into this case and to consider in the light of the above remarks whether he should frame a charge under S. 403, I. P. C., or discharge the accused. Nothing that I have said should prejudice the Magistrate in deciding one way or the other in this matter. The petition is allowed.

C.R.K./B.D. *Petition allowed.*

A. I. R. 1938 Madras 173

NEWSAM J.

K. Ramaswami Iyengar — Petitioner.

v.

K. V. Panduranga Mudaliar — Respondent.

Criminal Revn. Case No. 213 and Petn. No. 200 of 1937, Decided on 28th September 1937, from order of 4th Presidency Magistrate, George Town, Madras, D/- 1st March 1937.

Criminal P. C. (1898), S. 195—Court declining to prosecute person for offence under Ss. 193 and 199, I. P. C. — Private complaint against such person cannot be allowed.

Where the Court in its discretion declines to prosecute a person for an offence against public justice, punishable under S. 193 and possibly also under S. 199, I. P. C., on the ground that there was no strong prima facie case, a private complaint against such person cannot be allowed. [P 174 C 2]

S. Panchapakesa Sastri and N. Krishnamurthi — *for Petitioner.*

K. Sankarasastry and A. K. Muthuswamy Iyer — *for Respondent.*

K. V. Rameseshan for the Crown Prosecutor — *for the Crown.*

Order. — This is an application asking the Court to revise an order of the Fourth Presidency Magistrate made in the following circumstances. In a suit on a pronote for Rs. 200, plaintiff applied for attachment before judgment of the defendant's moveable property. The Court ordered notice to defendant. The notice was returned with an endorsement that it had been personally served on defendant. As defendant did not appear, attachment was ordered. As soon as the bailiff went to effect attachment, the defendant paid up. The defendant complains that his signature on the reverse of the notice was forged by the clerk of the plaintiff's advocate and the forged document was used to stifle his objections to attachment before judgment.

The defendant, after about a month's delay, moved the Court to prosecute the clerk of plaintiff's vakil and also filed a private complaint against him and also applied under S. 95, Civil P. C., for compensation against plaintiff for attachment before judgment without reasonable and probable cause. The Court declined to prosecute the plaintiff's vakil's clerk on 11th January 1937, and dismissed the application for compensation under S. 95, Civil P. C. on 17th December 1936. But the defendant's private complaint against plaintiff's vakil's clerk has been taken cognizance of. This petitioner requests that the order of the Fourth Presidency Magistrate deciding to go on with this private case should be revised.

The principle underlying S. 195, Criminal P. C., is plainly this. Where an act amounts to the offence of contempt of the lawful authority of public servants (Ss. 172-188, I. P. C.), or to an offence against public justice such as giving false evidence (Section 193, *et seq.*, I. P. C.), or to an offence relating to documents actually used in a Court (S. 471 etc.), private prosecutions are barred absolutely, and only the Court in relation to which the offence was committed may initiate proceedings. This salutary rule of law is founded on common sense. The dignity and prestige of Courts of law must be upheld by their presiding officers, and it would never do to leave it to parties aggrieved to achieve in one prosecution gratification of personal revenge and vindication of a Court's honour and prestige. To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals and to allow a Court's prestige to be the sport of personal passions. The offence alleged to have been committed here by the clerk of the plaintiff's vakil is undoubtedly an offence against public justice, punishable under S. 193, I. P. C., and possibly also under S. 199, I. P. C. The Court in its discretion has declined to prosecute on the ground that there was not a strong prima facie case and that no prosecution at all is far better than a prosecution which is likely to prove abortive.

The defendant cannot be allowed to prosecute merely because he feels that he has been personally dishonoured. It is not indeed clear how such a prosecution can vindicate his honour. The refusal of the Court to prosecute is final. It must mean that there should be no prosecution at all for this alleged offence. The complainant, who is animated by a sense of personal grievance, cannot be allowed or trusted to be an impartial advocate and deputy of the Court in the role of prosecutor. I allow this petition. The complaint is dismissed as barred by S. 195 (b), Criminal P. C.

C.R.K./S.C. *Petition allowed.*

A. I. R. 1938 Madras 174

ABDUR RAHMAN J.

S. A. Annamalai Chettiar — Petitioner.

v.

Chellammai Achi and another — Respondents.

Civil Revn. Petn. No. 985 of 1936, Decided on 27th August 1937, from order of Dist. Court, Ramnad, D/- 11th July 1936.

Civil P. C. (1908), O. 21, R. 90—Fact that inadequate price was due to irregularity in sale need not be proved by direct evidence—Sale can be set aside if there are facts from which it can be reasonably inferred that low price was due to irregularity.

The substitution in O. 21, R. 90 of the words "unless upon the facts proved the Court is satisfied" has removed the necessity of proving by direct evidence that the inadequate price was caused by reason of the alleged irregularity in the conduct of the sale. A sale can be set aside if the Court were satisfied upon the facts proved in the case that there were circumstances from which reasonable inference could be drawn that the inadequacy in price was the result of the material irregularity, although mere inadequacy of price, without either direct evidence or proof of such circumstances as mentioned above, would not be sufficient to set aside the sale : *20 Mad 159 ; 20 Cal 1 and 31 Cal 815, Ref.* [P 175 C 1, 2]

K. Rajah Ayyar — *for Petitioner.*

M. S. Venkatarama Iyer —
for Respondents.

Order.—It has been conceded by Mr. Rajah Ayyar, the counsel for the petitioner, that there was no proclamation before the property, which happens to be one-eighth share in a village, was sold by public auction. Admittedly this is a material irregularity. It was not seriously contested that the price at which the property was sold was grossly inadequate. A firm offer was made by the objecting creditor in the lower Appellate Court to the extent of about double the price for which the property was knocked down at the auction sale. It was also admitted that the purchaser is a close relation of the judgment-debtor.

The only point which was seriously contested by the counsel for the petitioner was that the sale could not be set aside as the respondent had failed to prove that the inadequacy in price was caused by reason of such irregularity. At one point of time, there was a divergence of views between the High Court of Allahabad on the one hand and those of the High Courts of Madras and Calcutta on the other. The High Court of Allahabad was of opinion that the inadequacy in the sale price was not sufficient to set aside the sale in the absence of direct evidence which established a causal connexion between the material irregularity and the inadequacy of price fetched at the sale. It was on the contrary held by the High Court of Madras in 20 Mad 159[1] that the fact that the inadequacy of price fetched at the auction was the result of the material irregularity committed in conducting the sale might ordinarily give rise to an inference that

the low price was a consequence of irregularity even though the manner in which the irregularity produced the low price be not definitely made out.

The High Court of Calcutta had taken a similar view in 30 Cal 1[2] and 31 Cal 815.[3] On account of this divergence of views, the Code of Civil Procedure had to be amended and the words "unless upon the facts proved the Court is satisfied" have been substituted to give effect to the decisions of the High Courts of Calcutta and Madras. It is no longer necessary to prove a causal connexion between the two by means of direct evidence; but a sale could be set aside if the Court were satisfied upon the facts proved in the case that there were circumstances from which a reasonable inference might be drawn that the inadequacy in price was the result of the material irregularity, although mere inadequacy of price, without either direct evidence or proof of such circumstances as mentioned above, would not be sufficient to set aside the sale.

In this case, material irregularity has been admitted and the inadequacy in price which the property fetched at the sale was not seriously contested. The fact that there was no proclamation might legitimately give rise to an inference that if the sale had been proclaimed, the intending purchasers might have been present to bid for the property which might have fetched a higher price in consequence. It was in any case open to the lower Appellate Court to draw this inference and having done so, it cannot be said that it exercised a jurisdiction which did not vest in it. It cannot therefore be questioned in revision. I would therefore dismiss the petition with costs.

C.R.K./D.S. *Petition dismissed.*

1. Venkatasubbaraya Chetty v. Zamindar of Karvetnagar, (1897) 20 Mad 159.
2. Sheorutton Singh v. Net Lall Sahu, (1903) 30 Cal 1=6 C W N 688.
3. Mahabir Pershad Singh v. Dhanukdhari Singh, (1904) 31 Cal 815=8 C W N 686.

---

* A. I. R. 1938 Madras 175

WADSWORTH J.

Official Assignee, Madras — Petitioner.

v.

P. Suryakanthammal and another — Respondents.

In the matter of B. G. Sundaram Naidu — Insolvent.

Petn. No. 417 of 1936 and Appln. No. 246 of 1937, Decided on 9th August 1937.

*** Presidency-Towns Insolvency Act (1909), Ss. 58 (5), 33 (4) — Obstruction by insolvent's agent in realizing insolvent's property—Contempt proceedings against agent cannot be taken.**

Neither S. 58 (5) nor S. 33 (4) can be invoked to enable the Court to punish for contempt an agent of the insolvent, who at the instigation of the insolvent, obstructs the realization of the insolvent's property. [P 176 C 1]

Official Assignee *in person.*

A. C. Nataraja Aiyar—*for Respondents.*

Judgment.—This is an application arising out of the sale of a house which was

the property of the insolvent. After the sale there was considerable trouble in getting the insolvent to quit the premises. He made a show of handing over the premises, but then, after the purchaser had got into possession of the upper storey, he with his family squatted in the lower storey. Contempt proceedings were taken against the insolvent who contended that the occupants of the lower storey of the house were not under his power, that his wife was out of his control and so on. That contention was negatived and he was committed to jail and the order was confirmed on appeal. He has served the period for which his detention was ordered, but his wife continues to squat in those premises.

I have no doubt as a matter of fact that the wife is acting under the instigation of her husband, the insolvent, though she denies that she has anything to do with her husband at present. But the question is whether this Court can evict the wife, the presumed agent of the insolvent, by taking contempt proceedings against her, the contempt proceedings against the insolvent himself having failed to achieve their object. There is no provision under the Presidency Towns Insolvency Act enabling contempt proceedings against an agent, so far as I am aware, except S. 58, sub.s. (5), which is in terms restricted to a refusal of an agent to hand over money and securities belonging to the insolvent. This certainly cannot cover the persistence by an agent of the insolvent in obstructing the delivery of immovable property. The insolvent himself is punishable by contempt proceedings by virtue of the provisions of S. 33, sub.s. (4). I am very doubtful indeed whether that provision of law can be extended so as to enable the Court to punish for contempt an agent of an insolvent who at the instigation of the insolvent obstructs the realization of the insolvent's property. No doubt the Court can treat the insolvent as in contempt when he instigates an agent to do that which the law prohibits him from doing himself. Such action has already been taken in this case. It would to my mind be an undesirable and unwarranted extension of the powers given to the Court to take against the alleged agent contempt proceedings which the law only expressly warrants against the insolvent himself. In this view of the law I must dismiss the application. In the circumstances of the case I make no order as to costs.

C.R.K./B.D. *Application dismissed.*

---

* A. I. R. 1938 Madras 176

LEACH C. J. AND BURN J.

A. R. Ramanuja Mudaliar — Appellant.

v.

L. C. Sundaravaradachariar and others — Respondents.

Appeal No. 277 of 1936, Decided on 21st October 1937, against order of Dist. Court, Chittoor, D/- 13th February 1936.

*** Company—Winding up—Official liquidator selling decree standing in name of directors by auction and assigning it to purchaser with Courts' sanction — Sale cannot be set aside and principles of O. 21, R. 90, Civil P. C., do not apply.**

Where, as a result of a compulsory winding up of a company, the official liquidator sells a decree standing in the name of the directors by auction and the liquidator assigns the decree to the purchaser with the sanction of the Court, the principles of O. 21, R. 90, Civil P. C., do not apply and the Court has no right to set aside the sale.

[P 177 C 1]

P. R. Srinivasan — *for Appellant.*

Leach C. J.—The Sundara Shanmuga Vilas Prize Chit Fund, a company registered under the Companies Act, is being wound up in the Court of the District Judge of Chittoor as the result of a compulsory winding up order passed by this Court. This Court appointed three official liquidators who on taking over charge of the assets came to the conclusion that one asset, a decree in favour of the directors of the company, should be sold by auction, as it would be too expensive to undertake execution proceedings. They accordingly applied to the District Judge for directions under S. 183 of the Act and he ordered the decree to be sold by auction. In accordance with this order an auction was held on 1st November 1934 and the appellant bid Rs. 25. As there was no higher bid he was declared to be the purchaser. On 5th November 1934 the three liquidators executed a deed assigning the decree to the appellant who, on 17th January 1935, applied to be brought on the record and to have leave to execute the decree. Before he could take advantage of his purchase, one of the liquidators applied to the District Judge for directions in order to get the sale set aside. By an order dated 13th February 1936 the District Judge did set aside the sale as he considered

that there were good grounds for thinking that the sale was not properly advertised, and on general grounds he thought that a doubtful asset should not be sold. It is from this order that the present appeal has been preferred.

It is clear that the learned District Judge had no power to set aside the sale. The decree was sold by auction and the appellant was the highest bidder. The appellant having become the purchaser, the official liquidators with the sanction of the Court assigned the decree to him. In these circumstances the Court had no right to set aside the contract. The principles of O. 21, R. 90, Civil P. C., do not apply, but even if they did there would be no ground for setting aside the sale. It is not suggested that the appellant was a party to any fraud. The appellant having bought the decree is entitled to the benefit of it, and the order of the learned District Judge must therefore be set aside. Having succeeded, the appellant is entitled to costs which will be paid out of the assets of the Company.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 177

VENKATASUBBA RAO J.

Buchayyagari Ranga Reddy — Petitioner.

v.

Official Receiver, Anantapur — Respondent.

Civil Revn. Petn. No. 1375 of 1935, Decided on 3rd September 1937, from order of Dist. Court, Anantapur, D/- 17th July 1935.

Provincial Insolvency Act (1920), S. 54 — Fraudulent preference — Test is dominant motive of debtor — Person appointed guardian of son-in-law misappropriating ward's funds — In order to relieve from this obligation guardian selling his immovable property to ward—Subsequent insolvency of guardian — Sale held did not amount to fraudulent preference.

To determine whether a particular transfer amounts to a fraudulent preference, the test is what is the dominant or operative motive of the debtor in making the transfer : (*1883*) *23 Ch D 695, Foll.* [P 178 C 1]

A person was appointed the guardian of his son-in-law under the Guardians and Wards Act. The guardian committed breach of trust and misappropriated his ward's funds. The guardian offered to convey his immovable property to the ward in order to get himself released from this obligation and executed a sale deed in favour of the ward. The guardian was subsequently adjudged an insolvent :

Held that the sale deed did not amount to fraudulent preference. [P 178 C 1, 2]

P. Chandra Reddy — *for Petitioner.*

V. V. Chowdhury — *for Respondent.*

Order. —The question to decide is whether the sale deed impeached amounts to a fraudulent preference under S. 54, Provincial Insolvency Act. The material dates are these. Respondent 2 was adjudicated insolvent on 30th November 1931 on a creditor's petition dated 8th August 1931. The insolvent had executed the sale deed in question on 27th July 1931 in favour of his nephew and son-in-law, respondent 1. On 9th July 1932 the application out of which this civil revision petition arises was made by the Official Receiver for the setting aside of the sale deed. The learned District Judge, reversing the decision of the trial Court, has held that the conveyance amounts to a fraudulent preference. Respondent 1, the transferee, questions the correctness of the District Judge's order.

There is practically no dispute about the facts which may be shortly stated. In 1922 respondent 2 was appointed guardian of respondent 1 under the Guardians and Wards Act. As the record shows, bonds of the value of about Rs. 7200 belonging to the ward were taken possession of by the guardian. On 22nd February 1931 respondent 1 who had by then attained majority applied to the Court for directions against his quondam guardian complaining that he had misappropriated the ward's funds and that proper accounts had not been rendered. Respondent 2 in his counter-affidavit dated 6th July admitted the breach of trust and after putting forward various excuses offered to convey his immovable property to get released from his obligation. The matter was apparently adjourned to enable respondent 2 to carry out his promise, and on 27th July, as already stated, the sale deed in question came into existence. The sale purports to be for Rs. 6000, respondent 2 having been given credit for some amounts which he alleged to have expended on his ward's behalf. The application was finally disposed of on 8th August when the Judge, after recording the settlement, dismissed the petition. On the same day, as already noted, the petition to adjudicate respondent 2 insolvent was filed.

On these facts the question arises, does the conveyance amount to a fraudulent preference under S. 54, Provincial Insolvency Act? Both the Courts concur in finding that there was a true pre-existing debt as alleged by the transferee. They concurrently find further that the property conveyed was not worth more than Rupees 6000, the consideration mentioned in the deed. That a petition imputing breach of trust to respondent 2 was then pending is common ground. Beyond these admitted facts respondent 1 swears that some ill-feeling had arisen between him and his former guardian, a circumstance to which the District Judge does not advert. True, when he moved the Court, respondent 1 was aware, as admitted by himself in his affidavit that respondent 2 was "on the brink of insolvency". These being the facts is the Judge's decision right? The test in such cases is what is the dominant or operative motive of the debtor in making the transfer. Is it a reasonable inference from the facts above mentioned that the dominant view which influenced respondent 2 was to prefer a particular creditor or is it more reasonable to hold that he acted with a view to protect himself from exposure or from any sort of proceedings? Respondent 1 was pressed to say in cross-examination : "As I was his son-in-law, respondent 2 wanted to pay me first."

The learned District Judge seizes upon this answer for the purpose of inferring that the transferor's object was to give the creditor a preference. He forgets that a debtor in giving a security to a particular creditor often acts from mixed motives. The very fact that S. 54 has been invoked shows that while one creditor has been benefited, there are others who as the result of the act impeached have been defeated or defrauded. The question is not whether several motives have not operated on the mind of the debtor but what among them was the dominant or effectual motive. If the debtor is influenced solely by one motive the case presents no difficulty whatsoever; but when the Court has to ascertain which of several motives is the operative or substantial motive, its task becomes difficult. In the present case there is on the one hand the desire on the part of the debtor to protect himself; there may be, on the other, in view of the admission referred to above, some desire to benefit his own near relative. In a case like the present it is natural if not inevitable, that the debtor has present to his mind, as one view among several, the giving of a preference to the particular creditor benefited; that could hardly be decisive of the matter. It would suffice to refer to the following cases where this question was considered by me in its different aspects : 49 M L J 562,[1] A I R 1932 Mad 459,[2] 41 M L W 358[3] and 68 M L J 57.[4] In addition it may be useful to quote here the words of Bowen L. J.:

> It is an exceedingly difficult thing (it is possible no doubt for juries may have to do it) to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It is a very difficult matter to prove that the dominant motive was the sole motive, and I think that the true test under S. 92 is this: (1) had the debtor a view of giving a preference to the creditor, and (2) was that the operative effectual view : (1883) 23 Ch D 695.[5]

Applying this test, I can have no hesitation in holding that the lower Appellate Court's decision is wrong and it is accordingly set aside and the petition is allowed with costs throughout.

C.R.K./D.S. *Order set aside.*

1. Arunachellam Chettiar v. Official Receiver of Tanjore, (1925) 12 A I R Mad 1089=91 I C 522=49 M L J 562.
2. Ramaswamy v. Chinnathambi, (1932) 19 A I R Mad 459=140 I C 463.
3. Gangappa v. Official Receiver of Bellary, (1935) 22 A I R Mad 300=159 I C 541=41 M L W 358.
4. Venkanna v. Official Receiver, Rajahmundry, (1935) 22 A I R Mad 250=157 I C 559=68 M L J 57.
5. Ex parte Hill; In re Bird, (1883) 23 Ch D 695 =52 L J Ch 903=49 L T 278=32 W R 177.

---

* A. I. R. 1938 Madras 178

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Arumandla Veerayya and another — Appellants.

v.

Arumandla Subbamma—Respondent.

Appeal No. 267 of 1932, Decided on 7th October 1937, against decree of Sub.Judge, Bapatla, D/- 15th March 1932.

* **Hindu Law—Reversioner—Suit by *A* as nearest reversioner for declaration that will left by deceased was not genuine—During pendency, Act 2 of 1929 coming into force and *A* becoming remoter reversioner—*A* held**

should be allowed to continue his suit after making nearest reversioner party defendant.

A suit was instituted by *A* as nearest reversioner of the deceased testator that the will left by him was not genuine. During the pendency of the suit, Act 2 of 1929 came into force and sister's son of the deceased became the nearest reversioner who also brought a suit for declaration that the will was not genuine :

Held* that for the ends of justice *A* should be allowed to continue his suit after making the nearest reversioner a party defendant and after making such amendments of the plaint as might be necessary : *6 Cal 764, Expl.; 1936 M W N 1111 and A I R 1937 Mad 699, Foll.; A I R 1932 Lah 361, Not foll. [P 179 C 2 ; P 180 C 1]

K. Kotayya — *for Appellants.*

V. Govindarajachari and M. Sreerama-murthy — *for Respondent.*

Pandrang Row J.—This suit relates to the genuineness of a will alleged to have been executed by one Arumandla Byragi on 17th September 1926. The plaintiffs instituted the suit as the nearest reversioners of the deceased testator in 1928 impleading the widow. The suit was not tried on the merits, though it was pending from 1928 to 1932 when an additional written statement was put in contending that by reason of subsequent legislation, viz. Act 2 of 1929, the plaintiffs ceased to be the nearest reversioners, the order of succession having been altered by that Act, and that the suit ceased to be maintainable, as the sister's sons of the deceased had become nearer reversioners and had not been brought on record. An application which was made to bring the sister's sons on record was dismissed by the lower Court which at the same time dismissed the suit altogether on the ground that the suit was not maintainable as it stood. It would appear that an application by the plaintiffs to amend the plaint by adding a new allegation of fraud between the sister's sons and the widow was also dismissed. The present appeal is an appeal from the decree of the Subordinate Judge dated 15th March 1932, dismissing the suit. It might be necessary to state in this connexion that a separate suit, which was instituted by the sister's sons for a similar declaration, namely that the will was not genuine, was ultimately dismissed on the ground that Act 2 of 1929 did not have any retrospective effect and did not make them the nearest reversioners to the deceased. We have thus both the suits for a declaration in respect of the same will dismissed without any trial on the merits, the reasons given for the dismissal of the two suits being contradictory.

The main question for us to decide in this appeal is whether in the circumstances of the present case the plaintiffs-appellants should not be given an opportunity of continuing the suit with such amendments as may be necessary after making the sister's sons party defendants. There can be no doubt that in the interests of justice the Courts have ample power to allow amendment and to allow fresh parties to be joined. This cannot be and is not questioned. It is however contended that certain observations of the Judicial Committee in 6 Cal 764,[1] particularly those at p. 772, preclude us from allowing the plaintiffs to continue their suit when at the present moment they are no longer the nearest reversioners by reason of Act 2 of 1929 which was enacted during the pendency of the suit in the Court below. It is not possible in our opinion to say that their Lordships in 6 Cal 764[1] contemplated a contingency of this kind, namely where a suit, which was properly instituted by the nearest reversioners, becomes by virtue of legislation during the pendency of the suit, a suit by remote reversioners. This unusual contingency does not appear to have been contemplated and it cannot be said that the observations in 6 Cal 764[1] really prevent the Court from allowing the continuance of the suit in the circumstances mentioned above. Similar cases have come before Courts and in two cases which were decided by Benches of our own High Court, namely 1936 M W N 1111[2] and (1937) 2 M L J 209,[3] it has been held that the plaintiffs in these circumstances should be allowed to continue the suit after making the nearest reversioners parties to the suit and after such amendment of the plaint as may be necessary. There are no doubt one or two decisions of other High Courts contra. One of them, 13 Lah 178,[4] does not discuss the question ; another is by a single Judge ; and the third no doubt takes the

1. Rani Anand Kunwar v. Court of Wards, (1881) 6 Cal 764=8 I A 14=8 C L R 381=4 Sar 195 (P C).
2. Subba Rao v. Venkayya, (1936) M W N 1111.
3. Lakshmi Ammal v. Anantarama Iyengar, (1937) 24 A I R Mad 699=171 I C 7=(1937) 2 M L J 209.
4. Shib Das v. Nand Lal, (1932) 19 A I R Lah 361=138 I C 291=13 Lah 178=33 P L R 423.

view that in no case other than the cases mentioned in 6 Cal 764[1] could a remote reversioner maintain a suit. After considering the question fully in the light of the decisions, we are of opinion that there is no reason why we should not follow the decisions of our own High Court, and all the more so in view of the nature of the suit and the observations made as regards the character of such suits in the Full Bench decision in 29 Mad 390[5] at p. 402, namely :

> The true purpose of the concession of a right of suit in all these cases is the protection of the interest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. Now as it is not possible either to determine beforehand who will be the actual successor or to predicate the existence of any substantial distinction between the right of one reversioner and that of another, in theory it would seem that the right to take legal proceedings for perpetuation of testimony should be conceded to each and all of such persons.

The purpose for which Courts permit declaratory suits by reversioners in cases like the present can be served only if the present suit is allowed to be continued, because in the circumstances of the present case, if this is not permitted, there will be no chance even for the nearest reversioner to question at present the validity or genuineness of the will, and that question will have to be postponed till the death of the widow which might happen many years hence when it would be difficult to expect oral testimony to be available on the subject. Looking to the purpose in view, and also of the peculiar circumstances of this case, namely that by an Act of the Legislature the persons who had a right to maintain the suit have been deprived of the particular character in virtue of which he was entitled as a matter of right to bring the suit, we consider that the ends of justice will be served best by permitting the plaintiffs to amend their plaint and make the nearest reversioners party defendants and prosecute the suit further in the Court below.

The appeal is accordingly allowed and the decree of the Court below dismissing the suit set aside. The suit is remanded to the lower Court for disposal according to law after allowing the plaintiffs one month's time after the receipt of the records in the Court below to apply to amend their plaint and to make the nearest reversioners party defendants. In the circumstances of the case there will be no order as to costs of this appeal. The costs of the lower Court will be provided for in the revised decree of the Court below. The plaintiffs-appellants are entitled to get a refund of the court-fee paid by them on the memorandum of appeal.

C.R.K./D.S. *Suit remanded.*

5. Chiruvolu Punnamma v. Chiruvolu Perrazu, (1906) 29 Mad 390=16 M L J 307 (F B).

---

* A. I. R. 1938 Madras 180

VARADACHARIAR AND MOCKETT JJ.

Secretary of State — Appellant.

v.

Kattari Nagayya Kama Rajendra Ramaswami Kamya Naicker Zamindar of Saptur—Respondent.

Appeal No. 166 of 1930, Decided on 30th April 1936, against decree of Sub-Judge (Second Addl.), Madura, in O. S. No. 73 of 1926.

(a) Easement — Riparian rights — Right of upper riparian owner to divert water to tank situate at long distance is in nature of easement and not riparian right.

Where the upper riparian owner seeks to use the water of the river not for the riparian tenement but to fill a tank situated at a long distance, the right to divert water to such a tank by putting up a permanent dam across the river is one in the nature of an easement and is not a riparian right. The lower riparian owner is therefore entitled to insist that there should be no excessive user and that the easement should be enjoyed in manner consistent with his rights and without increasing the burden of the easement : *32 Mad 141, Rel. on.* [P 182 C 2]

(b) Riparian Rights—Obstruction—Acquisition of prescriptive right to maintain dam—Party does not obtain immunity in respect of all other obstructions naturally arising owing to existence of dam — Obstruction by accumulation of silt amounts to nuisance—Remedy of person injured thereby stated.

Even when a party acquires the right by prescription to maintain a dam, it does not obtain a kind of immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam. The obstruction caused to the free flow of water in the stream by accumulation of silt owing to existence of dam, amounts to a "nuisance" and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and for damages. [P 183 C 1, 2]

(c) Limitation Act (1908), S. 23—"Continuing wrong"—Obstruction to water by accumulation of silt due to construction of dam—Injury to lower riparian owner is continuous.

The injury caused to the lower riparian owner by obstructions due to the accumulation of silt owing to the construction of a dam may well be regarded as a "continuing wrong" within the meaning of S. 23 and he will have a cause of action accruing *de die in deiem*, until the opposing party acquires a prescriptive right to maintain the obstruction : *6 Cal 394, Rel. on.* [P 183 C 2; P 184 C 1]

(d) Easements Act (1882), S. 17—Prescriptive right in respect of silt accumulation (*Quaere*).

It is doubtful whether a prescriptive right can be acquired at all in respect of a shifting or changing mass like silt accumulation: (*1895*) *A C 1, Ref.* [P 184 C 1]

*** (e) Riparian Rights—Upper proprietor's rights—Acquisition of prescriptive right to maintain dam — Owner can still use such water only as he was accustomed to—He cannot enlarge dimensions of channel.**

The acquisition by the upper riparian owner of a prescriptive right to maintain a dam in a stream will not of itself entitle him to all the waters intercepted by the dam but only to such water as he had been accustomed to take by the channel previously. If he is entitled to draw water through a channel with certain dimensions, he cannot enlarge the dimensions of that channel : (*1906*) *A C 72 and* (*1747*) *1 Wilson K B 174, Rel. on.* [P 184 C 2; P 185 C 1]

Govt. Pleader (K. S. Krishnaswamy Iyengar) and K. S. Champakesa Iyengar — *for Appellant.*

K. V. Krishnaswamy Iyer, M. A. Krishnaswamy Iyer and R. Ramasubbu Iyer — *for Respondent.*

Varadachariar J. — As the introductory facts have been set out in our judgment in A. S. No. 165 of 1930, it is sufficient to state here that this appeal arises out of disputes between the Government and the zamindar of Saptur in respect of silt clearance near and over the Vannapparai anicut and of the extent of the Government's right to take water through the Sivaneri channel, which branches off from the Periyar in front of this anicut. At this point, the river has a bend and flows more or less south to north. The anicut has been constructed south-west to north-east and the channel takes off from the right or eastern bank of the river. In the plaint, the zamindar who is a lower riparian owner complained of two matters: (i) that the Government through its servants and ryots of the Ayan villages had widened and deepened the Sivaneri channel from time to time thus obstructing more water from the river, and (ii) that the river has silted up on both sides above the anicut and reeds, etc., have grown, with the result that water passes only over a small portion of the anicut. Two reliefs were accordingly prayed for: prayer (a) related to the clearance of silt and removal of the reeds, etc; prayer (b) asked for the restoration of the channel to a width of six yards with the bed level at half a foot above the crest of the Vannapparai dam. Prayer (c) may be left alone as it merely suggested a method by which the relief asked for in prayer (b) might be carried out.

The written statement denied that there had been any widening or deepening of the channel after 1876. This particular year was mentioned because it was with reference to that date that the High Court had decided in A. S. 31 of 1883 that the Government had not been shown to have changed the depth, width or position of the channel. No figures were given in the written statement as to the dimensions, etc. of the channel, but the Government took care not to admit the correctness of the allegations in the plaint as to the dimensions of the channel or its bed level. As regards the silting, Government said that "no act of the defendant contributed to the silting up, if any, or to the growth of the reeds"; it was added:

Whatever earth or brushwood may be found is on the natural banks of the river near the anicut and exists for the safety and protection of the adjoining lands.

The Government also raised a plea of limitation founded on
the continuance to the knowledge of the plaintiff and his predecessors-in-title of the present state of things in assertion of a hostile title by the defendant for over half a century.

Of the issues framed in the case it is sufficient to mention Issue (2) relating to the width and bed level of the channel, Issue (4) relating to the silting up of the river and obstruction by growth of brushwood and Issue (6) raising the plea of limitation. Issue (9) was the general issue as to the relief to be given to the plaintiff. The trial Court held that the suit was not barred by limitation. Under Issue (4) it found that the river had become silted up and obstructed and accordingly gave certain directions in respect of the removal of the silt and reeds. Under Issue (2) it accepted as correct the figures given in the commissioner's report and plan [Exs. 63 and 63 (a)] as to the width of the channel and fixed the bed level at the head as two feet below the crest of the Vannapparai anicut. During the pendency of the suit

in the lower Court, certain works alleged to be by way of clearance of sand at the mouth of the channel had been executed by the Government and certain interlocutory proceedings had taken place with reference to the same. Adverting to the terms of the High Court's order made in that connexion, the learned Subordinate Judge also directed the defendant to restore the status quo ante as per the detailed provisions contained in para. (3) of the decree. Against the decree, in so far as it is against the defendant, Government has preferred the appeal. The plaintiff has filed a memorandum of objections claiming that all the reliefs asked for in the plaint should have been granted.

It will be convenient at the outset to deal with an argument as to onus of proof advanced on behalf of the appellant. The plaint alleged that by reason of the state of things therein described, the supply of water to the plaintiff's tanks was greatly diminished, that the plaintiff's ryots suffered thereby and that in consequence thereof plaintiff suffered damage to the extent of Rs. 440 in Faslis 1329 to 1331. The written statement denied that there had been any diminution in the supply of water flowing over the anicut and passing to the plaintiff's tank. It also denied that the plaintiff had sustained any damage. It suggested that, on the other hand, by reason of what the zamindar had been doing further east on the river (at the point A), his tanks were receiving a much larger supply of water than before and that the cultivation under them had been greatly extended. This is the matter in dispute in the connected suit. On the issue as to damages framed in this case, the lower Court found that the zamindar had not proved that he "has suffered damages as a result of any specific act of the defendant." Taking his stand on this finding, the learned advocate for the appellant has contended that in the absence of proof of damage, the plaintiff was not entitled to any of the reliefs claimed in the suit. He maintained this proposition even on the footing that the suit was to be regarded as one between two riparian proprietors. But at the end of his argument he also made reference to the prerogative of the State in India to distribute the waters of public streams in any manner it liked and contended that in this view at least the onus must be laid on the plaintiff to prove damage. The decision in 32 Mad 141,[1] on which he relied, is itself sufficient authority against the first contention, because the Government, as upper riparian owner, is not seeking to use the water of the river for a riparian tenement but to fill a tank situate at a long distance. Further, the right to divert water to such a tank by putting up a permanent dam across the river is one in the nature of an easement and is not a riparian right. The lower riparian owner is therefore entitled to insist that there should be no excessive user and that the easement should be enjoyed in a manner consistent with his rights and without increasing the burden of the easement. As the Government claims the easement by prescription, the lower Court rightly held that it is for the defendant to show the extent of his prescriptive right. The existence of the dam is not in dispute nor its dimensions. But on proof that the silt has accumulated near or over it in a way calculated to obstruct the normal flow of water over the dam, the plaintiff is entitled to relief unless Government can show that the plaintiff's remedy in respect thereof has become barred by limitation. As regards the dimensions of the channel, it is the plaintiff who complains that they have been interfered with by the Government and the lower Court was therefore right in throwing upon him the burden of proving that fact. By an application of the presumption against wrong doing, the Court started with a presumption in favour of the existing state of things and called upon the zamindar to prove that it is different from the original or lawful condition.

Should the question of onus however be considered from the point of view of prerogative of the State, the decision in 32 Mad 141[1] no doubt lends support to the appellant's contention that even in circumstances like those of the present case, the onus is on the plaintiff to show that he has sustained damage. The learned Judges however did not base their decisions on that ground because they found that even placing the onus on the defendant, the evidence established that the plaintiff in that suit had not sustained damage. We are however unable to accede to the contention that the present case should be determined with reference to the preroga-

1. Fisher v. Secy. of State, (1909) 32 Mad 141 = 2 I C 325 = 19 M L J 131.

tive of the State. The written statement makes no reference to this aspect and it has not been suggested that anything is now being done by the Government in pursuance of any project or contemplated irrigation work. Both parties dealt with the case on the footing that it was one intended to determine the extent of the existing rights of the zamindar on the one hand and the Ayan ryots served by the Sivaneri channel on the other. It does not seem to us fair at this stage to convert the defence into one based on the Government's prerogative right. The finding recorded by the lower Court on the question of damages is carefully worded. The judgment undoubtedly proceeds on the footing that the accumulation of silt, etc. near and over the anicut has diminished the supply of water flowing over the dam, but it nevertheless found against the plaintiff on the question of damages because the damage, if any, was not shown to be attributable to any act of the Government. We may also point out that, so far as the plaintiff complains of the obstruction caused by the accumulation of silt, it is difficult to see where any question of prerogative right of distribution of water comes in. On the other hand, if driven to it, we feel constrained to say that the correspondence discloses an unreasonable attitude on the part of some of the local officers concerned in rejecting even modest proposals made from time to time by equally responsible officers, though for the time being the latter happened to be in charge of the estate under the Court of Wards.

It was also contended on behalf of the appellant that as the accumulation of silt has been found to be due to natural causes, and the allegations in the plaint attributing the same to the acts of Government officers have not been proved, the plaintiff is not entitled to any relief. This argument ignores the effect of the evidence (including that of P. W. 13, an officer of the Government) showing that the accumulation is caused by the existence of the anicut which has been constructed by the Government for the benefit of the Sivaneri channel. The authorities establish that the obstruction caused to the free flow of water in the stream by such accumulation amounts to a "nuisance" and that the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and for damages : see Coulson and Forbes on Waters, 5th Edn. pp. 667 and 668; Angell on Watercourses, paras. 388 and 389; Gould on Waters, para. 363. The observations in para. 445 of Farnham on Waters show that the position is the same even when natural causes combine with the existence of the dam to bring about the obstruction. We cannot accept the appellants' contention that once Government acquires the right by prescription to maintain the dam, it also obtains a kind of immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam.

It was next contended that plaintiff's remedy if any in respect of the clearance of the silt had become barred by limitation. It must be mentioned here that though there is a reference in para. 15 of the written statement to the plea of limitation, it would rather seem to refer to the state of the channel than to the accumulated silt in the river. The written statement carefully avoids making any admission as to the silt accumulation, as shown by the use of the expression "if any" in para. 10. In any event, the defendant puts forward no specific or definite case as to the time during which there has been accumulation of silt at any particular spot. Appellants' learned counsel relied on the fact, appearing from Exs. H series and N. series, that from time to time over a period of nearly forty years before suit, the plaintiff's officers have been complaining to the defendant's officers about silt accumulation in the suit locality and have been asking for its removal, while the defendant's officers have uniformly declined to allow it to be done. But the evidence in the case, including that of P. W. 13, establishes what might even otherwise be safely presumed, that in this jungle stream the silt appears at one season and disappears by the action of the floods in another season and its re-appearance in another year may well be on different spot. P. W. 13, who examined the locality under instructions from the Government just before he gave evidence, has prepared a sketch (Ex. SSS) wherein he shows, to the south of the dam, a mass of obstructing material which he describes as "shifting low sand shoal now a little above anicut crest." This practically corresponds to what is shown in the com-

missioner's plan Ex. 63 (a), as A.7, A.8, A.9, C.2, C.3, C.8, C.4 and is described in para. 10 (c) of his report (Ex. 63) as "silted up by sand in uneven level". It is difficult to see how there can arise any plea of limitation in respect of the removal of such obstruction. The injury caused to the lower riparian owner by obstructions of this kind may well be regarded as a "continuing wrong" within the meaning of S. 23 and he will have a cause of action accruing *de die in deiem*, *see* 6 Cal 394[2] at pp. 404, 405 (and S. 24 of Act 9 of 1871 with its Illustration), until the opposing party acquires a prescriptive right to maintain the obstruction. As stated already, the Government has no specific case in respect of this silt accumulation. There is accordingly no question of any acquisition of prescriptive right in respect thereof. It is indeed doubtful whether a prescriptive right could be acquired at all in respect of a shifting or changing mass like silt accumulation : *see* (1895) A C 1[3] at p. 6.

It was sought to be maintained by reference to the sketch N.3, that the accumulation on the left flank of the river indicated by the letters "abc" on that sketch must have continued to exist at that definite spot and in that definite form for a sufficiently long time so as to give rise to a prescriptive right. One answer to this argument is that no such case has been put forward in the written statement. In N.3, which is dated 1894, it is indicated that this silt bank is overgrown with shrubs. There is nothing to show the length of time during which or up to which it existed. Between 1894 and 1896 the estate officers were pressing for the removal of silt, but in N.20 dated 16th September 1896 it is stated by the Deputy Collector, as reported by the Manager, "that the silts have been cleared by nature during the late freshes in river". In subsequent correspondence, till we come to 1917, no reference is found to silt accumulation or its removal. We are therefore unable to hold that the silt accumulation shown in N.3 has permanently remained there in any definite form. In Ex. SSS, P. W. 13 has shown in the same locality an accumulation which he has described in the following words: "portion referred to as silt bank formed by river deposit, with vegetation, reeds, after the anicut was built". No question was put to him in chief examination about this except to elicit that the

silt bank acts as a buffer to the natural bank by increasing the breadth of ground through which the water will have to cut (para. 25 of the deposition).

In cross-examination the witness explained how in his opinion the silt bank comes to be formed on the left flank (para. 58) and added in para. 59 "from the vegetation on the silt banks, I shall say that they are a few years old." Nothing further was elicited from him in re-examination as to what he meant by saying "a few years". On the other hand, the suggestion of Government as appears from the cross-examination of D. W. 1 (on p. 677 of the record) was that these "are not silt banks but natural high grounds". D. W. 1 emphatically repudiated that suggestion and P. W. 13 agreed with equal emphasis that it was silt accumulation and not natural high ground. There is also the fact (noted by the lower Court) that in respect of any cause of action that accrued to the plaintiff subsequent to 1906, no plea of limitation can affect the plaintiff's remedy because of the minority of the plaintiff and his elder brother who died a minor. We accordingly hold that there is no force in the plea of limitation so far as the claim for the removal of the silt is concerned.

We see no other tenable objection to the direction in para. (1) of the lower Court's decree. The question whether from an engineering point of view the removal of the silt is desirable or undesirable seems to have been considered by the officers of Government almost wholly with reference to the interests of the Ayan ryots. Such considerations seem to us irrelevant to the case, though even on the aspect of "safety" to the dam, the evidence does not make out that the direction given by the lower Court will in any way endanger it.

Proceeding next to the objections to Cl. (2) of the lower Court's decree, we may state at the outset that the acquisition by the defendant of a prescriptive right to maintain the dam will not of itself entitle him to all the waters intercepted by the dam but only to such water as he has been accustomed to take by the Sivaneri

2. Rajrup Koer v. Abdul Hossein, (1881) 6 Cal 894=7 I A 240=7 C L R 529=4 Sar 199 (P C).

3. Lemmon v. Webb, (1895) A C 1=64 L J Ch 205=11 R 116=71 L T 647=59 J P 564.

channel : *see* (1906) A C 72.[4] If he is entitled to draw water through a channel with certain dimensions, he cannot enlarge the dimensions of that channel : *see* (1747) 1 Wilson KB 174 (=95 ER 557).[5] The dimensions of the Sivaneri channel have so often been the subject of dispute between the parties that it is eminently desirable to fix them with such precision as the circumstances permit. (Their Lordships after considering the oral and documentary evidence in the case concluded as follows.) Except to the extent of the variation above made in respect of the depth of the channel, the decree of the Court below is confirmed and the appeal and the memorandum of objections are dismissed. As the appellant has succeeded in part and failed in part, we make no order as to the costs either in the appeal or in the memorandum of objections.

C.R.K./S.C. *Decree varied.*

4. John White & Sons v. J. & M. White, (1906) A C 72=75 L J P C 14=94 L T 65.
5. Brown v. Best, (1747) 1 Wilson K B 174 = 95 E R 557.

A. I. R. 1938 Madras 185

STODART J.

A. P. M. Syed Ibrahim Sahib & Brother — Appellant.

v.

V. S. Gurulinga Aiyar — Respondent.

Second Appeal No. 138 of 1936, Decided on 1st March 1937, against decree of Sub-Judge, Vellore, in A. S. No. 97 of 1935.

(a) Partnership Act (1932), S. 74 — Retrospective effect.

The operation of S. 74 is not confined only to suits and proceedings which were pending at the commencement of the Partnership Act as the section does not say so in express terms : *A I R 1934 Cal 754 and A I R 1935 Lah 893, Dissent.* [P 186 C 1]

(b) Partnership Act (1932), Ss. 69 and 74— Right of action accruing before passing of Act — Suit instituted after passing of Act — S. 69 does not affect right but alters procedure which must be followed.

The right of action, which has accrued to the firm before the passing of the Partnership Act, is not affected by S. 69. The firm still has the same right as it had before the passing of the Act. What has been altered is the mode in which the firm can enforce that right and now before filing a suit the firm has to get itself registered and that is a matter of alteration in procedure. The procedure under S. 69 must therefore be followed in suit instituted after 1st October 1933 : *A I R 1936 All 3; A I R 1934 Cal 754 and A I R 1937 Mad 419, Rel. on; 6 M H C R 122 and A I R 1920 Cal 435, Disting.* [P 186 C 2]

(c) Partnership Act (1932), S. 69 — Suit instituted contrary to provisions of S. 69 cannot be validated by subsequent compliance.

Section 69 must be strictly construed and the suit instituted contrary to its provisions is bad and cannot be subsequently validated by compliance with those provisions : *A I R 1936 Mad 24, Disting.* [P 188 C 2]

K. S. Krishnaswamy Iyengar and S. Ramachandra Iyer—*for Appellant.*

V. C. Veeraraghavachari — *for Respondent.*

Judgment.—The appeal is by the plaintiff. The plaintiff is a firm and the suit was against a debtor of the firm to recover money due on dealings. The suit was filed on 12th October 1933, i. e. it was presented into Court on that day; and it was admitted to the file on 20th November 1933. The Partnership Act 9 of 1932 came into force on 1st October 1932, except S. 69 which came into force according to S. 1 (3) of the Act on 1st October 1933. And the question for decision in this suit is whether, having regard to the provisions of S. 69, the suit is maintainable. S. 69 (2) is :

> No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm.

This suit was instituted after 1st October 1933, and the trial Court and the Court of first appeal have both held that it is not maintainable, because the plaintiff firm was not registered on 12th October 1933. Another point that arises in the suit is this. The plaintiff firm did actually get itself registered on 15th January 1934; and it is contended that the lower Courts were wrong in not holding that the suit could be treated as valid as from that date. Two arguments have been put forward on appeal. The first is that the right to bring a suit without being registered as a firm to recover this debt was a right which had vested before the passing of Act 9 of 1932, and so is not affected by the provisions of that Act. That is the argument founded on general principle : and it is also contended that S. 74 of the Act confirms this principle. The second argument relates to the further point which I have just mentioned,

namely that the lower Courts should have treated the suit as valid as from the date when the firm became registered. The relevant words of S. 74 are as follows :

> Nothing in this Act shall affect or be deemed to affect : (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act; or (b) any legal proceeding or remedy in respect of any such right.

Before examining the principal argument in the appeal which is briefly that S. 74 merely enunciates the general principle that new enactments cannot retrospectively affect vested rights unless by express provision in the enactments themselves, I would observe that the legal proceedings indicated in S. 74 (b) have been interpreted in some decisions to mean proceedings pending at the commencement of the Act, and it is argued as a preliminary point that that interpretation is not correct. With all respect to the learned Judges who decided those cases, namely 62 Cal 213,[1] and A I R 1935 Lah 893,[2] I must say that I find myself in agreement with the learned Government Pleader, who appears for the appellants, on this point. There appears to be no reason why, if the Legislature intended to confine the operation of S. 74 only to suits and proceedings which were pending at the time of the commencement of the Act, they should not have said so in express terms. One finds such provisions in other enactments. On the main point however, namely that S. 69 either by the general law or by reason of the operation of S. 74 has no retrospective effect, I find myself unable to agree with the learned counsel for the appellant. The argument, as I have said, is that the firm, prior to the passing of the Act, had the right to sue for debt without being registered, that right was a vested right which cannot be taken away by the Act, and therefore since the cause of action accrued before the Act, the plaintiff firm can bring exactly the same kind of suit as it could before the Act, i. e. without first getting itself registered under Ch. 7 of the Act. In my opinion the only right which is affected by S. 69 is a processual right. Before the Act, the firm had acquired rights under its contract with defendant. Those rights are not affected or impaired by the passing of the Act. Before the Act, the firm could have brought a suit against the defendant to enforce that contract. The right to bring a suit is not impaired by the passing of the Act. So far as I can see, the only difference is that prior to bringing the suit the plaintiff firm must now do a certain act, namely get itself registered in the office of the Registrar of firms, and I think that is a processual matter.

Therefore though the general principle relied upon by the learned Government Pleader cannot be gainsaid, and while it cannot be denied that it applies to protect all vested rights from the retrospective effect of new enactments, this in my opinion is the exception, namely where the right relates to procedure in which the litigant has not got a vested right. I cannot however omit to set out the argument in its strongest form, which has now been put forward on behalf of the appellant, namely that the right indicated in S. 74 (a) is a right of action, and if S. 69 can be construed as affecting the right of action, which the plaintiff firm had before the Act, that section is nullified by S. 74. I have given that argument my careful consideration, and I feel that the right of action in this case is not affected as such by S. 69. The plaintiff firm has still got that right, the same right as it had before the Act was passed. What has been altered is the mode in which the firm can enforce that right. Formerly it had only to file a suit into Court. Now before filing a suit the firm has to get itself registered, and that as I have said, is a matter of alteration in procedure which the law is perfectly competent to effect. This is the view of the section taken in the Allahabad High Court in 58 All 495[3] at page 499.

My attention has been drawn to several decisions in India in which the general principle has been affirmed. The first of these is 6 M H C R 122.[4] That was a case where the landlord sued to recover arrears of rent. The suit was instituted in April 1869 and included arrears which were due for 1865.66 before the passing of Act 8 of 1865. That Act governed the

1. Surendranath De v. Manohar De, (1934) 21 A I R Cal 754=153 I C 671=62 Cal 213=39 C W N 67.
2. Firm Krishen Lal Ramlal v. Abdul Ghafur Khan, (1935) 22 A I R Lah 893=160 I C 513 =17 Lah 275=88 P L R 633.
3. Danmal Parshotamdas v. Baburam Ohhotelal, (1936) 23 A I R All 3=160 I C 277=58 All 495=1935 A L J 1245.
4. Lee Morris v. Sambhamurthi Rayar, (1872) 6 M H C R 122.

relations between landlord and tenant at the time of the suit, and according to S. 7 of that Act, no suit to enforce the terms of a tenancy could be maintained unless pattas and muchilikas had been exchanged. The defendant in the Madras High Court Reports Suit[4] contended that so far as rent due for 1865.66 was concerned, the suit was unsustainable, since patta and muchilika had not been exchanged. The fact however was that at the time when the arrears accrued, the Act had not come into force, and it was not necessary in order to enforce the recovery of those arrears that patta and muchilika should have been exchanged; and it was held in that case that S. 7 of the Act had no retrospective effect.

The exchange of patta and muchilika of course had nothing to do with the procedure by which the law was put into motion. The procedure was, as everybody knows, by instituting a suit in the Court of the Collector. The right to recover arrears even though no patta and muchilika had been exchanged was a vested right prior to the passing of the Act. Another important case cited in this connexion was 47 Cal 1108.[5] That case arose out of a difference between S. 66 of the present Civil Procedure Code and the corresponding S. 317 of the Code of 1882. The latter barred suits by the real owner only against the benami purchaser at Court auction of property sold under a decree, but not against the purchaser's assignees. The new S. 66 barred suit by the real owner against any person claiming title by virtue of the Court auction-purchase. The suit related to a Court auction-purchase which was confirmed on 30th July 1906, but in which the sale certificate was not taken out till 24th April 1909. The suit was filed after 1909 when the present Code of Civil Procedure had come into force. It was held that the rights of the parties were governed by S. 317 of the old Act, in other words S. 66 of the new Act could not operate to take away the right which had been vested before the commencement of that Act. In this case therefore the vested right was a substantive right. The new Code took it away absolutely. It was not a case where the new Code merely effected an alteration in the mode of enforcing that right.

5. Promotha Nath Pal v. Mohini Mohan Pal, (1920) 7 A I R Cal 485=58 I C 327=47 Cal 1108=31 C L J 468=24 C W N 1011 (F B).

In (1864) 10 H L C 704[6] the principal point for decision was whether the Barons of the Court of Exchequer had the delegated power under S. 26 of 22 and 23 Victoria, Chapter 21, to extend certain provisions of the Common Law Procedure Act, 1854, to the Revenue Side of the Court of Exchequer. One of the results of such extension was to create a right of appeal to the Court of Exchequer Chamber from the verdict of the Court of Exchequer. The point was decided in the negative. It was held that the Barons had no such power under the aforesaid section of 22 and 23 Victoria, Chapter 21. But two of the learned Lords who decided that case held the opposite view, and they proceeded to consider the further point whether this alteration in the law could affect pending actions. That point was very pertinent to the case, because the respondents had obtained a verdict in the Court of Exchequer before the Barons of the Exchequer made the rule aforesaid and claimed that the new rule could not operate retrospectively so as to give appellant the right of appeal. Concerning the question whether the new rules affected pending actions, Lord Wensleydale said (page 762 of the report) :

A question has been presented to our attention which must be now considered—Was it competent for the Judges of the Exchequer to alter the law as to then pending proceedings, and to enact provisions at the time . . . . so as to affect the verdict, which the claimant then had, which was subject only to the then existing law, and make it subject to another mode of enquiry ? I was much impressed with this objection at first, and was for a time strongly inclined to think that it was well founded, and that the new rules, though operative as to all future suits, were not operative in this. But further argument, and a full consideration of this question, have satisfied me that this objection is not well-founded. (Page 763). . . . I think that if it were an alteration in the mode of proceeding only, to the prejudice of the claimants, the objection would not prevail. . . . . It is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter. (Page 764). The right of the suitor is to bring the action, and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That therefore takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action

6. Attorney-General v. Sillem, (1864) 10 H L C 704=10 Jur 446=10 L T 434.

conducted according to the rules then in force with respect to procedure. I am therefore clearly of opinion, that if the provisions of the rule had been in an Act of Parliament of the same date, the Act would have affected existing suits, and would unquestionably have given an appeal in suits in which verdicts were already obtained.

I may add that in the case already cited, 62 Cal 213,[1] it is held that S. 69 is operative not to affect an existing right, but merely to make an alteration of procedure to enforce that right. Though as I have said I do not find myself in agreement with the construction of S. 74 adopted by the learned Judges in that case, their interpretation of S. 69 is in my view, if I may say so with respect, a correct one. The same conclusion has been reached in recent cases of this Court. The case in 45 M L W 276[7] is one instance.

I now come to the second argument which has been raised in the appeal, and that is, that although the suit may have been bad at the time of the institution, the Courts below should have held that it was good from the date when the firm got itself registered. In support of this argument the case reported at 69 M L J 791[8] is cited. That was a case where the plaintiff having applied to be allowed to sue as a pauper and his application having been refused subsequently instituted a suit in the ordinary manner. But he did so without first paying the costs of the pauper petition to the defendant. The suit was accordingly dismissed, though prior to the dismissal of the suit he had deposited the costs in question. It was held by this Court on the appeal of the plaintiff that the Court below need not have dismissed the suit altogether, that it was unnecessary to go through the formality of a dismissal and re-institution the next moment after payment of the costs of the pauper application. The words of O. 33, R. 15 are "the applicant shall be at liberty to institute a suit in the ordinary manner provided that he first pays costs", etc., and these words in my opinion have the same effect as S. 69 (2), Partnership Act, which is that no suit to enforce a right shall be instituted unless the firm is registered. O. 33, R. 15 might read "no suit shall be instituted by the applicant unless the costs of the pauper petition are first paid". On the analogy therefore of this decision in 69 M L J 791[8] it is contended by the learned Government Pleader that the appellant's suit should not have been dismissed but should have been regarded as instituted on the date when the firm was registered which was 15th January 1934; and in support of this argument it is pointed out that the defendant in the suit was not aggrieved by the delay or default in getting the firm registered, because he raised no objection to the progress of the suit while the trial was going on, but only at the stage of argument did he disclose the fact to the Court that the suit had been filed at a time when the firm was not registered.

In my opinion the circumstances of this case are different from those in 69 M L J 791.[8] The circumstances of the two cases would be similar if in the present case the plaintiff firm had come to Court on 15th January 1934 and asked to be allowed to withdraw his suit on the ground that it was incompetent and to file another immediately. It was not until a year later that the Court in the present case was informed that the suit as filed was incompetent. The defendant in the ordinary course must be taken to have assumed when the suit was filed that the plaintiff firm was a registered firm and that it was registered under the style and title found in the plaint. But when in March 1935 after the trial was over, the defendant discovered that the suit firm had not been registered at the time of the plaint, then only was he in a position to ascertain the real identity of the plaintiff by consulting the certificate of registration. I do not say that he was actually prejudiced in the present case; but certainly cases can be imagined in which the certificate of registration might disclose some change in the nature of the firm which would support possible defence against the claim. On the whole therefore I am inclined to interpret S. 69 strictly and to hold that the suit instituted contrary to its provisions is bad and cannot be subsequently validated by compliance with those provisions. In the result this second appeal is dismissed with costs. Leave to appeal is requested and it is granted.

C.R.K./S.C. *Appeal dismissed.*

7. Parinchu v. Ravi Varma, (1937) 24 A I R Mad 419=45 M L W 276.
8. Ramakrishna Nadar v. Thirumalai Vandaya Thevar, (1936) 23 A I R Mad 24=169 I C 1029=69 M L J 791.

A. I. R. 1938 Madras 189

KING AND VENKATARAMANA RAO JJ.

C. V. C. T. V. Venkatachalam Chettiar —Petitioner.

v.

V. Vr. N. Ar. Nagappa Chettiar and others—Respondents.

Civil Misc. Petn. No. 1745 of 1937, for a writ of certiorari, Decided on 13th July 1937.

Madras Local Boards Act (14 of 1920), S. 199 (c), R. 35 (2)—Government can stay proceedings at any time before result is declared—Election Commissioner can enquire only after declaration of results.

Under R. 35 (2) the "election proceedings" continue right till the results are declared and it is competent for the Government to stay them at any time before that. The jurisdiction of the Election Commissioner to enquire commences only when the results are declared. Thus where the polling at only one booth is stopped by the polling officer under R. 24-B (1) and the Government on enquiry conclude that there has been systematic interruption of the polling at all the polling booths and fix a date for the fresh poll, the order of the Government is not ultra vires. The Election Commissioner cannot interfere unless the order of the Government is ultra vires of the election rules or mala fide. Nor has the Election Court any jurisdiction to consider whether the order of a fresh election was justified or not justified on the facts. [P 189 C 2 ; P 190 C 1]

B. Sitarama Rao and K. Subba Rao—*for Petitioner.*

T. R. Venkatarama Sastri for K. S. Sankara Ayyar and Government Pleader —*for Respondents.*

Order. — This matter relates to the election of a member to the District Board of Ramnad for the Pallathur Circle. The election was first fixed for 23rd November 1936. On that date, the poll at one of the fourteen polling booths was stopped by the Polling Officer under R. 24-B (1) of the Election Rules. The Election Authority, on being notified of this, referred the matter for the orders of Government. Government passed orders on 3rd December for the holding of a fresh poll at all the polling booths, stating it to be their conclusion after enquiring that there had been systematic interruption of the polling at all the polling stations. The date for this fresh poll was fixed by the Election Authority as 14th December. On that day polling proceeded normally, and in due course Mr. Venkatachalam Chettiar (the present petitioner) was declared elected. The defeated candidate, Mr. Nagappa Chettiar (the present respondent) thereupon filed a petition before the Election Commissioner (Principal Subordinate Judge, Madura) who held that the order of Government was ultra vires, and the election of 14th December therefore void except in so far as it concerned the one polling booth where polling had been stopped in November. The Election Commissioner further ordered that the votes cast in the other thirteen booths in November should be counted, and on the result ascertained by this count and by the polling in the one booth in December, he declared Mr. Nagappa Chettiar to be elected. Thereupon Mr. Venkatachalam Chettiar moved this Court to issue a writ of certiorari.

The question for our decision is whether the Election Commissioner had any jurisdiction to pass the orders which he has passed. It is clear that Mr. Nagappa Chettiar had no complaint to make with regard to the actual conduct of the election on the 14th. He attacked it solely on the ground that it ought never to have been ordered. The Election Commissioner therefore can have jurisdiction only if the order of the Government is either ultra vires of the election rules or mala fide. That the Government's order was ultra vires, it seems to us, to be impossible to maintain. It was passed under R. 35. Sub-s. (2) of that Rule, omitting unnecessary words, runs as follows :

> Pending .... the issue of final orders on any enquiry which the Local Government may institute upon receipt of any information that an election is being held in contravention of the rules, it shall be lawful for the Local Government to direct the stay of the election proceedings at any stage thereof prior to the declaration of the results.

This sub-section obviously contemplates the following : (i) Government may hold an enquiry ; (ii) they may hold it at any time before the results are declared ; and (iii) they may pass final orders on their enquiry. In the present case the Government state that they have held an enquiry, they did hold it before the results were declared, and they have passed final orders. We are unable to see how these orders can be questioned on the ground that Government had no power to pass them.

It was argued by Mr. Venkatarama Sastri for the respondent here that when once votes have been cast into the ballot-box and the hours of polling are over, the jurisdiction of Government ends and the

jurisdiction of the Election Commissioner begins. But this argument overlooks the clear statement of R. 35 (2) that "election proceedings" continue and may be stayed by Government at any time before the results are declared and of course, the rules for the enquiry by the Election Commissioners into election petition show clearly enough that until results have been declared, there is nothing for an Election Commissioner to enquire about. We repeat therefore that Government were within their rights in passing the order of 3rd December.

Mr. Venkatarama Sastri then proceeds to argue that even if Government had the power to order a fresh election, the Election Court can come to its own conclusion whether the order was justified or not justified on the facts. But this view is contrary to the law of interference on revision, and we are unable to accept it. As stated already, respondent must now fail, unless he can show that Government's order was passed mala fide. On this point though Government's order is referred to and attacked on the ground of illegality in the petition to the Election Commissioner, there is no positive assertion whatever. We find accordingly that as Government's order was not ultra vires, and was not asserted to be mala fide, it was beyond the jurisdiction of the Election Court to consider it on its merits. The Election Court has therefore acted without jurisdiction in setting aside the election of the petitioner on 14th December and in declaring the respondent elected, and we must quash its orders. Respondent 1 must pay petitioner's costs. Vakil's fee Rs. 150.

C.R.K./B.D. *Order quashed.*

A. I. R. 1938 Madras 190

VARADACHARIAR J.

Murugesa Mudali — Petitioner.

v.

Angamuthu Mudali — Respondent.

Civil Revn. Petn. No. 1373 of 1935, Decided on 8th October 1937, from order of Dist. Court, North Arcot at Vellore, D/- 26th September 1935.

Civil P. C. (1908), O. 39, R. 1 and S. 151 — Powers of Subordinate Courts to issue injunction and punish disobedience thereof are confined within O. 39—S. 151 cannot be invoked to add to powers conferred by O. 39 —Mere act of taking possession in execution of decree after 'interim stay' order does not amount to breach of injunction punishable under O. 39.

Word "prescribed" in S. 94 undoubtedly means "prescribed by the rules". Whatever may be said as to the powers of the High Court to issue injunction for other purposes and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of subordinate Courts must be found within the four corners of the Code, and when the Code has expressly dealt with the injunctions in O. 39, S. 151 cannot be invoked to add to the powers thus conferred. O. 39, R. 1 contemplates an injunction being granted only to prevent any property being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree. The mere act of taking possession in execution of a decree, after the Court's order merely stating "notice and interim stay" will not amount to a disobedience of an injunction punishable under O. 39. [P 191 C 2 ; P 192 C 1]

V. T. Rangaswami Aiyangar — *for Petitioner.*

A. C. Sampath Ayyangar — *for Respondent.*

Order.—This revision petition arises out of an application to punish the petitioner for disobedience of an injunction issued by the District Munsif's Court at Ranipet. It will be convenient to describe the parties with reference to their array here. The petitioner had obtained a decree against one Kadirvelu Mudali, in O. S. No. 982 of 1928, for vacant possession of a piece of land on which part of a building stood. When the decree-holder went to take possession, he was resisted by the present respondent and M. P. No. 618 of 1932 was accordingly filed for removal for obstruction. An order for removal of obstruction was passed on 10th October 1932 and it is agreed that early on 11th October the Amin, to whom the warrant to carry out that order had been entrusted, went to the locality which is about two miles from the Court premises to carry out that order. The evidence also shows that the petitioner was present during the time that the Amin was carrying out that order. On 11th itself the respondent, against whom the order on M. P. No. 618 of 1932 had been passed, instituted O. S. No. 414 of 1932 apparently under O. 21, R. 103, and on the same day he filed M. P. No. 1666 of 1932 for an order restraining the defendant by a temporary injunction from executing the decree in O. S. No. 982 of 1928 and thereby demolishing the building and taking possession of the same until disposal of the suit. The petition purported

to be under Rr. 1 and 2 presumably of O. 39, Civil P. C. and S. 151. This came on for orders sometime after 2 P. M. on 11th and the District Munsif passed an order "notice and interim stay".

The trouble in this case arises from the informal terms of the order on the injunction petition. A reference to Appendix F, Form No. 8 of the Civil Procedure Code, will show how temporary injunctions are expected to be framed. The order actually served on the petitioner does not correspond to the terms of Form No. 8. It stated that an order of interim stay had been passed in respect of the execution of the decree in O. S. No. 982 of 1928 and proceeded to add that the petitioner was accordingly bound not to do so. It is common ground that even before 2 P. M. on the 11th, some portions of the building on the site in question had been demolished and it is also admitted by the petitioner that at about 6 P. M. that evening he took formal delivery in terms of the receipt filed in this case. There was some question raised as to when the order of injunction was served on the petitioner, but I see no reason for not accepting the finding of the District Court that it must have been served upon him between 3 and 3.30 P. M. The learned District Judge himself finds that after service of this notice, the petitioner must have gone to his vakil at Ranipet and taken his advice as to the further course to be followed. It also appears from the evidence that even during the petitioner's absence, as the petitioner's vakil in the main case was present when the temporary injunction petition came on for orders before the District Munsif at 2 P. M., the District Munsif orally informed the petitioner's vakil of the order that he was passing. It may therefore be presumed, as stated by the District Munsif, that when the petitioner went to consult his vakil, the vakil would have advised him not to disobey the injunction. I do not therefore see sufficient reason to think that any demolition was likely to have taken place after the service of the order upon the petitioner.

The District Munsif however thought that the passing of the receipt of delivery and the act of taking delivery therein implied amounts to a "technical" breach of the injunction and curiously he added that it was significant that the petitioner went to the scene even on the next day, as though that will amount to a breach of the injunction. As in his view the disobedience was only technical, he directed that the petitioner should be imprisoned for a week. The learned Judge on appeal disagreed with the view that the disobedience was only technical; but I cannot help thinking that the learned Judge has been carried away by his opinion that even apart from the injunction, the act of demolition was highhanded and unauthorized from beginning to end, because he thought that the order passed on M. P. No. 618 of 1932 did not warrant it. It is unnecessary for me to canvass the correctness of this conclusion, because that is not a matter that arises for consideration in this proceeding. We have only got to see whether there has been any disobedience of the injunction said to have been passed in M. P. No. 1666 of 1932.

I am unable to agree with the view that the taking of delivery implied in the passing of the delivery receipt is punishable as an act of disobedience of the injunction. O. 39, R. 1, Civil P. C., contemplates an injunction being granted only to prevent any property being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree. This certainly would not include the mere act of taking possession in execution of a decree. I am aware it has been sometimes held that O. 39 and Rr. 1 and 2, are not exhaustive of the Court's power to grant a temporary injunction: *see* 7 M L W 328,[1] 95 I C 196[2] and 73 I C 909.[3] A different view was taken in 24 Bom L R 378,[4] and I must add that the cases which held that O. 39 is not exhaustive do not seem to have given due weight to the words "if it is so prescribed" occurring in the opening paragraph of S. 94 of the Code. "Prescribed" in that section undoubtedly means "prescribed by the Rules". Whatever may be said as to the power of the High Court to issue injuno-

1. Vidyapurna Thirthaswami v. Vicar of Suratkal Church, (1918) 5 A I R Mad 340=44 I C 56=7 M L W 328.
2. Adaikala Thevan v. Imperial Bank, Madura Branch, (1926) 13 A I R Mad 574=95 I C 196 =50 M L J 401.
3. Kanshi Ram v. Sharafdin, (1923) 10 A I R Lah 144=73 I C 909.
4. Nusservanji Cawasji v. Shahajadi Begam, (1922) 9 A I R Bom 385 = 66 I C 768 = 46 Bom 939=24 Bom L R 378.

tion for other purposes and to punish disobedience thereof in exercise of its own inherent power as a Court of Record, the power of subordinate Courts must be found within the four corners of the Code and it seems to me too much to suggest that, when the Code has expressly dealt with the injunctions in O. 39, S. 151 can be invoked to add to the powers thus conferred. I do not however discuss this question further, because even assuming for the sake of argument that the Court has such power, I have still got to see what the order in this case was and whether there was any reason for the petitioner to assume that the Court granted an injunction wider in scope than O. 39, R. 1 contemplates.

As I have stated already, the Court's order merely stated "interim stay" and the notice actually served on the petitioner did not make matters clearer. Whether a delivery taken after an order of that kind will not be void in law is another matter; but I see no justification for holding that the taking of delivery in those circumstances will amount to a disobedience of an injunction punishable under O. 39. If I were satisfied that even after 3.30 P. M. on 11th October the petitioner was a party to any further demolition, I should not have hesitated to deal with him as he deserved. But though the respondent alleged and sought to prove that the demolition continued up to 10 P. M. that night and even for a part of the next day, neither Court has accepted that version, and both the Courts have based the order against the petitioner only on the ground that he took delivery after service of the injunction order. I am unable to hold that this conduct of the petitioner will amount to a breach of the injunction. On this ground, I set aside the order of the Courts below, but as the petitioner has undoubtedly acted in haste and has been in some degree responsible for bringing about this situation, I make no order as to the costs of this civil revision petition.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 192

LAKSHMANA RAO J.

Sina Thana Navana Nachiappa Chetty —Petitioner.

v.

M. Nachiappa Chettiar — Respondent.

Criminal Revision Case No. 384 and Petition No. 352 of 1937, Decided on 30th September 1937, from order of Dist. Magistrate, Ramnad, D/- 12th June 1937.

Criminal P. C. (1898), S. 503—Witness in Burma—District Magistrate in India cannot issue commission.

Burma has now ceased to be a part of British India and therefore a District Magistrate in British India cannot issue a commission for the examination of any witness in Burma as S. 503 does not empower him to issue a commission beyond British India : *5 Bom 338 and 4 I C 400, Rel. on.* [P 192 C 2]

N. Surayanarayana — *for Petitioner.*

T. L. Venkatarama Aiyer — *for Respondent.*

Public Prosecutor — *for the Crown.*

Order.—This is an application to revise an order of the District Magistrate refusing to issue a commission for the examination of a witness in Burma and the sole question for determination is whether the District Magistrate has jurisdiction to issue the commission. S. 503, Criminal P. C., does not empower the District Magistrate to issue a commission for the examination of any witness beyond British India or the territories of any Prince or Chief in India, where there is an officer representing the British Indian Government, *vide* 5 Bom 338[1] and 10 Cr L J 571,[2] and it is not disputed that Burma has ceased to be part of British India. The existence of Magistrates in Burma to whom commissions might issue if permissible under the Criminal Procedure Code has no bearing and it follows that the District Magistrate has no power to issue the commission. The revision petition therefore fails and is dismissed.

C.R.K./S.C. *Petition dismissed.*

---

1. Empress v. Moorga Chetti, (1880) 5 Bom 338 (F B).
2. Emperor v. Corporal Allen, (1909) 10 Cr L J 571=4 I C 400.

* A. I. R. 1938 Madras 193

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Pothukutchi Appa Rao and others — Appellants.

v.

Secretary of State — Respondent.

Appeals Nos. 327 and 421 of 1931, Decided on 28th September 1937, against decrees of Sub-Judge, Guntur, in O. S. Nos. 54 of 1929 and 13 of 1931.

(a) Grant—Extent of — Original grant by pre-British Government produced — Inam title deed in British rule not curtailing rights conferred by terms of original grant — Original grant is best evidence of what has been granted by Crown.

The law undoubtedly is, that after a cession of territory, the only enforcible rights in respect of lands ceded, are those subsequently conferred by the Crown by express or implied agreement, or by legislation. The British Government were not bound to recognize the revenue free grants of the previous Governments, though in practice they did recognize them. But when the original sanad is produced and the inam title deed does not curtail or limit the right conferred by its terms, the original grant remains the best evidence of what has been granted by the Crown as the result of the inam enquiry : *A I R 1915 P C 59 and A I R 1921 P C 1, Rel. on.* [P 194 C 2]

(b) Res judicata — Suit by inam holder for declaration that he was owner of whole village excluding communal porambokes—Decree in terms asked for granted but tank-beds whether communal porambokes not decided — Decree does not make title to tank-beds res judicata.

A suit was brought by an inam holder for a declaration that the whole village except certain minor inams and communal porambokes was granted to him. The decree declared the right of the inam holder to the entire village exoluding minor inams and communal porambokes. Whether tanks or tank beds were communal porambokes was a question that was neither raised nor decided :

Held that the decree did not make the title to the tank-beds res judicata. [P 195 C 1,2]

(c) Grant — Grant of village — Irrigation tanks are not communal porambokes and hence can be held to pass under grant—Tank within inam limits passed under grant.

The Government cannot be presumed in making a grant to include in it communal property, i. e. what the villagers own in common : *24 M L J 86, Rel.on.* [P 196 C 1]

Where tanks were primarily intended for irrigation purposes and were used as irrigation sources, the mere fact that the villagers sometimes used the water for other purposes, such as for drinking, for bathing or for washing cattle, does not suffice to create any rights of ownership in them. The true position in regard to irrigation tanks is that they do not belong to the community as such, the rights of irrigation, appertaining as they do, to the lands irrigated; such rights therefore as the owners of these lands possess, are in the nature of easements : *A I R 1925 Mad 139, Rel. on.* [P 196 C 1]

Such tanks not being public or communal porambokes there is nothing to prevent their passing under the wide terms of a grant. Moreover where the tank or channel is wholly within the limits of the inam, it must be held to pass under the grant. [P 196 C 2]

(d) Evidence Act (1872), S. 110 — Case under Madras Land Encroachment Act — Presumption under S. 110 does not operate—But long possession can be relied on as evidence of grant by original owner.

Section 110, no doubt, enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions, must yield to proof. Where therefore title is proved or assumed, the presumption created by S. 110 can no longer apply. Madras Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property including the beds of tanks. There is no conflict between S. 110 Evidence Act, and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner : *Case law referred.* [P 197 C 1]

(e) Grant—Tank-beds in agraharam openly cultivated by agraharamdar — Government collecting cesses but not assessment — Effect is admission of Agraharamdar's title by Government.

Certain tanks situated in an agraharam ceased to be used for purpose of irrigation and the tank-beds were openly cultivated by the Agraharamdars. The Government collected cesses, but forbore from collecting assessment :

Held that collecting cesses but forbearing to collect assessment almost amounted to an admission on Government's part of the Agraharamdar's title to the tank-beds whether the Government so intended it or not. [P 198 C 1]

*** (f) Limitation — Declaratory suit — Bare repudiation of person's title without overt act would not make incumbent on him to bring declaratory suit — Successive denials of title — Owner of title may ignore any particular denial and can base his cause of action on any fresh denial.**

There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit. A party surely has a right to elect as to when he may bring a suit for vindicating his right, when there are several or successive denials. True, a mere continuation of a prior cause of action does not give rise to a fresh right, for instance, where property is attached, the procuring of the attachment is the wrongful denial and the cause of action arises when the attachment is effected; in such a case it is wrong to hold that there has been a "continuing wrong" so as to give a fresh starting point during the whole period the attachment subsists. But from this it does not follow that an owner can never ignore an attack against his title, however casual or trivial, without his right to sue being imperilled in respect

of a subsequent invasion. It is for the plaintiff to decide at his option, on which act he chooses to found his cause of action, and when he does so, it is with reference to the particular infringement he alleges that the limitation should be reckoned : *Case law referred.* [P 198 C 2; P 199 C 1]

P. Satyanarayana Rao and S. Venugopala Rao — *for Appellants.*

Government Pleader (K. S. Krishnaswamy Iyengar)— *for Respondent.*

Appeal No. 327 of 1931

Venkatasubba Rao J.—The question raised in this appeal is whether the tank-bed lands in question are the property of the Agraharamdars (the plaintiffs) or the Government (the defendant). The suit has been filed with a view to get a declaration that the lands belong to the Agraharamdars, and to get a refund of the penal assessment, alleged to have been wrongly levied from them. The plaintiffs trace their title to a confirmatory grant in their favour of 1797, made by the then zamindar of Narasaraopet (Ex. A.) This refers to a yet earlier grant of an unknown date (not forthcoming) and the plaintiffs rely upon the recitals in Ex. A, wide and unqualified, to the effect that the whole village is granted "inclusive of the hills, channels, saline lands, donkas, tank-bed lands" within the boundaries specified. It will be seen that there is in this grant a specific mention of the tank-bed lands, which are expressly conveyed. The Agraharamdars next rely upon a conveyance of 1844, under which they acquired a portion of this agraharam from certain third parties. There again the tanks are in terms mentioned among the rights appertaining to the property conveyed. This agraharam came within the purview of the inam enquiry instituted by the Government and in 1860 it was both confirmed and enfranchised and an inam title deed was issued to the Agraharamdar (Ex. G.) What was granted and confirmed "as freehold in perpetuity" was the entire village, nothing having been excluded. In the title deed issued by the Government, it was the title of the plaintiffs' ancestors "to the agraharam village" that was acknowledged on behalf of the Governor-in-Council. In the Inam Fair Register (Ex. F.) there is a recital on which the plaintiffs strongly rely. It refers to the sanad of 1797, and goes on to say that it appears therefrom that the original grant comprised the entire village, excluding only the common village site, and certain minor inams, which had already been carved out. The plaintiffs take their stand upon these documents and ask: If the pre-British grant was unqualified and was of the entire village, inclusive of the tank beds, and that grant was duly confirmed by the Governor-in-Council, how can the Government sustain their present claim? The plaintiffs complain that the Judge in the Court below, who has negatived their claim, has misunderstood the issue to be tried and has misconceived the law to be applied.

In our opinion the learned Judge has not given due effect to the completeness of the grant evidenced by the original sanad and the inam title deed. At the inam enquiry there was an express reference, as already observed, to the comprehensiveness of the original grant, and when the proceedings culminated in the issue of the title deed, the tank-beds which had been specifically conveyed by the sanad were not excluded. What is even more significant is that certain items were particularized as having been excepted, and neither the tanks nor the tank-bed lands were among those so excluded. The law undoubtedly is that after a cession of territory, the only enforcible rights in respect of lands ceded are those subsequently conferred by the Crown by express or implied agreement, or by legislation: 42 I A 229.[1] The British Government, as observed in 40 Mad 664[2] at p. 667, were not bound to recognize the revenue free grants of the previous Governments, though in practice they did recognize them. But when the original sanad is produced and the inam title deed does not curtail or limit the right conferred by its terms, the original grant remains the best evidence of what has been granted by the Crown as result of the inam enquiry. This is the effect of the pronouncement of the Judicial Committee in 48 I A 56.[3] That case is also valuable as showing that their Lordships recognize the existence of Indian documents, where apt words occur intended to create a complete interest in land, including even the right to minerals (see page 65). "In the clearer light afforded" (to use the language of their Lordships—vide page 66)

1. Secy. of State v. Bai Raj Bai, (1915) 2 A I R P C 59=30 I C 303=42 I A 229=39 Bom 625 (P C).
2. Sam v. Ramalinga Mudaliar, (1917) 4 A I R Mad 281=34 I C 803=40 Mad 664=30 M L J 600.
3. Secy. of State v. Srinivasachariar, (1921) 8 A I R P C 1=60 I C 230=48 I A 56=44 Mad 421 (P C).

by the original grant produced here which expressly conveys the tank-beds, no inference can be drawn against the agraharamdars from the non-mention of those items in the inam title deed—more especially in view of the exclusion of certain specified items other than the tank-beds in the Inam Register. This being so, it remains to consider whether the Government have made out their claim in the face of these documents that they are the owners of the lands in question.

It is contended by the Government that there is a finding in a former suit, which constitutes the question res judicata. How the lower Court was persuaded to accept this contention is inconceivable. The agraharamdars filed the previous suit, O. S. No. 7 of 1905, for a declaration that the whole village was granted to them and not merely certain specified portions thereof, as then contended by the Government. A decree was made by Mr. Rice, the District Judge, who heard the suit upholding the agraharamdars' claim in its entirety. Though the plaint in the previous suit has not been filed, the schedule thereto containing the particulars of the property claimed has been exhibited. From that schedule, it appears that the agraharamdars claimed the entire village less certain minor inams with which we are not concerned, and communal porambokes. The decree that was passed granted to the agraharamdars all that they had asked for in the plaint. In the course of his judgment, Mr. Rice refers to the inam proceedings and says that the Inam Fair Register granted what was exactly claimed in the inam statement, neither more nor less. The formal decree that was drawn up follows the terms of this judgment and declares the right of the agraharamdars to the entire village, "exclusive of the porambokes and the minor inams not claimed at the inam settlement."

From what has been said above, it becomes clear that what were excluded by the decree were (besides the minor inams) communal porambokes alone. It further appears that to those items no claim was ever put forward, not even at the inam enquiry, by the agraharamdars. The effect of the previous decree then is to declare merely that the plaintiffs are not entitled to the communal porambokes and it does nothing more. Whether the tanks and the tank-beds were communal porambokes or not, was not a question that was raised and the decree does not profess to decide it. It is impossible to hold, as the lower Court has done, that this decree has made the title to the tank-beds res judicata.

The learned Judge ignoring the scope of the previous suit and brushing aside the express wording of the decree, seizes upon some passage in Mr. Rice's judgment—which both sides have had to confess is obscure—and infers therefrom that the plea of res judicata has been made out. The obscurity has arisen from the fact that the Government, whose duty it was to file the pleadings in the previous suit, have not done so, and strictly speaking, the plea of res judicata ought not to have been entertained at all. Before Mr. Rice, some contest seems to have been raised, in regard to the ownership of some 120 odd acres of land in the village. The Government claimed that that land was liable to be assessed and the agraharamdars asserted the contrary. At the inam enquiry this extent was apparently not taken into account in fixing the quit-rent and the Government seem to have urged that it should accordingly be deemed as comprised in the excluded poramboke. By way of answer, the agraharamdars appear to have contended that the reason for its exclusion was not that it was poramboke, but because it was then thought not worth cultivating. Mr. Rice, after accepting the agraharamdars' version, observes towards the end of his judgment: "The actual result appears to be to deprive Government of the power of assessing about 120 acres of valueless land". On this unsatisfactory and tenuous foundation the lower Court bases its finding of res judicata. It must be remembered that at that time the tanks were functioning as irrigation sources and no question of the Government's "power of assessing" could possibly have arisen in regard to them. The lower Court's treatment of this question has been perfunctory and its conclusion cannot be accepted. In this connexion we must own to some surprise at the remark made by the Judge, that every presumption should be drawn against the agraharamdars, who failed to produce the inam statement. In the course of the inam proceedings, they produced a copy of this statement, which they say has since been lost. The inam statement is a part of the Government records and the agraharamdars applied to Government, for the purpose of this suit, for copies both of the

inam statement and of the Inam Register. A copy of the Register was furnished, but the Government failed to grant a copy of the statement, presumably on the ground that they were unable to do so. How, in the circumstances, any blame attaches to the agraharamdars is incomprehensible.

The question then arises, as already stated, are the suit lands communal porambokes? This question is relevant for two purposes: first, on account of the previous judgment already referred to and secondly, because of the sound rule of construction that the Government cannot be presumed in making a grant to include in it communal property, i. e. what the villagers own in common: 24 M L J 36[4] at p. 40. That these tanks were primarily intended for irrigation purposes and were used as irrigation sources is not seriously denied. The learned Judge assumes this though he does not find so in various places in his judgment. The mere fact that the villagers sometimes used the water for other purposes, such as for drinking, for bathing, or for washing cattle, does not suffice to create any rights of ownership in them. Usually, in a village, interference with such acts is not called for until some question of title is raised, and no importance therefore attaches to such user. When the inam title deed was issued and the quit rent computed, some cultivated area was treated as wet land and there can be no doubt that the wet cultivation became possible by reason of the existence of these tanks. The true position in regard to irrigation tanks is, that they do not belong to the community as such, the rights of irrigation appertaining as they do to the lands irrigated: such rights therefore as the owners of these lands possess are in the nature of easements: 20 M L W 185.[5] It is an admitted fact here, that besides the Agraharamdars, the only proprietor that used the water for irrigation, was the karnam in respect of his minor inam. The tanks became useless as irrigation sources in 1915, owing to heavy rains and breaches and since then the Agraharamdars have been using the tank-beds as cultivable land. It is a question that does not arise here and nobody raises it, whether or not the minor inamdar's easement has become extinguished, granting that he once possessed such a right. At any rate, even by the date of the suit (and it is now seven years since it was filed) the easement had not been exercised for about fourteen years. However that be, the point is clear beyond doubt that the tanks were not public or communal tanks and therefore there was nothing to prevent their passing under the wide terms of the grant.

Some cases have been cited at the Bar relating to tanks or channels. The principle underlying those decisions seems to be this: where the tank or channel is wholly within the limits of the inam, as in the present case, it must be held to pass under the grant. The question was not considered whether or not it was communal property, but presumably it was assumed that it was not: 23 M L J 109.[6] But where from the source, lands other than those of the inamdar are also irrigated, it being the function of the Government to conserve and control works of irrigation, it would be right to presume, in the absence of an express grant, that the tank or channel was not intended to be conveyed, the reason being that it would be injurious to introduce divided responsibility and divided control, 28 Mad 539[7] and 24 M L J 36,[4] although this principle was departed from and the inamdar's right was recognized in 37 Mad 369.[8] It is sufficient to say here that judged by any test, the tanks in question passed under the grant to the plaintiffs.

This finding as to the title based upon the grant would be sufficient to dispose of the case, apart from the question of limitation which we shall presently consider: but we have been referred to acts of possession and enjoyment on the part of the Agraharamdars, as furnishing independent evidence of their title. Mr. N. Srinivasa Ayyangar for the Government Pleader broadly contends however that as against the Crown, when the question is one under the Land Encroachment Act, possession can never be relied upon as evidence of ownership. There is a fallacy

4. Narayanaswami Naidu v. Secy. of State, (1912) 24 M L J 36=14 I C 261=(1912) M W N 496.

5. Kannayiram Pillai v. Virdupatti Gins Ltd., (1925) 12 A I R Mad 139=81 I C 1021=20 M L W 185.

6. Secy. of State v. Venkataratnammah, (1914) 1 A I R Mad 482=15 I C 594=37 Mad 364n =28 M L J 109.

7. Ambalavana Pandarasannadhi v. Secy. of State, (1905) 28 Mad 533=15 M L J 251.

8. Secy. of State v. Ambalavana Pandara Sannadhi, (1914) 1 A I R Mad 552=18 I C 294= 37 Mad 369N.

underlying this argument as we shall show. S. 110 of the Evidence Act, no doubt enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions must yield to proof. Where therefore title is proved or assumed, the presumption created by S. 110 can no longer apply. Now turning to the Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property, including the beds of tanks. There is no conflict between the section of the Evidence Act and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But is there anything to prevent long possession being relied upon as evidence of a grant made by the original owner ? The very argument based on grant presupposes title in the party said to have made the grant. Therefore it is one thing to say that you cannot use the fact of possession as evidence of title, but it is quite a different thing to argue therefrom that you cannot rely upon it in support of a grant. Where there was evidence of exclusive possession for a long period of a pew annexed to a dwelling house in the parish, it was held —upon the principle that a legal origin ought to be presumed if a legal origin be possible—that the grant of a faculty ought to be presumed : (1891) A C 228.[9] That this principle extends to cases where the Government was the original owner has been established by very authoritative decisions. In 35 I A 195,[10] the Judicial Committee, after finding that the plaintiff otherwise failed to establish his title held upon the proof afforded by his long possession and enjoyment that his title was made out. Again in 19 I A 69,[11] their Lordships point out that if the question were one of limitation, the defendant was bound to fail, but if the possession was used for making out a title, there was sufficient evidence in support of it : *see also* 57 I A 125,[12] decided by the Judicial Committee and the observation of Varadachariar J. in 1936 M W N 1315[13] at p. 1326.

Now looking at the evidence in this aspect, it seems to us that there is sufficiently long possession on the part of the plaintiffs in assertion of a title, attributable to a grant in their favour. The inam title deed, as already stated, was issued to them in 1860. Since then the plaintiffs have been constantly exercising acts of ownership. There is a lease of the same year (Ex. D) executed by the agraharamdars, which shows their possession. Again in 1876 (by D.1), in 1883 and 1897 (by E. Series) they leased out various portions of the tank bunds. Further, they effected repairs to the tanks in 1887 (j), 1898 (k), and 1907 (J.1, GG and GG.1), and incurred expenses in that connexion. That they were in possession without question previous to the suit of 1905 is a fact which cannot be disputed. Indeed, the Government seems to have assumed before the decree in that case that the plaintiffs were lawfully in possession and that its own right commenced from the date of and in virtue of that decree. On 5th August 1907, the Board of Revenue passed a proceeding (Ex. 23) stating that the finding of the District Court *over-rides the general law that "porambokes in whole inam villages belong to the inamdars"* and that the latter should accordingly be prevented from leasing the tank porambokes in future. This shows beyond doubt that the inamdars were till then in possession without their right being challenged. Orders similar to this were in the years 1907 and 1908 issued by the Government, but the plaintiffs' possession was never interfered with or disturbed. One such order was that issued by the Collector on 2nd August 1908 (Ex. 23-c) to which we shall refer later, when considering the question of limitation. Then from 1915, as already observed, the tanks ceased to be useful as such and the tank-beds were openly cultivated. And what did the Government do? It started levying about the year 1920 (and went on doing so) not assessment as one might expect, but cesses as the Local Board's agent (see the evidence of D. W. 3, p. 171). The evidence on this point has been completely misread and misunderstood by the trial Judge. Numerous exhibits bearing on this have been filed, and a scrutiny of one of them, Ex. I-e, by way

9. J. E. Phillips v. J. E. Halliday, (1891) A C 228=61 L J Q B 210=64 L T 745=55 J P 741.
10. Mohammad Ali v. Secy. of State, (1908) 36 Cal 1=1 I C 182=35 I A 195=12 C W N 1095=8 C L J 486 (PC).
11. Secy. of State v. Durbijoy Singh, (1892) 19 Cal 812=19 I A 69=6 Sar 113 (P C).
12. Mahammad Mazaffaral Musavi v. Jabeda Khatun, (1930) 17 A I R P C 103=123 I C 722=57 Cal 1293=57 I A 125 (P C).
13. Subramania Desikar v. Secy. of State, (1936) M W N 1315.

of example, will show that the amounts collected were cesses and do not represent the assessment. The evidence of P. W. 6 (at pp. 146 and 148), which remains uncontradicted, proves this conclusively. The lower Court observes, almost casually, that the wet assessment was collected, which statement is clearly wrong and the learned counsel for the Government was unable to support it. Collecting the cesses and forbearing from collecting the assessment, almost amounts to an admission on the Government's part of the Agraharamdars' title, whether the Government so intended it or not. We merely refer to this and do not propose to use it against the Government. Then for the first time in 1929, the Government levied assessment and this suit was immediately brought. Thus our finding as to the title receives support, if support were necessary, from the evidence of possession and enjoyment to which we have referred.

The next question that arises is whether the lower Court's view that the suit is barred by limitation is right. There are two reliefs claimed : (i) for a declaration of the plaintiff's title and (ii) for the refund of the penal assessment levied. The amount was collected on 27th March 1929 and the suit was filed within six months from that date. How in the teeth of S. 14, Land Encroachment Act, the learned Judge has held that the suit for the refund is barred, we are unable to follow. That section expressly provides that in respect of any assessment or penalty, the cause of action arises on the date on which it is levied. Even where there has been more than one levy, it has been held that a suit for refund brought within six months of the last of the levies, (the previous levy not having been challenged) is not barred in respect of such last levy under S. 14, the question however being left open as to the limitation applicable to a suit for declaration : 16 M L W 197.[14] The question in the present case is much simpler, there having been no previous levy and there is thus not even the semblance of an excuse for holding that the suit is barred in respect of the relief for refund. It must be observed that the learned Government Pleader has not sought to justify the lower Court's decision on this point.

Then as to the relief praying for a declaration the learned Judge's view is also wrong. He seems to think that the suit ought to have been brought within six years of the Collector's order dated 2nd August 1908, Ex. 23-c, to which we have already referred. There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit. A party surely has a right to elect as to when he may bring a suit for vindicating his right, when there are several or successive denials. If a person's right is called in question, he may ignore that particular attack or challenge; but that does not mean that a fresh attack does not give rise to a fresh cause of action. There may be an ineffectual threat, a *brutum fulmen* : see the judgment of Coutts-Trotter C. J. in 47 Mad 927,[15] which a person may ignore, without his right to bring a suit in respect of a subsequent invasion being impaired. When an attachment was followed by an execution sale, it was held that there was a fresh invasion of the owner's right and that the sale gave rise to a fresh cause of action; his forbearance to sue on the first occasion did not debar him from suing, when by reason of the sale there was a greater invasion of his right: 22 M L J 108.[16] True a mere continuation of a prior cause of action does not give rise to a fresh right—for instance, where property is attached, the procuring of the attachment is the wrongful denial and the cause of action arises when the attachment is effected; in such a case it is wrong to hold that there has been a "continuing wrong" so as to give a fresh starting point during the whole period the attachment subsists: 26 Mad 410.[17] But from this it does not follow that an owner can never ignore an attack against his title however casual or trivial, without his right to sue being imperilled in respect of a subsequent invasion. There is no inconsis-

14. Secy. of State v. Hussain Sheriff Saheb, (1922) 9 A I R Mad 232=70 I C 165=16 M L W 197.

15. Koyasan Koya Haji v. Secy. of State, (1924) 11 A I R Mad 825=82 I C 414=47 Mad 927 =47 M L J 379.

16. Anantarazu v. Narayana Raju, (1913) 36 Mad 383 = 13 I C 96 = 22 M L J 108 = (1911) 2 M W N 531.

17. Rajah of Venkatagiri v. Isakpalli Subbiah, (1903) 26 Mad 410.

tency between the two cases cited above, 22 M L J 108[16] and 26 Mad 410,[17] as seems to have been assumed (with great respect) wrongly in (1914) M W N 197.[18] The facts of the last mentioned case do not appear sufficiently from the report; but if the effect of the decision is that where there are several acts the earliest of them alone furnishes the starting point, we must express our dissent from that view: *see also* 47 Mad 927[15] at p. 932, where Ramesam J. also disagrees with this opinion, though no case is particularized. It is for the plaintiff to decide at his option, on which act he chooses to found his cause of action, and when he does so, it is with reference to the particular infringement he alleges, that the limitation should be reckoned : *cf.* 58 I A 125[19] at p. 140. It is a more difficult question, what is the extent of the injury or infringement that gives rise to, what may be termed, a compulsory cause of action? In 47 Mad 927,[15] already referred to, Ramesam J. indicates that where a penal assessment has been levied, the person affected cannot be allowed to ignore the payment and rely on a later proceeding, the reason being that the levy of the assessment amounts to a virtual loss of his right. On the facts of the present case a question of this sort does not arise.

Then turning to the lower Court's judgment, it is difficult to see how 47 Mad 572[20] relied on by the Subordinate Judge, is applicable. The plaintiff there preferred objections to the exclusion of the lands in suit from the rough pattah granted to him by the Government. His objections were definitely rejected in 1905. The suit that was brought to set aside the order of rejection and to obtain a declaration of his right was not instituted until 1913. The Judicial Committee held that the claim was barred under Art. 120. In that case there was an overt act, namely the issue of the pattah and moreover the invasion of the right complained against was the order passed in 1905, which on the plaintiff's own showing furnished the starting point. In the present case, as already observed, no effect was given to the proceeding that was passed and such possession or enjoyment as the plaintiffs had was never disturbed; nor is the cause of action here based on that proceeding. The suit therefore even in respect of the relief of declaration is not barred. The appellants do not press their claim in regard to item 3. The result therefore is that the lower Court's decree, in so far as it relates to items 1 and 2, is set aside and the appeal to that extent is allowed with full costs throughout. We understand that the decree should be for the amount claimed in the plaint less Rs. 3.7.0.

Appeal No. 421 of 1931.

From the judgment just delivered by us in the connected case, it follows that this appeal also to the extent indicated there should succeed and it is accordingly so allowed with full costs throughout. Deduct from the amount claimed Rs. 3.7.0. Under S. 82, Civil P. C., we fix three months' time for compliance with the decrees.

[These appeals having been set down "to be spoken to" this day, the Court delivered the following]

Judgment. — This matter is posted before us for being spoken to, at the request of the Government Pleader. He says in his letter that the terms of our injunction may appear too wide in view of the recent amendment of the Madras Estates Land Act. Our judgment proceeds upon the footing that the suit lands are non-communal property; apart from that, we could not have intended by our judgment to deal with matters which were not raised in the pleadings or with the supposed rights that came into existence subsequent to the suit.

C.R.K./D.S. *Appeals partly allowed.*

---

18. Thirumala Rao v. K. Durgi Shettethi, (1914) 1 A I R Mad 429=22 I C 883=(1914) M W N 197.
19. Gobinda Narayan Singh v. Sham Lal Singh, (1931) 18 A I R P C 89=131 I C 753=58 Cal 1187=58 I A 125 (P C).
20. Ambu Nayar v. Secy. of State, (1924) 11 A I R P C 150=80 I C 885=51 I A 257=47 Mad 572 (P C).

A. I. R. 1938 Madras 199

LEACH C. J. AND VARADACHARIAR J.

H. Venkata Sastri and Sons and others — Appellants.

v.

Shroff Balakrishna Rao and another — Respondents.

City Civil Court Appeals Nos. 45 to 51 of 1935, Decided on 31st August 1937, against decrees of City Civil Judge, Madras, in O. S. Nos. 586 to 588 and 592, 597, 598 and 600 of 1933.

(a) Trust—Breach of—Debtor and Creditor —Composition — Debtor executing composition deed in favour of one creditor who

agreed to composition—Such creditor receiving amount for distribution becomes trustee—Payment by such trustee to such creditors only who accept composition when funds are not sufficient to satisfy all creditors does not amount to breach of trust—Trustee commits breach by paying to himself whole balance when he knows that one creditor is willing to accept composition.

Where a majority of the creditors agree to accept a composition of some annas in a rupee and a composition deed is executed by the debtor in favour of one of the creditors, and such creditor receives the amount for the distribution, he becomes a trustee in respect of such amount. If such a trustee distributes all the amount he has received, which is not sufficient to satisfy all the creditors, among such creditors only who accept the composition while the rest of the creditors have knowledge of such composition he does not commit a breach of trust. But he commits a breach of trust if he pays to himself the balance of the funds remaining in his hands when he has knowledge that one more creditor is willing to accept the composition and the funds are not sufficient to pay off such a creditor, for it is his duty to share the balance rateably with such a creditor. [P 201 C 2; P 202 C 1]

(b) Debtor and Creditor—Composition deed—Every creditor need not execute deed—He can signify his acquiescence by other means.

In the case of a deed of trust for the benefit of the creditors, it is not absolutely necessary that every creditor should execute the deed. A creditor can signify his acquiescence in it by other means. Unless he expresses in some manner his willingness to accept the deed he cannot claim any benefit under the deed. He cannot stand idly by: *(1841) 1 Dr & War 227 and (1858) 24 Beav 642, Rel. on.* [P 201 C 2]

V. Radhakrishnayya and L. Krishna Das — *for Appellants.*

B. Somayya and S. Balakrishna Rao — *for Respondents.*

Appeal No. 45 of 1935

Leach C. J.—The appellant was the plaintiff in the Court below. The suit was one to recover a sum of Rs. 1257-2-0 alleged to be due to the appellant under a deed of composition entered into by respondent 2 with his creditors. Respondent 1 was sued as the trustee under the deed. In 1930 respondent 2 who at all material times was a merchant carrying on business in Madras became financially involved and by the month of July 1930, he owed his creditors an aggregate sum of over Rs. 88,000. There were 26 creditors altogether, 14 of them being resident in Madras and 12 resident in Mysore. At a meeting of the Madras creditors, it was agreed that they should accept a composition of four annas in the rupee. A deed was drawn up on this basis and executed by respondent 2 in favour of respondent 1 as trustee for the creditors. Respondent 1 was himself a creditor for a sum of over Rs. 15,000. The total amount required to pay a composition of four annas in the rupee was about Rs. 22,000. Respondent 2 had not got the cash, but on 2nd August 1930 certain property owned by him was sold and the proceeds, Rupees 12,250, handed over to respondent 1, as part of the Rs. 22,000 which respondent 2 was due to pay to him under the deed. Later that year, two further sums, one of Rs. 1500 and the other of Rs. 1750 were paid to respondent 1 by respondent 2, making a total payment to him of Rupees 15,500. The Madras creditors in due course signed the deed, but the Mysore creditors were not so ready to accept it. It is clear from the evidence that they were fully aware of the proposal by the month of October 1930, but only two of them agreed to the arrangement then. These two signed the deed and in due course received payments of four annas in the rupee on the amounts of their debts. The Madras creditors also received the amounts due to them under the deed of composition. Respondent 1 admits that the appellant signified his acceptance of the deed in a letter dated 24th December 1930. By that time, the Madras creditors, apart from respondent 1, had all been paid what was due to them under the deed, as had two of the Mysore creditors. Respondent 1 had in his hands on 24th December 1930, a sum of Rs. 3804-4-6, which was only sufficient to pay him three annas and nine pies on the amount due to him. He did not allocate this money to his own debt then, but kept it in a suspense account where it remained until the month of November 1931, when he transferred it to himself. When he did this, he had notice of the appellant's acceptance of the composition and had that notice for nearly 12 months. As respondent 2 did not pay the balance of the Rs. 22,000 to him he was not able to make any further payments to the creditors. Having allocated Rs. 3804-4-6 to himself there was nothing to pay to any of them. The appellant then launched a suit against respondent 1 as trustee and against respondent 2 as the principal debtor to recover the sum of Rs. 1257-2-0, representing a quarter of the total amount due to him by respondent 2. He also claimed interest on this amount. The suit however failed. I might mention here that the other nine Mysore creditors who remained unpaid, filed similar suits in the City Civil Court to recover their proportions. They met

with the same fate as the appellant and have filed appeals which have been heard together with this appeal. There are however points of difference between this case and the other cases and it will be convenient to deal with them in separate judgments.

In the trial Court, it was contended by the appellant that respondent 2 had in fact paid to respondent 1 the whole of the Rs. 22,000. This plea was based on an allegation that respondent 2 had handed over to respondent 1 two promissory notes for sums of Rs. 2000 and Rs. 5000 respectively. This plea has been maintained before us. The learned trial Judge however held that these promissory notes were never handed over to respondent 1 and that all that respondent 1 received was the Rs. 15,500 which I have mentioned. We see no reason to disagree with this finding. The learned Judge dismissed the suit as against respondent 1 on the following grounds : (1) The Mysore creditors of whom the appellant was one, had not accepted the deed of composition ; (2) the deed was an incomplete contract and gave rise to no rights and imposed no liabilities; (3) respondent 1 was not a trustee and that he had made payments to the Madras creditors and to the two Mysore creditors as the agent of respondent 2 ; and (4) he was under no duty to pay the creditors rateably and was therefore entitled to appropriate the balance of Rs. 3804.4.6, towards his own debt. The learned Judge accordingly dismissed the suit as against respondent 1 but he decreed it as prayed against respondent 2.

The learned Judge erred in treating respondent 1 merely as an agent of respondent 2. A deed of composition was entered into by a majority of the creditors. This deed was signed by the respondents and under it respondent 1 received Rupees 15,500 for distribution among the creditors. Respondent 1 was therefore clearly a trustee in respect of this sum. It must be remembered however that the deed was entered into, on the understanding that respondent 2 would pay to respondent 1 sufficient for the payment of a composition of four annas in the rupee to all the creditors. Respondent 1 paid the Madras creditors and the two Mysore creditors when they applied for the moneys due to them under the deed and there can be no doubt that he hoped that at a later stage the other creditors would come in and that he would be put in funds to pay them the amounts due to them. It became apparent in 1931 that respondent 2 was not in a position to make any more payments and it was then that he allocated the Rupees 3804.4.6 to his own debt. We do not consider that there was any breach of trust on the part of respondent 1 in making the payments to the Madras creditors and to the two Mysore creditors. These payments were all made before the appellant or the plaintiffs in the other suits had signified their intention of accepting the composition. The other plaintiffs did not in fact signify their willingness to accept the composition until a few months before the suit was filed in July 1933. That was long after the payments had been made. In (1841) 1 Dr & War 227=58 R R 253[1] it was held that in the case of a deed of trust for the benefit of creditors it is not absolutely necessary that every creditor should execute the deed. A creditor could signify his acquiescence in it by other means. The Lord Chancellor (Sir Edward Sagden, afterwards Lord St. Leonards) observed :

> The principle upon which this Court acts in cases like the present, is no longer in dispute . . . . It was argued for the defendants that Mr. Field did not execute the deed at the proper time, and that when, in point of fact, he did execute, he did so without the assent or authority of any person qualified to permit him. But it is not absolutely necessary that the creditor should execute the deed ; if he had assented to it, if he had acquiesced in it, or acted under its provisions, and complied with its terms, and the other side expressed no dissatisfaction, the settled law of the Courts is that he is entitled to its benefits. The mere fact of his signature is not actually required.

But there must be actual assent to the deed. Unless the creditor in some manner expresses his willingness to accept it, he cannot claim any benefit under it. This was emphasized in (1858) 24 Beav 642.[2] He cannot stand idly by, but if he does some act which amounts to acquiescence, it is sufficient. The position here is that all the creditors who had assented to the deed by November 1930, were paid what was due to them under it and we consider that as the other creditors had not signified their intention of coming in, although they were aware of the arrangement, respondent 1 was in the circumstances of the case

1. Field v. Lord Donoughmore, (1841) 1 Dr & War 227=58 R R 253.
2. Biron v. Mount, (1858) 24 Beav 642 = 27 L J Ch 191=4 Jur (N S) 43.

justified in paying out to those who had signified their assent. Therefore we agree that so far as the payments to the Madras creditors and to the two Mysore creditors are concerned, there was no breach of trust on the part of respondent 1.

But the case against him does not rest there. It is admitted that he paid himself Rs. 3804.4.6 after he had notice of the appellant's willingness to accept the composition and he paid himself this sum at a time when he knew that there would be no further payments to him by respondent 2 in order to carry out the terms of the composition deed in their entirety. In these circumstances it seems to us that respondent 1 was guilty of a breach of trust so far as the appellant is concerned. He had no right, knowing that there was another creditor willing to accept the composition, to pay himself the balance of the funds which remained in his hands. As a trustee, his duty was to share that balance rateably with the appellant. It was not a case of acting without notice of the appellant's claim. He had full notice of that claim. The appellant is therefore entitled to a decree against respondent 1 for a proportion of the sum of Rs. 3804.4.6. It is agreed that on this basis, the appellant will be entitled to recover from respondent 1 Rs. 920. The appeal will be allowed as against respondent 1 and the decree of the trial Court varied by substituting as against him a decree in favour of the appellant for Rs. 920 with interest at 6 per cent. till date of payment. As the appeal only succeeds in part, we think the parties should bear their own costs in this Court. The appellant will be entitled to proportionate costs in the trial Court.

Nos. 46 to 51 of 1935 : The judgment in these appeals must be read in conjunction with the judgment which we have delivered in C. C. C. A. No. 45 of 1935. These cases were tried together in the Court below and the appeals have been heard together with C. C. C. A. No. 45 of 1935. The facts differ slightly from the facts of that appeal. The appellants in these appeals did not signify their acceptance of the deed of composition until after the trustee had distributed the whole of the money received by him from respondent 2 under the deed of composition. Therefore the appellants have no case against respondent 1, and the appeals must be dismissed with costs in favour of respondent 1.

C.R.K./S.C. *Order accordingly.*

A. I. R. 1938 Madras 202

VENKATASUBBA RAO AND NEWSAM JJ.

Kodoth Ambu Nair and others — Appellants.

v.

Utha Amma and others — Respondents.

Appeal No. 578 of 1930, Decided on 30th July 1937, against decree of Sub-Judge (Addl.), South Kanara, in O. S. No. 30 of 1936.

(a) Malabar Law—Tavazhi—Tavazhi consisting of female and descendants in female line as subdivision of tarwad is legal entity and can hold property as distinct unit.

A tavazhi consisting of a female and her descendants in the female line as a sub-division of tarwad is a legal entity capable of holding properties as a distinct unit and therefore individual members of tavazhi holding properties in their own name can validly relinquish the properties in favour of the tavazhi: *A I R 1928 Mad 870, Rel. on.* [P 204 C 1]

(b) Registration Act (1908), S. 17 (2) (vi)—Unregistered compromise decree under old provisions referring to conveyance of property is admissible in evidence to prove completed conveyance.

Under the old provisions of S. 17 (2) (vi) an unregistered compromise decree which refers to an out and out conveyance of property is admissible in evidence to prove the completed conveyance of that property and not for a limited purpose of proving only an agreement to convey : *1919 P C 79, Expl.; A I R 1920 Mad 242 and A I R 1935 Mad 232, Rel. on.* [P 204 C 2]

T. R. Venkatarama Sastry, C. V. Mahadeva Iyer and C. V. Harihara Iyer— *for Appellants.*

B. Sitarama Rao and P. Govinda Menon — *for Respondents.*

Venkatasubba Rao J. — We think it unnecessary to restate the facts of this case in any detail, as they have been fully set out in the judgment under appeal. The suit has been filed by the karnavan of the Kodoth tarwad, said to be a well-known and wealthy tarwad in South Kanara District. The object of the suit was to have it declared that the acquisitions made by four individuals, Kunhi Kanna Nair, Kunhi Kora Nair, Pathali Kanna Nair and Ukkoman Nair belonged to the entire tarwad, of which the plaintiff is the karnavan. This tarwad consisted of three tavazhies and the four persons named above belonged to the tavazhi known as

Pattinhara Veddu. The lower Court has held that it is unnecessary to decide whether the ownership of the properties claimed originally vested in the four individuals or in their tavazhi, for, according to the learned Judge, granting that at their inceptions the acquisitions had been made for the benefit of the four members, their interest was subsequently validly conveyed to the entire tavazhi. The plaintiff's claim that the properties should be deemed to have been acquired for the benefit of the tarwad was negatived by the lower Court. This finding coupled with its other conclusion already referred to, namely that the tavazhi became the ultimate owner of the properties in question, led to the dismissal of the suit.

As we substantially agree both with the conclusions of the learned Judge and his reasons in support thereof we propose to deal with the appeal very briefly. It is common ground that although the suit relates to several acquisitions, the most important of them were those made about the years 1878 and 1880; it was with the income derived from these acquisitions, that the other properties in the suit were acquired. The question therefore to be decided is for whose benefit or in what circumstances were the acquisitions of 1878 and 1880 made? Mr. Venkatarama Sastri for the appellants takes his stand on the finding of the lower Court, that the tarwad as a whole was possessed of considerable property, whereas the tavazhi in question was not shown to have had separate funds worth the name of its own. This being so, he contends that it should be assumed that the acquisitions made by the members of this tavazhi must have been made with the aid of the funds belonging to the tarwad. In addition, he relies on the circumstance that the person, who in the crucial years had the control of the tarwad property, was its karnavan Ambu Nair, who also happened to be the senior most member of the tavazhi in question. His contention is that Ambu Nair, with a view to benefit his own tavazhi at the expense of the main tarwad, acquired properties in the names of the junior members of the branch, thus defrauding the tarwad, whose interests it was his duty to safeguard. As we have said, we do not wish to repeat the arguments of the lower Court, but it seems to us that this contention of the learned counsel ought not to be allowed to prevail. Ambu Nair, the person already referred to, was the karnavan from 1873 to 1881. His successor was one Kora Nair, who was the karnavan for 20 years (1881 to 1901) and he was in turn succeeded by Kamaran Nair, whose karnavanship extended over 10 years (1901 to 1911). What is most significant is that neither of these two last-mentioned karnavan belonged to the Pattinhara tavazhi and yet they took no steps whatever to challenge the acquisitions in question during the three decades they were in office. Of the four individuals referred to above, Kunhi Kannan Nair died in 1903 and the other three either in 1923 or in 1924. The plaintiff, who likewise belonged to a different tavazhi, became the karnavan in 1911 and the transactions in question were not challenged till all the four members had died. In 1924, after the death of the last survivor, there were mutation proceedings and it was then for the first time that the plaintiff chose to challenge the transactions. Even then the case he put forward was not that the acquisitions were made on behalf of the tarwad, but that on the death of the four members who made the acquisitions, the properties lapsed to the tarwad under the Marumakathayam law. Further, in 1923, there was a suit filed, the parties to which were the members of the Pattinhara tavazhi and the question was there raised, were the properties the acquisitions of the individual members or did they belong to the tavazhi as a whole? That suit ended in a compromise which declared that the properties belonged to the tavazhi; in other words, there was a relinquishment in virtue of that compromise of the rights, if any, of the individual members. It is incredible that the other tavazhies were not aware of this proceeding, and if the properties did in fact belong to the tarwad as is now suggested, it is difficult to believe that no claim to that effect would then have been put forward. What then is the natural inference from this long and uniform conduct? The several karnavans that succeeded Ambu Nair acquiesced in the properties being treated as not belonging to the tarwad. Is it proper to allow the plaintiff to re-open the transactions which were acquiesced in by his predecessors and which he himself did not choose to impeach till all the persons connected with the acquisitions had died and all the evidence had disappeared? We therefore agreeing with the lower Court hold that his acquisitions were not

made on behalf of or for the benefit of the tarwad.

It is not contended for the appellants that if the ownership vested in the four individual members, the properties would on their death lapse to the tarwad and not to the tavazhi. That this would be the correct position in law, is not disputed. But the question is granting that the properties originally belonged to the individual members, did or did they not become, by virtue of the compromise, the properties of the tavazhi? In the lower Court, it was strenuously argued and it was feebly suggested here that a tavazhi as a legal entity can have no existence and can acquire no properties as such. We agree with the learned Subordinate Judge that this contention is untenable. In 51 Mad 574,[1] it has been held that a tavazhi consisting of a female and her descendants in the female line as a sub-division of a tarwad is a legal entity, capable of holding properties as a distinct unit. That the properties could be relinquished in favour of the tavazhi in question, can therefore admit of no doubt. The question then remains was there a valid relinquishment in favour of the tavazhi, granting that the properties did in fact belong to the individual members in whose names the acquisitions had been made? The suit which ended in the compromise to which we have referred, did not embrace all the properties in dispute and if the amended provision now in force of the Registration Act applies, there can be no question that the compromise decree not having been registered cannot affect such of the properties as were extraneous to the suit. But Mr. Venkatarama Sastri contends that even under the old provision, the compromise decree could not be received in evidence to show a completed transfer. In other words, he argues that the effect of the pronouncement of the Judicial Committee in 46 I A 240=47 Cal 485[2] is that the compromise decree could be used as evidence to prove the agreement to convey and not the completed conveyance. The next step in his argument is that in the present case the agreement, which alone was proved, has not been followed by an out and out relinquishment. This argument proceeds upon an entire misreading of the Privy Council decision. Their Lordships observe :

> It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents (p. 246).

Then they go on to say, referring to the word "decree" in S. 17 (2) (vi), Registration Act :

> There is therefore no reason why a limit should be imposed upon the meaning of the word so as to confine it to the operative portion only of the decree (p. 247).

These observations make it perfectly clear that an unregistered decree could under the old provision be received in evidence of its "contents" there being no suggestion whatever, that although the decree refers to an out and out conveyance, it can be used for a limited purpose only, that of proving an agreement to convey. This is also the effect of 43 Mad 688[3] and 68 M L J 41,[4] which have considered the Privy Council decision. We therefore agreeing with the lower Court hold that there was a valid relinquishment in favour of the tavazhi of such rights as the members possessed and that the doctrine of lapse contended for can have no application. We have now disposed of the properties covered by Schs. A to C. As to the property in Sch. D, the lower Court has disallowed the defendants' claim to improvements, and the correctness of this conclusion has not been attacked by the respondents. The lower Court has however refused to grant a declaration in respect of this property in favour of the plaintiff on the ground that the tarwad's title had never been questioned previous to the suit. We think in the circumstances, the lower Court ought to have granted a declaration in respect of the Sch. D property, and Mr. Sitarama Rao, the respondents' learned counsel, does not dispute this.

In the result, the lower Court's decree dismissing the suit in regard to the properties in Schs. A to C is confirmed. As regards the Sch. D property, we grant a declaration in favour of the appellants and to that extent the lower Court's decree is varied. In view of this modification of the decree, we direct the appellants to pay

1. Moitiyan Kutti v. Puthiapurayil Mammali, (1928) 15 A I R Mad 870 = 110 I C 480 = 51 Mad 574=55 M L J 208.
2. Hementha Kumari v. Midnapur Zamindari Co., (1919) 6 A I R P C 79 = 53 I C 534=46 I A 240=47 Cal 485 (P C).
3. Poovvanayi Ayissa v. Kundron Chokru, (1920) 7 A I R Mad 242=58 I C 554=43 Mad 688= 39 M L J 77 (F B).
4. Govidaswami Mudaliar v. Rasu Mudaliar, (1935) 22 A I R Mad 232 = 156 I C 791 = 68 Mad 781=68 M L J 41.

only three-fourths of the respondents' costs of the appeal. The lower Court's order as to costs will stand.

C.R.K./S.C. *Decree modified.*

---

* A. I. R. 1938 Madras 205

HORWILL J.

Muhammad Mohideen Nachiar and others — Petitioners.

v.

Muhammad Naina Maracair and others — Respondents.

Civil Revn. Petn. No. 902 of 1937, Decided on 7th September 1937, from order of Dist. Court, South Arcot, D/- 1st May 1937.

(a) Civil P. C. (1908), Sch. 2, Para. 18—Provisions are mandatory—Petition for stay filed after three years from suit and at instance of Court—Provisions of Para. 18 are not complied with.

The wording of Para. 18, Sch. 2 as well as of S. 22, is clearly mandatory. It is clearly beyond the powers of a Court to treat some laws of the Legislature as being less binding on them than others. [P 205 C 2; P 206 C 1]

Where therefore the petition for stay is filed after three years from the filing of the suit, and that too at the instance of the Court and after the issues are framed, the provisions of Para. 18, Sch. 2, are not complied with : *A I R 1925 Lah 175 and A I R 1925 Lah 322, Rel. on.* [P 206 C 1]

(b) Civil P. C. (1908), Sch. 2, Para. 18—Agreement to arbitrate.

An agreement to arbitrate does not by itself operate as a stay of suit. [P 206 C 1]

*** (c) Civil P. C. (1908), Sch. 2, para. 18—Stay of suit—Stay should not be "sine die"—Court must exercise its control over arbitration proceedings — Court should see that delay is avoided.**

Where a Court adjourns a case under Para. 18, Sch. 2, the case should not be adjourned "sine die". The Court ought not to renounce its powers and duties in disposing of a suit, and it is bound to exercise as much control as it can over the proceeding before the arbitrator. It is the duty of the Court to see that the parties do not delay the disposal of the arbitration proceedings and to see that as far as possible they prosecute those proceedings. [P 206 C 2]

S. T. Srinivasagopalachariar and T. D. Srinivasachariar — *for Petitioners.*

K. S. Krishnaswamy Iyengar and S. K. Ahmed Meeran — *for Respondents.*

Order.—The defendants in their written statement in this suit raised various defences and one of them was that the plaintiffs had agreed to submit their case to arbitration. Various issues were framed, one of which was whether the Court had jurisdiction. That issue and another were heard nearly three years later; and on the last day of arguments on these issues the Court drew the attention of the vakil for the defendants to the fact that he should, under Para. 18, Sch. 2, Civil P. C., have put in an application for a stay. The defendants' vakil acted on this and filed a petition; but even then, the petition did not contain some of the necessary elements and it had to be amended. Orders were then passed granting stay of the suit to permit the parties having recourse to arbitration. In the first instance, a stay for six months was granted and later the suit was adjourned sine die. An appeal was filed to the District Court, which upheld the orders of the Subordinate Judge. In revision it is urged that the Subordinate Judge acted illegally in granting stay at such a late stage of the proceedings; for the provision of Para. 18, Sch. 2, like those of S. 22, Civil P. C., requires an application at the earliest possible opportunity or at or before the framing of issues if stay is to be granted.

The Courts below seem to be of opinion that this objection of the plaintiffs was a highly technical one and one that should not be allowed to prevail. Certain cases were quoted before them; but they came to the conclusion that although there was no ambiguity in the language of Para. 18, Sch. 2, yet it did not appear probable that Para. 18 intended to lay down any rigid rule. Reference was made to 46 Cal 1041,[1] where it was only in the High Court in appeal that an objection was raised that no application for stay had been put in. In that case, not only had one side failed to put in an application for stay, but the other side had failed to take any objection to the proceedings on that ground; and so the Calcutta High Court thought that the best procedure to adopt was to remand the suit to the stage of framing issues, so that the trial Court could consider the merits of an application for stay. I do not think there is anything in this case which suggests that the learned Judges of the Calcutta High Court who heard that appeal thought that the provisions of Para. 18, Sch. 2 were not mandatory. The wording of Para. 18, as well as of S. 22, Civil P. C., is clearly mandatory and if any authority were

1. Dinabandhu Jana v. Durga Prasad Jana, (1919) 6 A I R Cal 479=51 I C 80=28 C W N 716=46 Cal 1041=29 C L J 399.

needed for that position, it is found in A I R 1925 Lah 175[2] and A I R 1925 Lah 322.[3] The suit was filed in August 1933 and issues were framed on 5th December 1933. The petition for stay, far from being filed at the earliest opportunity was put in only at the instance of the Court on 11th September 1936. It cannot therefore be said that the provisions of Para. 18, Sch. 2 were complied with; and I think the lower Courts were wrong in treating the provisions of this paragraph so lightly. It is clearly beyond the powers of a Court to treat some laws of the Legislature as being less binding on them than others. It is however argued that although the defendants did not put in a regular petition for stay, Para. 6 of the written statement is tantamount to an application for stay. Paragraph 6 runs as follows :

> This defendant submits that the suit is barred by article 14 of the agreement of partnership, whereby all the parties are bound to appoint arbitrators in accordance with Art. 119, Civil P. C., in force at Padang for the purpose of settling the accounts and distributing the shares. This defendant specifically called upon the plaintiffs to act in accordance with the said provision and not to rush to Court with a suit for accounts. The said clause is further evidence of the intention of the parties to be bound only by the authority and jurisdiction of the Courts at Padang.

Clearly, this paragraph was intended to be one of the many defences set up by the defendants to the plaintiff's suit and the final prayer was that the suit should be dismissed. Para. 6 cannot therefore in itself be interpreted as an application for stay. It is however possible to argue that if this defence were accepted, the Court could not go on with the suit, but would be obliged, if it thought that the matter should be referred to arbitration because the parties had contracted to do so, to stay the suit; and that although no application for stay was specifically made, yet the consequence of this defence was that the suit should be stayed. This argument was one that ought not, I think, to be accepted; for, upon the filing of a suit, the power of the parties to refer the matter to arbitration ends; and as Para. 18 of Sch. 2 itself shows an agreement to arbitrate does not operate as a stay of suit. Nevertheless, sitting in revision, I am reluctant to interfere, because substantial justice has been done by the Courts. It seems eminently desirable that as the parties had contracted to arbitrate they should be compelled to do so. The plaintiffs filed no reply to the written statement of the defendants; and until the situation had been cleared by arguments on the preliminary issues and by a decision by the Court on those points, it was not easy to say what the next step in the proceedings for the disposal of the dispute between the parties was to be.

I cannot however agree with the learned Subordinate Judge that the proper order to pass is 'adjourned sine die'. Clearly the Court ought not to renounce its powers and its duties in the disposing of the suit; and it is bound to exercise as much control as it can over the proceedings before the arbitrator. It is the duty of the Court to see that the parties do not delay the disposal of the arbitration proceedings and to see that as far as possible they prosecute those proceedings. I would therefore modify the order of the Subordinate Judge by granting an adjournment for one year from the last order of adjournment instead of sine die. It will then be open to the Subordinate Judge to adjourn the case to such further date as he thinks necessary, if the parties have done all that they could to further the disposal of their dispute before the arbitration tribunal. Although the Courts below have not done any injustice to the parties, they have passed an order which is technically wrong. I therefore order both sides to bear their own costs in regard to this petition for stay in all three Courts.

C.R.K./B.D. *Order modified.*

2. Beharilal Kanhaya Lal v. Official Receiver, Labore, (1925) 12 A I R Lah 175=78 I C 608.

3. Shiv Datt v. Moti Ram, (1925) 12 A I R Lah 322=88 I C 531=26 P L R 465.

A. I. R 1938 Madras 206

PANDRANG RAO AND VENKATARAMANA RAO JJ.

M. & S. M. Railway Co., Ltd. — Appellants.

v.

Garimella Satyanarayana and Sons and others — Respondents.

Appeals Nos. 347 and 348 of 1931 and Civil Revn. Petns. Nos. 463 to 471 of 1931, Decided on 5th August 1937, against decrees of Sub-Judge, Narasapur, D/. 30th June 1930.

Railways Act (1890), S. 72 — Burden of proof—Risk note form B—Liability of railway—Non-delivery of entire goods—Railway

must account for dealing with goods during all period while under its control—Evidence adduced should be such as would avoid all adverse inference.

Under the risk note Form B no doubt the Railway Company is freed from all responsibility for any loss of the consignment arising from any cause whatever except upon proof that such loss arose from the misconduct of the railway administration's servants. But under the proviso to the risk note, in the case of non-delivery of the whole consignment where such non-delivery is not due to accidents to trains or to fire, the railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in their possession or control and to give evidence in respect thereof and if misconduct on the part of the railway administration cannot be inferred from such evidence then only the burden of proof is shifted to the consignor. The evidence must be all the evidence which the railway administration considers desirable to avoid a fair inference of misconduct keeping in mind the provisions of S. 114, Evidence Act. Hence a Railway Company will be liable if they fail to account as to how the consignment was dealt with or from the evidence adduced in regard thereto an inference of misconduct can be presumed or if misconduct is proved : *A I R 1937 P C 152, Rel. on. [P 208 C 1, 2]

P. Somasundaram — *for Appellants.*

G. Lakshmanna and G. Chandrasekara Sastry — *for Respondents.*

Appeals Nos. 347 and 348 of 1931.

Venkataramana Rao J. — These two appeals arise out of two suits brought for the recovery of damages for non-delivery of the goods entrusted to defendant 1, the M. & S. M. Railway Company, through defendant 2, their out-agency contractor. Both the receipt of the goods and non-delivery are admitted. The Railway Company sought to escape from their obligation by relying upon the risk note form B in pursuance of which the goods were entrusted to them for carriage. They pleaded that the goods were lost by fire while they were kept in a shed near the Nidadavole Railway Station and therefore they were not guilty of any misconduct and that unless misconduct is proved against them they cannot be rendered liable. The learned Subordinate Judge found that the Railway Company failed to prove that the goods were lost by fire. He came to the said conclusion on a consideration of both the oral and documentary evidence in the case. Mr. Somasundaram sought to canvass that finding before us. We have gone through the said evidence and we see no reason to disturb the said finding. Only three witnesses were examined in support of the alleged loss by fire. They are D. W. 2, D. W. 3 and D. W. 5. The specific case sought to be proved through the said oral testimony is that the goods were sent from Palacole where they were entrusted to defendant 2's agent on or about 23rd January 1928 to Nidadavolu for entrainment and for three days they were taken to the railway station but on account of the non-availability of wagons, they could not be booked and they were brought back to the shed and kept there till the night of 16th February 1928 on which night there was a fire and the goods were lost. D. W. 5 does not know anything personally about the storage of the goods. D. W. 2 is the booking clerk of defendant 2. He is unable to state on what dates the goods were taken to the railway station and brought back. All that he says in his evidence is that the goods were put in the shed but he does not say when. He does not further say that the goods were continued to be kept there until 6th February and were in the shed when the fire occurred. D. W. 3 is a night watchman who is said to have watched the shed on the night when the fire occurred but he does not know specifically about the existence of these goods in the shed that night. He says that there is a second watchman whose business was to check the bundles but that second watchman has not been called and that there is no evidence that these goods were checked on the 6th and were found to be existing there before the fire occurred. There is no documentary evidence produced in support of the fact that these goods were there that night. It is alleged that the registers which might have thrown light on this fact were destroyed, but the evidence shows that the registers were being kept in a box and there is nothing to show that the box itself was destroyed. No doubt, Mr. Somasundaram relied upon a telegram alleged to have been sent immediately after the occurrence and a report made by defendant 2 to defendant 1 to the effect that 35 cloth bundles were destroyed by fire. It is interested testimony on which no Court could act.

The learned Subordinate Judge taking all these circumstances into consideration came to the conclusion that the Railway Company failed to discharge the obligation which rested on them to prove that the goods were destroyed by fire. Mr. Somasundaram contended that the second wit-

ness having stated that the goods were taken back from the railway station to the shed, there is a presumption that the goods must have continued to remain in the shed. We do not think that there is any such presumption in law. There is evidence in the case that the shed was not kept locked or maintained in such a manner as to lead to the inference that the goods could not be lost except by fire. The way in which the shed was maintained may also lead to the conclusion that the goods might have been stolen. So under such circumstances we cannot say that the inference drawn by the lower Court is wrong.

The question now is, the Railway Company having failed to prove that the goods were lost by fire could they escape their obligation to compensate the plaintiffs for loss for non-delivery. Mr. Somasundaram contends that all they have to do is to allege some loss and adduce some evidence and it is incumbent upon the plaintiffs to allege and prove misconduct and for this he relies on the risk note. Under the risk note, no doubt, the Railway Company is freed from all responsibility for any loss of the consignment arising from any cause whatever except upon proof that such loss arose from the misconduct of the railway administration's servants. But there is a proviso which has been introduced recently and which considerably modifies the obligations of the Railway Company. Under the proviso, in the case of non-delivery of the whole consignment, where such non-delivery is not due to accidents to trains or to fire, the railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in their possession or control and to give evidence in respect thereof and if misconduct on the part of the railway administration cannot be inferred from such evidence, then only the burden of proof is shifted to the consignor.

A similar risk note form B was the subject of interpretation before their Lordships of the Judicial Committee in a recent case in A I R 1937 P C 152.[1] Their Lordships clearly lay down there that there is a distinct obligation on the part of the Railway Company to give full disclosure of how the goods have been dealt with by giving necessary evidence and explain what that necessary evidence should be. The evidence according to their Lordships must be all the evidence which the railway administration considers desirable to avoid a fair inference of misconduct keeping in mind the provisions of S. 114, Evidence Act. In view of this recent pronouncement, it is clear that a railway company will be liable if they fail to account as to how the consignment was dealt with or from the evidence adduced in regard thereto an inference of misconduct can be presumed or if misconduct is proved. The loss by fire in this case has been relied upon by the Railway Company for two reasons: (1) to escape the obligation imposed upon them by proviso and (2) to show how the consignment was dealt with. Now the finding is that the Railway Company has failed to satisfactorily establish that the goods were lost by fire. From this it follows that they have failed to account as to how they dealt with the goods during the time they were in their possession and control, and as observed by their Lordships in the said case, if the administration fails to take the opportunity to satisfy the demands of the consignor to fulfil their obligation of disclosure so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure. Therefore having failed to account for the loss of the goods and for the non-delivery thereof, the Railway Company is liable.

The decision of the lower Court awarding damages is therefore correct. Mr. Somasundaram objects to the award of interest from the date when the loss is alleged to have occurred. We think that the lower Court is not right in giving interest on damages from the date of the alleged loss. We therefore modify the decree of the lower Court by awarding interest at 6% on the amount of damages awarded from the date of the plaint. In other respects the decrees of the lower Court are confirmed and the appeals are dismissed with costs. With regard to the memorandum of objections in Appeal No. 347/31, we think Mr. Lakshmanna is right in his contention in regard to the costs allowed to defendant 2 and we allow the appeal in regard thereto as we think that the award of costs is not justified.

C. R. Ps. Nos. 463 to 471 of 1931.

Following our judgment in Appeals Nos. 347 and 348 of 1931, we dismiss

1. Surat Cotton Spinning and Weaving Mills, Ltd. v. Secy. of State, (1937) 24 A I R P C 152=168 I C 1=64 I A 176=I L R (1937) Bom 375=21 S L R 326 (P C).

these revision petitions with costs and fix the advocate's fee at Rs. 10 in each except in C. R. Ps. Nos. 465 and 468, where we fix it at Rs. 20 in each.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1938 Madras 209

VARADACHARIAR AND BURN JJ.

A. K. T. K. M. Narayanan Nambudripad—Appellant.

v.

Board of Commissioners for Hindu Religious Endowments, Madras — Respondent.

Appeal No. 356 and Civil Revn. Petn. No. 1426 of 1930, Decided on 3rd September 1937, against order of Dist. Court, South Malabar, in O. P. No. 127 of 1928.

Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (12)—Question of intention to dedicate place for public use or of user by public as of right is necessarily matter for inference—Inference that institution must have been dedicated for use by public when can be drawn stated.

According to the definition of "temple" in S. 9 (12), the user by the public for the purpose of religious worship has to be proved as a fact. The question of intention to dedicate the place for the use of the public or of the user by the public being as of right, is necessarily a matter for inference from the nature of the institution, the nature of the user and the way the institution has been administered. Once a long course of user by the public for the purpose of worship is established and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for use by the public (unless the contrary is established)—particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. Similarly, when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution : *A I R 1934 P C 230 and A I R 1920 Mad 42, Ref.* [P 210 C 1, 2]

K. P. Ramakrishna Aiyar and Hrishikesan Nambudripad — *for Appellant.*

K. Subba Rao — *for Respondent.*

Varadachariar J.—By an order dated 3rd February 1936, we directed the trial Court to receive such additional evidence as the parties may tender as we were inclined to think that on account of some misapprehension, the whole available evidence had not been placed before the Court on the previous occasion. The learned District Judge has now admitted such evidence as the petitioner adduced, but as he thought that the additional evidence did not affect the substance of the previous judgment, he has stated that he considers it unnecessary to record a fresh finding. The additional evidence has not carried the petitioner very far. Part of it only serves to establish that the petitioner's family which is now living far away from the temple in question was at one time living within ¾ mile or a mile of the temple. Reliance has been placed on behalf of the petitioner on certain statements in the report of a Commissioner who was appointed by the lower Court to inspect the locality and make a report. It appears from that report that there is no regular foot path from the public road to the temple and there are no shops or bazars in the neighbourhood where worshippers can have the usual and ordinary facilities for making purchase for offerings and so on. The situation of the temple and the facilities for approach to the temple may have a bearing on the question whether in fact the public do go and worship at the place or not; but, as the learned Judge has found even on the former occasion on the evidence of the petitioners' witnesses themselves that such public as is available in the locality is in the habit of worshipping in the temple. These remarks in the Commissioner's report about the nature of the locality or the access available to the temple do not help us to come to one conclusion rather than to another. It must be remembered that the appeal itself is incompetent and that we can deal with the matter only under S. 115, Civil P. C. If the additional evidence had showed that any points of substantial importance were not before the Court on the previous occasion, there might be justification for our setting aside the previous finding and dealing with the case ourselves or asking for a revised finding. We are unable to say that the additional evidence is of such a character.

Mr. Ramakrishna Iyer, the learned counsel for the petitioner, has insisted that the judgment of the learned District Judge contains a number of material errors and as these errors must have vitiated the conclusion then arrived at, it is proper that we should either deal with the evi-

dence ourselves or call for a revised finding. Two errors to which special reference may be made are (1) the statement in para. 4 of the judgment that the temple which adjoins the petitioners' mana in Vadanakurissi is a Siva temple and (2) the statement in para. 9 of the judgment about the contents of a former judgment of 1871. Mr. Ramakrishna Iyer is right in pointing out that the evidence shows that the temple which adjoins the mana is a Vishnu temple and not a Siva temple; and there is also some justification for his criticism of the way in which the learned Judge read some of the observations in the judgement of 1871. But we are not satisfied that these errors are so substantial as to justify our setting aside the learned Judge's finding.

Mr Ramakrishna Iyer made a complaint that the learned Judge acted upon a presumption that temples in Malabar are public temples until the contrary is proved and he invited our attention to the judgment of the Privy Council in 67 M L J 788,[1] as negativing such a presumption. We do not think that the learned Judge lays it down as any legal presumption. Having regard to the observations which he quotes from Sadasiva Iyer's judgment in 54 I C 177,[2] he seems to have thought that if a temple possessed certain characteristics it is only fair to presume even in Malabar that it is a public temple till the contrary is proved. S 9 (12), Hindu Religious Endowments Act lays down that a "temple" (for the purpose of the Act) means a place used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by the Hindu community, or any section thereof as a place of religious worship. According to this definition, the user by the public for the purpose of religious worship has to be proved as a fact. The question of intention to dedicate the place for the use of the public or of the user by the public being as of right is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered. In the case already referred to, their Lordships of the Privy Council lay stress upon the fact of the temple having been used as a place of public religious worship, though they observe that if there had been sufficient reason for holding that the temple and its endowment were originally dedicated for the tarwad and were private trusts, their Lordships would have been slow to hold that the admission of the public in later times would affect the private character of the trusts. This observation suggests that once a long course of user by the public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public (unless the contrary is established) — particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples. Similarly, when user by the public generally to the extent to which there is a worshipping public in the locality is established, it is not unreasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution.

A point was made by Mr. Ramakrishna Iyer that the learned Judge has referred to only one instance of exclusion in this case whereas the evidence establishes two such instances. We are not sure that the evidence as to the other is so clear that the learned Judge was not justified in ignoring it. But even taking it to be otherwise, the exclusion is clearly the result of personal ill-will and can scarcely be regarded as indicating the exercise of a general right of exclusion at the choice of the Uralan. The result is that both the appeal and the revision petition must be dismissed with costs in the appeal including the costs of the additional evidence enquiry.

C.R.K./S.C. *Appeal and revision dismissed.*

---

1. Mundacheri Koman v. Achuthan Nair, (1934) 21 A I R P C 230=151 I C 329=61 I A 405=67 M L J 788=58 Mad 91 (P C).
2. Subramania Iyer v. Lakshmana Goundan, (1920) 7 A I R Mad 42=54 I C 177 (F B).

A. I. R. 1938 Madras 211

VENKATARAMANA RAO J.

R. S. Sankaranarayana Reddiar — Petitioner.

v.

Taluk Board of Aruppukottai — Respondent.

Civil Revn. Petn. No. 944 of 1934, Decided on 29th January 1937, from decree of Sub-Judge, Devakottai, in A. S. No. 37 of 1933.

Madras Local Boards Act (1920 as amended by Act 11 of 1930), Sch. 4, Rr. 11 and 11-A (5) —President calling on profession tax assessee by notice to produce accounts and assessing profession tax on arbitrary basis—Levy of tax held illegal.

Where on evidence it was found that a President of a Taluk Board called on a profession tax assessee by a notice to produce his accounts which he had no power to call for under Cl. (5) of R. 11-A, that the assessee was assessed to income-tax and that the President assessed the profession tax on an arbitrary basis:

Held that the levy of tax was illegal as provisions of R. 11-A were not complied with and as it was ultra vires of the Local Boards to adopt a basis different from that specified in the Act and the rules framed thereunder and as the President of the Taluk Board had disregarded the provisions of R. 11 of Sch. 4 : *27 Mad 647, Rel. on.*

[P 212 C 1]

A. Swaminatha Iyer — *for Petitioner.*

Ramaswamy Iyer — *for Respondent.*

Order.—The question in this civil revision petition relates to the legality of the profession-tax levied on the petitioner for two half years, i. e. the half year ending 30th September 1930 and the half year ending 31st March 1931, by the Taluk Board of Aruppukottai in Ramnad District. The amount levied was Rs. 100 for each half year; notices of demand were served on the petitioner for each half year's levy. He failed to prefer an appeal soon after the service of notice with reference to the half year ending 30th September 1930, but he did it only after the service of notice with reference to the second half year, for both half years after paying the taxes levied. The appeal was filed on 11th May 1931, the date of service of notice being 10th April 1931 and 10th May being a Sunday. The President of the Taluk Board rejected the appeal as time-barred without placing the memorandum of appeal before the Board as he was bound to do. This action of the President is not justified before me; the levy is impeached as not being in accordance with the provisions of the Local Boards Act and the rules framed thereunder.

Two main grounds are alleged, namely : (i) No notice was served on the petitioner calling on him to furnish a return as required by R. 11-A of Sch 4, Madras Local Boards Act, as amended by the Madras Act 11 of 1930. (ii) The basis of taxation is wrong as being in contravention of R. 11 of Sch. 4 of the said Act. The learned District Munsif, who tried the suit, found that no notice under R. 11-A was served and that no evidence was adduced by the Taluk Board to prove that such a notice was served. The learned Subordinate Judge did not specifically give a finding in regard thereto, but only observed that the plaintiff admitted that a notice was given. On a reference to the plaintiff's evidence, it will be seen that notice was given to him to produce his accounts, which the President had no power to call for under Cl. (5) of R. 11-A. Therefore it must be taken that the provisions of R. 11-A were not complied with. It is not disputed that the said Rule would be applicable to the case but for a Government notification to which I shall presently refer. Prima facie the levy would be illegal; so found the learned District Munsif. But, the levy was sought to be justified in appeal on the ground that the Taluk Board was not bound to give a notice under R. 11-A, having regard to the Government Notification issued on 6th October 1931 long after the levy. This contention prevailed with the Subordinate Judge, who reversed the decision of the District Munsif. The said notification runs thus :

In exercise of the powers conferred by S. 179, Madras District Municipalities Act, R. 12 of the schedule to the Madras Local Boards (Amendment Act 1930 (Madras 10 of 1930) (Amendment) Act of 1930 (Madras Act 11 of 1930) Governor acting with Ministers is hereby pleased notwithstanding anything contained in the said Act, to direct that Chairman of Municipal Councils, Presidents of Panchayats shall have power and shall be deemed to have had power until 30th September 1931 to levy profession-tax on companies and persons in respect of the half years ending 31st March 1931 and 30th September 1931 respectively, without serving the notice required by sub-r. (1) of R. 10 or 11-A of Sch. 4 to the Madras Dis. Municipalities Act, 1920 (5 of 1920)

Madras Local Boards Act (Act 14 of 1920).

This Notification purports to have been issued under R. 12 of the transitory provisions of Madras Act 11 of 1930. The said Rule is to this effect :

If any difficulty arises as to the first constitution or reconstitution of any Local Board after the commencement of this Act or otherwise in first giving effect to the provisions of this Act or of the said Act as amended by this Act the Local Government, as occasion may require, may by order do anything which appears to them necessary for the purpose of removing the difficulty.

Prima facie the Notification cannot apply to the half year ending 30th September 1930. In regard to the half year ending 31st March 1931, it is extremely doubtful if Rule 12 could empower the Government to issue the Notification in question. Assuming however that the Government had the power to do so, it seems to me that the basis of taxation indicated in R. 11 should be followed. Rule 11 clearly says that "the income shall be deemed to be" on a certain basis and in the case of a person assessed to income-tax for the year comprising the half year in question, "one half of the amount at which the profits and gains" of the business or the person against whom the levy is sought to be made "are computed under S. 10, Income-tax Act, 1922 for the purpose of assessing the income-tax". It is not disputed that the petitioner was assessed to income-tax for the year 1930-1931 (*vide* Ex. A.1). The Taluk Board must therefore be deemed to have disregarded the basis enjoined on them under the Act and the Rules. It is well settled that where a Local Board empowered to levy a tax adopts a basis different from that specified by the Act, which gives them the power, the levy is ultra vires: *Vide* 27 Mad 547.[1] The levy is thus illegal in this case. I therefore reverse the decree of the learned Subordinate Judge and restore that of the District Munsif. I direct each party to bear his or their own costs throughout.

C.R.K./D.S. *Decree reversed.*

1. Municipal Council of Mangalore v. Codial Bail Press, (1904) 27 Mad 547.

A. I. R. 1938 Madras 212

HORWILL J.

K. Venkateswara Sastrigal and others — Appellants.

v.

Krishna Iyer — Respondent.

Appeal No. 142 of 1932, Decided on 10th September 1937, against decree of Sub-Judge, Ramnad at Madura, in O. S. No. 26 of 1931.

Mortgage — Costs — Mortgage suit against mortgagor, puisne mortgagees, and purchaser of equity of redemption—Mortgagor denying liability and remaining ex parte — Other defendants contesting suit — Decree for personal liability for costs held could be passed against mortgagor as well as other defendants.

In a mortgage suit against the mortgagor, the puisne mortgagees, and the purchaser of equity of redemption, the mortgagor denied his liability and remained ex parte. In his absence, the other defendants, some doing the spade work of the cross-examination and leading evidence while others supporting them contested the suit:

Held that a decree for personal liability for costs could be passed against the mortgagor as well as the other defendants. Moreover, no distinction should be made between the defendants doing the spade work of cross-examination etc., and others who supported them. [P 213 C 1]

K. Balasubramania Iyer — *for Appellants.*

P. S. Narayanaswamy Iyer — *for Respondent.*

Judgment.—In this mortgage suit defendant 1 was the mortgagor; defendants 2 and 3 were puisne mortgagees; defendant 4 was the purchaser of the equity of redemption of the greater number of the items mortgaged; and defendant 7 was the purchaser of one item. Defendant 1 filed a written statement denying his liability and then remained ex parte. The other defendants mentioned above supported the written statement of defendant 1. Defendant 3 made a special claim to priority and defendant 7 raised a number of pleas in connection with the item of property that he had purchased. In the decree in the suit the lower Court made defendants 1, 2, 3, 4, and 7 all personally liable for costs on the ground that defendants 2 to 4 and 7 supported defendant 1 in resisting the plaintiff's claim. Defendants 2 to 4 and 7 appeal against the decree for costs.

It has been argued that in a mortgage suit no person but the mortgagor can be made personally liable for costs. If that contention were correct, it would lead to very anomalous results, as the mortgagor might admit the plaintiff's claim and all the resistance come from the other parties to the suit, who would not, if this argument were correct, be liable for costs at all. 29 M L J 120[1] has been quoted as an authority for this peculiar position. That was also a mortgage suit; but the decree contained a declaration of the personal liability of defendant 2 (who was not the mortgagor) for the

1. Venugopalachariar v. Padmanabha Rao, (1916) 3 A I R Mad 763=30 I C 188=29 M L J 120.

plaintiffs' costs in case the sale proceeds were not sufficient to pay them as well as the mortgage money. The argument was there accepted that O. 34, R. 6, Civil P. C., which relates to the recovery of any balance due on a mortgage after the sale, does not make any provision for recovery from any person personally other than the mortgagor, because the word "defendant" in R. 6 means only the mortgagor. It was a purely technical argument and it turned on the interpretation of R. 6. In the present case however, there is no need for recourse to R. 6; and no reason has been given why the Court in the exercise of its usual discretion with regard to costs cannot make any person who is a party to the suit liable for a part or the whole of the costs.

Although it appears from the record that it was defendant 2's counsel who was responsible for most of the cross-examination of the plaintiff's witnesses and for leading the evidence against the plaintiff, yet it is difficult to distinguish between the responsibilities of defendant 2 and the other appellants. It often happens that a particular defendant's counsel cross-examines the witnesses; and if his cross-examination is sufficient, there is no necessity for further cross-examination by the counsel for the other defendants. Similarly, one defendant, upon whose peculiar knowledge of the facts the defendants rely may lead evidence; but if it appears that the other defendants are supporting the defendant who is doing the spade work on behalf of all of them, there is no reason or equity why those other defendants should not be as fully liable for costs as the defendant whose counsel is responsible for most of the cross-examination and for the leading of the evidence on behalf of the defendants. I therefore find myself unable to agree that some distinction should have been made by the lower Court between the case of defendant 2 and those of the remaining appellants.

It is further argued that in any event the appellants ought not to have been saddled with the costs of the institution of the suit—the argument being that in any event, it was necessary to institute a suit and to pay the necessary costs of institution viz. court fee, vakalat fee, and so on, and that the fact that the appellants intervened and opposed the granting of the decree would at the most only make them liable for such costs as might have been incurred after the institution of the suit. There is no doubt some force in this argument; but when another defendant so completely identifies himself with mortgagor and, as in this case, goes to the extent of opposing the grant of the decree even when the mortgagor was ex parte, it is difficult to hold that the trial Court is not justified in declaring that those defendants who opposed the suit should be as fully liable for costs as the mortgagor himself. I do not therefore feel justified in interfering with the discretion of the trial Court in the matter of costs. The result is that this appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 213

KING J.

In re Kumarappa Chettiar and others —Petitioners.

Criminal Revn. Case No. 913 and Petn. No. 825 of 1936, Decided on 15th April 1937, to revise judgment of Sess. Court, Ramnad Division, in Cr. A. No. 66 of 1936.

Criminal P. C. (1898), S. 107 — Mere proof of violence by persons in past is not sufficient to justify order under S. 107.

In order to justify an order binding over certain persons what must be proved is that those persons are likely to break the peace in future. Merely proving that they have committed certain acts of violence in the past is not sufficient : *A I R 1937 Mad 356, Rel. on.* [P 213 C 2]

V. L. Ethiraj and K. S. Venkatarama Iyer—*for Petitioners.*

Public Prosecutor—*for the Crown.*

Order.—This petition is not seriously opposed by the learned Public Prosecutor. All that has been proved is that the petitioners have committed certain acts of violence in the past. What must be proved in order to justify an order of this kind is that the petitioners are likely to break the peace in future. Does any occasion, does any cause of quarrel exist which is likely to cause them to break the peace? The learned Sessions Judge has not found that any exists. He disbelieves the main feature of the prosecution that the petitioners formed a compact with the object of using force in agitating against the landlords.

In these circumstances, it is not enough for the learned Sessions Judge merely to say that he thinks that men who have been violent once will be violent again :

see 1937 M W N Cr 9[1] and I set aside the order binding over the petitioners.

C.R.K./R.M. *Order set aside.*

1. Maruthapali Goundan v. Emperor, (1937) 24 A I R Mad 356=169 I C 97=38 Cr L J 699=1937 M W N Cr 9.

A. I. R. 1938 Madras 214

VARADACHARIAR AND KING JJ.

Chinta Venkata Sundara Venugopalaswamy — Appellant.

v.

President of Board of Commissioners for Hindu Religious Endowments, Madras — Respondent.

Appeal No. 217 and Civil Revn. Petn. No. 1306 of 1932, Decided on 15th September 1937, to revise order of Dist. Court, Ganjam, D/. 18th December 1931.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 84—Appeal—Revision and not appeal lies from order under S. 84 (2).

No appeal lies against the decision of the District Judge upon an application under S. 84 but the matter can be dealt with by the High Court only under S. 115, Civil P. C. [P 214 C 1,2]

(b) Hindu Law — Religious Endowment—Private trust — Mere fact of admission of the public to temple does not affect private trust.

If originally the temple was dedicated for the use of the founder's family and was a private trust, the fact of the admission of the public to the temple later on would not of itself necessarily affect the private character of the trust: *A I R 1934 P C 230, Foll.* [P 214 C 2]

(c) Hindu Law — Religious endowment — Dedication — Dedication whether public or private trust must be determined independently of factum of dedication.

The dedication of property will no doubt impress the property with the character of trust but it may as well be a private trust as a public trust. The question whether the dedication was a public trust or not must be determined independently of the factum of the dedication of property. [P 214 C 2]

G. Lakshmana and G. Chandrasekhara Sastry — *for Appellant.*

P. V. Rajamanner — *for Respondent.*

Varadachariar J. — This appeal and the connected revision petition arise out of an application made to the District Judge of Ganjam under S. 84, Madras Hindu Religious Endowments Act. The Board had held the temple in question to be a public temple and the petition was filed to have that declaration set aside. As it has been held that this Court can deal with this matter only under S. 115, Civil P. C. and that no appeal lies against the decision of the District Court on such applications, it is not open to us to review the learned Judge's findings of fact. But we cannot help thinking that in the present case, the conclusion of the learned District Judge has been arrived at on the basis of some erroneous assumption of law and without sufficient realisation of the importance of coming to a definite conclusion as to whether at one time the temple was a private temple or not.

We do not wish to say anything which will hamper the lower Court in coming to its own conclusion on remand. We wish to point out that in view of the considerations adverted to in the learned Judge's order as supporting the petitioner's contention that at the inception the temple might have been a private temple, the petitioner is entitled to invoke the aid of the observations of the Judicial Committee in 58 Mad 91[1] at p. 104, that if originally the temple was dedicated for the use of the founder's family and was a private trust, the fact of the admission of the public to the temple later on would not of itself necessarily affect the private character of the trust. It therefore seems proper that we should ask the learned District Judge to come to a definite conclusion on the question whether originally the temple was a private temple or not.

Again, the learned Judge seems to think that the fact of properties being endowed in trust for this temple in 1900 itself amounts to a dedication to a "public" purpose. This is not correct in law. The dedication of property will no doubt impress the property with the character of trust but it may as well be a private trust as a public trust. The question whether the dedication was a public trust or not must be determined independently of the factum of the dedication of property. The circumstance that similar language was used in other dedications made about the same time to a temple which is admittedly public does not seem to us relevant because in the latter case, it is the admitted public character of the temple in favour of which the endowment was made that makes the endowment public, and it will be begging the question to assume that in the present case also the endowment so made must have been for a public purpose.

1. Koman Nair v. Achuthan Nair, (1934) 17 A I R P C 230=151 I C 329=61 I A 405=58 Mad 91 (P C).

It is difficult for us to say how far the final conclusion of the learned Judge has been influenced by errors and misconceptions on the above points. We therefore think it proper to set aside the learned Judge's order and remand the case to the lower Court to be disposed of in the light of the above observations. The appeal will be dismissed and the remand will be made in the revision petition. There will be no order as to costs in the appeal and the costs in the revision petition will abide the result.

C.R.K./S.C. *Case remanded.*

A. I. R. 1938 Madras 215

HORWILL J.

Rangaswami Chetty — Appellant.

v.

K. S. Narayana Iyengar—Respondent.

Appeal No. 149 of 1934 and Civil Revn. Petn. No. 11 of 1933, Decided on 11th February 1937, against order of Small Cause Court, Trichinopoly, D/- 4-8-1934.

Civil P. C. (1908), Ss. 145, 47— Decree-holder seeking to make surety liable—Surety is entitled to raise objections to executability —Inquiry by Court into question raised between decree-holder and surety is one under S. 47 and is appealable—Provisions analogous to S. 145 apply in cases where S. 145 does not literally apply.

Section 145 puts the surety for the purpose of execution and of appeal on the same footing as an original party to the suit ; and if S. 145 and S. 47 be read together, then if the decree-holder seeks to make the surety liable, it is open to the surety to raise objections to executability, and the inquiry of the Court into the question raised between the decree-holder and the surety is one under S. 47 and is therefore appealable. Although S. 145 in terms applies only where the surety is personally liable yet if the sureties are made parties to the application to make them liable on a bond then they become parties as it were to the suit and can therefore be made liable in execution in any inquiry under S. 47. Although therefore S. 145 does not apply, provisions analogous to S. 145 would be applicable to a case to which S. 145 does not literally have any application.

[P 216 C 1, 2]

A surety for the performance of a certain obligation by the receivers appointed by Court had deposited into Court money as security and he was not personally liable. The Court ordered execution against the security deposited into Court and it was contended that the surety not being personally liable could not appeal against the order of the Court directing execution against the security :

Held that though the surety having deposited into Court money as security was not personally liable, yet the provisions analogous to S. 145 did apply and the surety did have a right of appeal under S. 47: *A I R 1919 P C 65, Applied* ; *A I R 1933 Mad 780, Foll.*; *A I R 1924 All 105, Ref.*

[P 215 C 2; P 217 C 1]

K. V. Sesha Ayyengar and K. Aravamudan—*for Appellant.*

R. Krishnamurty—*for Respondent.*

Judgment.—Two parties claimed to be lessees of a tope under the respondent in this appeal and one of them brought a suit against the other for possession. During the pendency of that suit, as both parties were disputing possession, a receiver petition was put in, and the defendants in that suit, O. S. No. 18 of 1926, were appointed joint receivers upon their furnishing security for one year's estimated income, which amounted to Rs 1425. This security was to be either in cash or in immovable property. The appellant deposited in Court, Rs. 1425, for investment in the Co-operative Bank. Later, the lessor applied to be made a party and he was added. The matter was taken in revision to the High Court, which held that he was not a proper party to that suit, and that he should file a suit himself. He thereupon filed O. S. No. 87 of 1928 and made the lessees defendants. As the matter in dispute had to be fought out in O. S. No. 87 of 1928, O. S. No. 18 of 1926 was by agreement dismissed, both parties agreeing that the receiver should continue throughout the second suit. Eventually, the second suit, O. S. No. 87 of 1928, was decreed and the defendants to the first suit were found liable. The plaintiff in O. S. No. 87 of 1928 thereupon applied to draw from Court the money that had been deposited by the appellant. The District Munsif of Trichinopoly ordered the money to be paid over to the successful plaintiff in O. S. No. 87 of 1928. The surety thereupon filed an appeal to the Judge, Court of Small Causes, Trichinopoly, who held that an appeal did not lie. The present A. A. O. has been filed against the order of the Small Cause Judge, and the C. R. P. against the order of the District Munsif. The only question that has been argued in the appeal against appellate order is whether the learned Judge was right in holding that no appeal lay. The security bond runs thus :

So, in accordance with the said order, I have this day deposited (the amount) in this Court for a period of six months as surety for the same to be invested in the Trichinopoly Co-operative Urban Bank as fixed deposit for six months, the aforesaid deposit amount being Rs. 1425. This sum of rupees one thousand four hundred and twenty-five has been paid by me as security. If

the plaintiff sustained any loss in the matter of rendering accounts to Court properly by defendants 1 and 2, I agree to the said loss having been adjusted out of the said security amount. If the plaintiff's suit is dismissed, and if defendants 1 and 2 should properly render accounts till the disposal of the suit and act justly, I alone shall receive the said amount with interest after this security bond having been cancelled.

It is argued on behalf of the respondent that the appellant was not a surety in the ordinary sense of the word. He deposited in Court a certain sum of money which was to be paid over to the plaintiff in case he sustained any loss on account of the receivership, and, it is suggested, the Court, having passed a decree against the defendants, could at once have ordered that this money be paid over to the plaintiff, and the petition for payment of money was not therefore in any sense an execution petition. I do not see why, because money has been deposited in Court, it is in a different position than if it had been deposited elsewhere, or if it had been in the custody of some other person or existed as some other form of property. It seems that the Court could not in its decree have straightway ordered the money in deposit to be paid over to the decree-holder; but in any case that was not done. The application put in after a decree was passed was that the money should be paid over to the decree-holder. It therefore seems that the appellant was in the same position as a surety who offered security of immovable or moveable property. S. 145 puts the surety for the purpose of execution and of appeal on the same footing as an original party to the suit; and if S. 145 and S. 47 be read together, then if the decree-holder seeks to make the surety liable, it is open to the surety to raise objections to executability, and the inquiry of the Court into the question raised between the decree-holder and the surety is one under S. 47 and is therefore appealable. S. 145 in terms applies only where the surety is personally liable; and it is therefore contended that as the surety in this case has deposited the money and that that money only is liable for the satisfaction of any loss that may have occurred, S. 145 does not apply to an agreement of this nature. A Bench of the Allahabad High Court in 45 All 649[1] at page 651, says :

> The personal or individual liability of the surety under the security bond may not always be as extensive as that of the judgment-debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond.

I do not think however that their Lordships of the Privy Council in 42 All 158,[2] found that the surety who was not personally liable in the sense generally understood came under S. 145. Their Lordships appear to have taken it for granted that he did not. They found some difficulty in deciding what the remedy of a decree-holder against the surety was. They discussed the possibility of his bringing a suit under the Transfer of Property Act; and they found that that course was not open to him. They then say at p. 167 :

> It is suggested that they are bound to the Court but the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains therefore that here is an unquestioned liability, and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money,

i.e. their Lordships think that if the sureties are made parties to the application to make them liable on a bond then they become parties as it were to the suit and can therefore be made liable in execution in any inquiry under S. 47. Although therefore they find that S. 145 does not apply, they would apply provisions analogous to S. 145 to a case to which S. 145 does not literally have any application. 42 All 158[2] was considered in 56 Mad 909.[3] Venkatasubba Rao J. says in a case where the surety had offered her immovable property as security :

> It is true that to the proceeding in question S. 145 does not apply, and we must regard that the order against the surety was made, not under the terms of that section, but under the general power which the Judicial Committee has held the Courts possess in regard to executing orders made against sureties.

In discussing whether an appeal lies he adds :

> But having regard to their Lordships' decision and the policy underlying S. 145, we must hold that it was not intended that the surety's rights should in this respect be abridged.

1. Mahalakshmi Bai v. Badan Singh, (1924) 11 A I R All 105=74 I C 927=45 All 649 = 21 A L J 604.
2. Raj Raghubar Singh v. Jai Indra Bahadur Singh, (1919) 6 A I R P C 55=55 I C 550=42 All 158=22 C C 212=46 I A 228 (P C).
3. Ayyaswami Ayyar v. Sivakki Ammal, (1933), 20 A I R Mad 780 = 145 I C 871 = 56 Mad 909=65 M L J 407.

It is sought to distinguish this case by showing that the question there was whether the surety was a representative of a party to the suit; but even if she was, the reasoning applies equally well to a case where she is not, the principle underlying the decision being that even if S. 145 does not apply, the surety has an equal right of appeal. The learned advocate for the respondent seems to distinguish the position of the appellant from that of an ordinary surety by pointing out that he had not really offered his own money and that what he had deposited was the estimated value of the cocoanuts of the tope which he himself had purchased. Even if that were the case, it would only explain why he had offered himself as surety. His liability would be as a surety, though he had secured himself by purchasing in advance the cocoanuts. It has been suggested that as I have been taken through most of the important documents in the case, I might dispose of this matter myself; but it seems more satisfactory that the lower Appellate Court, which is the final Court of fact, should decide a matter in which questions of fact must of necessity arise. I do not think that the point raised is altogether a question of law. The second appeal is therefore allowed, and the first appeal remanded for disposal on the merits by the lower Appellate Court. The costs of this appeal will be costs of the first appeal.

C.R.P. No. 11 of 1933.—I have decided in C. M. S. A. No. 149 of 1934 that an appeal lay from the decision of the District Munsif. This petition is not therefore competent; but in view of the fact that it has been the contention of the respondent that no appeal lay, it is unnecessary for me to order any costs in dismissing the petition, except as to costs of printing, which will be paid to the respondent.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 217

MADHAVAN NAIR J.

Thavasikannu Thevar and others — Petitioners.

v.

S. Sankaralingam Pillai — Respondent.

Civil Revn. Petn. No. 345 of 1936, Decided on 24th September 1937, from order of Sub.Judge, Tuticorin, D/. 8th October 1935.

Decree—Ex parte—Setting aside — Order declaring party ex parte made and decree passed—Decree not appealed against within time—Application under S. 115, Civil P. C., for setting aside order declaring him ex parte — Jurisdiction of High Court to interfere with order.

In a suit an order declaring a party ex parte was made and a decree was passed. The party did not appeal against the decree within time and hence the decree became final. The party made a petition to the High Court under S. 115 for setting aside the order declaring him ex parte :

Held that even if the lower Court was wrong on merits, the High Court had no jurisdiction under S. 115 to interfere with the lower Court's order. [P 217 C 2 ; P 218 C 1]

Held further that even if the petition was allowed and remanded, the lower Court would not be in a position to deal with the petition and set aside the ex parte decree unless the decree that was already passed had been set aside. The very fact of sending back the petition for consideration by the lower Court would not amount to setting aside the decree : *A I R 1915 Mad 197 and A I R 1935 Mad 43, Disting.* [P 218 C 1]

C. Padhmanabha Iyengar — *for Petitioners.*

S. Ramaswamy Iyer — *for Respondent.*

Order.—This is a civil revision petition under S. 115, Civil P. C., and I am asked to set aside the order of the learned Subordinate Judge declaring the petitioners ex parte. The learned Judge has given reasons for not acceding to the request of the petitioners to restore the case. On two previous occasions, the suit was adjourned for their convenience and they did not appear. The present is the third occasion. The learned Judge apparently thought that there was no justification for giving them another indulgence. The affidavit filed in support of their application shows that they could have been more diligent in the step they took to be present in Court at the proper time. If they missed the train as they say they did, they could have sent a telegram from the place apprising the Court of their inability to be present and might have followed in a car. They say that they did follow in a car and that they reached the place at a later hour. If they had sent a telegram that would have been better evidence in support of their bona fides. I cannot say that the learned Judge was wrong on the merits in refusing to set aside the order declaring the petitioners ex parte. Even if the learned Judge was wrong on the merits, I am not satisfied that I have jurisdiction under S. 115, Civil P. C., to interfere with the lower Court's order.

Apart from these considerations, there is another factor of importance which has also a bearing on the present question. It appears that a decree has been passed in the suit and as it has not been appealed against within the period allowed by law that decree has now become final. The present position is this: if this petition is allowed, what will be the effect of it on the decree that has been passed already? It appears to me that unless that decree is set aside, the lower Court will not be in a position to deal with this application and set aside the ex parte decree. It is said that the very fact of sending back this application for consideration by the lower Court amounts to setting aside the decree and that decree cannot stand in the way of the disposal of this application. The authorities that have been cited before me do not satisfy that this is the correct legal position. If the decree that has been passed by the Court depended for its validity upon the order which is now challenged before me, then it may be said that the very fact of remanding the application would result in supersession of the decree, but this is not a case of that kind. The decisions brought to my notice, namely 37 Mad 29,[1] and 58 Mad 116,[2] do not therefore help the petitioners. In these circumstances, I cannot see my way to set aside the order of the learned Judge. The proper procedure for the petitioners was to have preferred an appeal against the decree and got their remedy by urging the present grounds. As it is, I do not think I have even jurisdiction to deal with this matter under S. 115, Civil P. C. The civil revision petition is accordingly dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

1. Lakshmi v. Marudevi, (1915) 2 A I R Mad 197=12 I C 664=37 Mad 29=21 M L J 1063.
2. Sundaram Chettiar v. Valli Ammal, (1935) 22 A I R Mad 43=152 I C 687=58 Mad 116=68 M L J 16.

---

* A. I. R. 1938 Madras 218

LEACH C. J. AND MADHAVAN NAIR J.

Secretary of State — Petitioner.

v.

Vinjamuri Kistnamacharyulu — Respondent.

Civil Misc. Petns. Nos. 2694 and 2695 of 1937, Decided on 5th October 1937.

*** Civil P. C. (1908), O. 22, R. 9—Ignorance of death of respondent in absence of negligence is sufficient cause to excuse delay in seeking to set aside abatement.**

It is not incumbent upon an appellant to make periodical inquiries as to whether the respondent is alive. Ignorance of the death of the respondent in the absence of any negligence or other act or omission, for which the appellant can be held responsible is sufficient cause within the meaning of S. 5, Lim. Act, to excuse the delay in seeking to set aside abatement: *A I R 1932 All 459 and A I R 1924 Cal 90, Rel. on.* [P 218 C 2; P 219 C 1]

Govt. Pleader — *for Petitioner.*

V. Govindarajachari — *for Respondent.*

Leach C. J.—This is an application for an order excusing delay in seeking to have the abatement of Appeal No. 399 of 1931 set aside and for an order setting aside the abatement. The petitioner is the Secretary of State for India in Council, acting through the Collector of the West Godavari District. It appears that the respondent died on 18th September 1935, but the learned Government Pleader did not become aware of his death until the 4th May of this year, that is two days before the Court closed for the long vacation. The learned Government Pleader promptly communicated with the Collector, who on the re-opening of the Court on the 15th July filed the present application. The learned advocate for the respondent does not contend that there was any delay in filing the application after the news of the death had been received, but he does contend that the Court should not set aside the abatement. His argument is that ignorance of the death of the respondent is not sufficient to support the application.

It has been proved to our satisfaction that neither the Collector nor any Government Official concerned with this appeal was aware of the death of the respondent until May of this year, and that being so, we consider that the petitioner is entitled to have the abatement set aside under the provisions of O 22, R. 9. It is not incumbent upon an appellant to make periodical inquiries as to whether the respondent is alive. We are in entire agreement with the observations in 54 All 280,[1] where it was said that there was no justification for holding that ignorance of the death, in the absence of any negligence or other act or omission, for which the applicant can be held responsible, was not sufficient

1. Lakshmichand v. Behari Lal, (1932) 19 A I R All 459=135 I C 159=54 All 280=1932 A L J 18.

cause within the meaning of the Limitation Act. A decision to the same effect was given by the Calcutta High Court in 27 C W N 710.[2]

Here it has not been contended that there has been any negligence or any act or omission on the part of the petitioner which would prevent him from having the benefit of S. 5, Lim. Act. For these reasons we excuse the delay and set aside the abatement.

C.R.K./D.S. *Abatement set aside.*

2. Rajani Kanta v. Jyoti Prasad, (1924) 11 A I R Cal 90=75 I C 255=27 C W N 710.

A. I. R. 1938 Madras 219

STODART J.

Raja of Vizianagaram — Appellant.

v.

Perla Annapuranamma Garu and another — Respondents.

Second Appeal No. 656 of 1933 and Civil Misc. Petn. No. 5047 of 1934, Decided on 25th February 1937, against decrees of Sub-Judge, Vizagapatam, D/- 22nd December 1932.

(a) Madras Local Boards Act (14 of 1920), S. 88—Grant originating in ancient times — Payment to zamindari of kattubadi cess — No inference that grant was by zamindar and not by ruling power.

In the case of ancient grants which originated at a time when the proprietary rights of the ruling power and of the local chieftains were not kept separate and distinct, it should not inevitably be drawn as an inference that, where a certain village is liable to a payment to the zamindari of what is called kattubadi, the grant was made by the zamindar and not by the ruling power : *A I R 1923 Mad 454, Rel. on.* [P 220 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 88 — Inam lands not included in assets of zamindari — Inamdar is directly connected with Government for payment of cess.

The scheme of the Local Boards Act is that when the inam lands have not been included in the assets of the zamindari, the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government but the Government collects the cess from the landholder and the landholder reimburses himself from the inamdar treating him as an intermediate landholder : *A I R 1937 Mad 917, Rel. on.* [P 220 2; P 221 C 1]

S. Venkatesa Iyengar—*for Appellant.*

N. Vasudeva Rao — *for Respondents.*

Judgment.—The plaintiff is the appellant in this second appeal. He is the Raja of Vizianagaram and the defendants represent the proprietors of the Mokhasa village of Konda Konguva in the Raja's zamindari. The Rajah, during the suit years, included in the sum he paid to the Government as land cess due on his estate under the Madras Local Boards Act 14 of 1920 a certain sum as being the cess due on the rental value of the suit village and he claims that he is entitled under the proviso to S. 88 of the Act to collect from Mokhasadars what he had paid to the Government. There is no question that the payment of land cess under the Act is a proper burden on this village. The defendants however object to pay it through the landholder. They do not deny the liability to pay but claim to pay direct to the Government. Nevertheless the point now in dispute is somewhat important, too important, I think to be raised in a suit like this, which on the surface is concerned only with the machinery provided by law for the collection of a tax. the liability to pay which is not disputed by any of the parties. The point which these parties wish to be decided is whether the Mokhasa village is held by the Mokhasadars on an under tenure created, continued or recognized by the Rajah. If it is so held then under the proviso to S. 88, the Rajah on paying to the Government the land cess due on the Mokhasa village will recover it from the Mokhasadars. The full text of the proviso is :

Provided that in all cases where a person holds lands with or without a right of occupancy as an intermediate landholder on an under tenure created, continued or recognized by a landholder, it shall be lawful for the landholder to recover from the intermediate landholder the whole of the cess paid by the landholder in respect of lands held by the intermediate landholder less one half the cess assessable on the amount of any kattubadi etc., payable by the intermediate landholder to the landholder.

The trial Court decided in plaintiff's favour but the learned Subordinate Judge reversed that decision on an appeal by some of the proprietors holding that the Mokhasa village was not held on an under tenure as described in S. 88 of the Madras Act 14 of 1920. The learned Subordinate Judge considered that the deciding factor in the case was whether the Mokahasa village had, at the time of the permanent settlement in 1803, been included or excluded from the assets of the estate in calculating the total income of the estate on the basis of which the permanent peshkush was fixed. There was evidence in the case which was sufficient to enable

a decision to be reached on that point and the learned Subordinate Judge has given his reasons for construing that evidence against the landholder, the present appellant. He found as a fact that the Mokhasa village in suit was excluded at the time of the permanent settlement in making the calculations described above. That was a finding of fact, and since there was evidence to support it, it does not seem to me that it can be made the subject of objection on second appeal. It is argued however that the learned Subordinate Judge wrongly relied on two documents Exs. I and P. There are recitals in those documents which are relevant to the point in dispute but the argument now is that the documents are of no value and that the learned Subordinate Judge should not have relied on them. About Ex. P the argument comes strangely from the mouth of the appellant, because that was a document which was filed by the appellant himself at the trial. However that may be, I am not convinced that the evidence afforded by these two papers was the only evidence on which the Court based its finding. Another argument is that the finding of the Court is wrong because it failed to draw the proper inference from certain undisputed facts. One of these facts is that the village is liable to a payment to the zamindar of what is called Kattubadi. Kattubadi is defined in Wilson's Glossary as a favourable rent assessed on lands granted for public service. The argument is that where you find lands subject to such payment, the proper inference is that the grant was made by the zamindar and not by the ruling power. But though that might appear eminently reasonable at first sight, it is not an inference which can inevitably be drawn in the case of these ancient grants which originated at a time when the proprietary rights of the ruling power and of the local chieftains were not kept so separate and distinct as the rights of the Government and the rights of the landholder are kept at the present day.

Fortunately, this is not a matter into which I am compelled to enter at any great length, because it is the subject of a decision of this Court in 45 M L J 91;[1] it became necessary to decide the nature of an inam whether it was granted by the Rajah of Pittapur or by the Government before the permanent settlement of 1802. At the time of the suit it was found that the land was subject to a small Kattubadi, and the learned Judges (Oldfield and Ramesam JJ.) who decided that case held that the "alienated lands" which were excluded from the accounts at the time of the permanent settlement comprised an inam grant subject to a favourable quit rent. In the present case also, in the sanad by which the peshkush of this particular estate, namely Vijianagaram, was settled, the class of lands to which the Mokhasa village now in suit belongs was expressly excluded. Reliance was placed by the defendants on this sanad Ex. A and the relevant words are :

> This permanent assessment of the land tax on your zamindari is exclusive of the lakhiraj lands and of all other alienated lands paying a small quit rent (which quit rent unchangeable by you, is included in the assets of your zamindari.)

The appellant admitted at the trial that this Mokhasa village was a pre-settlement grant, that is to say prior to 1803, but his case was that it was a grant made by the zamindar of that day. The decision of the lower Appellate Court was that it was not included in the assets of the zamindari in taking the account on the basis of which the peshkush was determined. It was regarded that is to say as a grant made by the Government.

I do not think there is any proper ground for my interfering with the lower Appellate Court's finding of fact that this Mokhasa village was excluded from the assets of the estate at the time of the permanent settlement. This being the state of the facts, it is no longer possible to hold that the village can be regarded as an under tenure village within the meaning of S. 88, Local Boards Act. This very point came for decision very recently before a Full Bench of this Court in (1937) 1 M L J 91.[2] In delivering the judgment of the Court, Varadachariar J. says :

> The scheme of the Local Boards Act is that when the inam lands have not been included in the assets of the zamindari, the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government but the Government collects the cess

1. Kuppu Reddi Nookaya v. Mondaluka Bheemanna, (1923) 10 A I R Mad 454=73 I C 733=45 M L J 91.

2. Rajah of Vizianagaram v. Dindi China Thammanna, (1937) 24 A I R Mad 217=167 I C 490=I L R (1937) Mad 498=(1937) 1 M L J 91 (F B).

from the landholder and the landholder reimburses himself from the inamdar treating him as an intermediate landholder.

I am greatly indebted to the learned counsel on both sides for the most interesting and instructive arguments on the point in issue, but I do not think it is necessary to say anything further on this appeal. This second appeal is dismissed with costs. Leave to appeal is refused.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1938 Madras 221

LEACH C. J. AND VARADACHARIAR J.

Official Assignee, Madras —Appellant.

v.

Vedanarayana Naicker — Respondent.

City Civil Court Appeal No. 40 of 1935, Decided on 3rd August 1937, against decree of City Civil Judge, Madras, in O. S. No. 428 of 1934.

Civil P. C. (1908), Ss. 11 and 80 — Insolvency of *J* — Official Assignee executing deed of release in *V's* favour in respect of *J's* half-share in property in consideration of Rs. 738 — Prior to deed of release, *J's* half-share sold in execution of *D's* mortgage decree — Suit by *V* against Official Assignee for recovery of Rs. 738 on ground that release deed was void—Suit dismissed — Subsequent suit by *V* against Official Assignee for recovery of Rs. 738 on ground of damages — Suit held not barred by res judicata—Notice under S. 80 held not necessary.

V and *J* had equal shares in some property. Under a compromise decree *V* took *J's* half share in consideration of Rs. 700 which he paid into the Court. Subsequently *V* discovered that *J's* half-share was subject to the mortgage of *D* and he therefore withdrew the amount he had paid into the Court. Later on *J* was adjudicated insolvent. The Official Assignee executed a deed of release in favour of *V* in respect of *J's* half-share and *V* paid to the Official Assignee the sum of Rs. 738. The release gave *V* the right to enjoy the share without any claim on *J's* part or any one claiming under J. Prior to the release deed, the half share of *J* was sold in execution of *D's* mortgage decree. Thereupon *V* filed a suit against the Official Assignee in order to recover Rs. 738 on the basis that the release had no legal effect. This suit was dismissed. *V* subsequently brought a suit against the Official Assignee representing the estate of *J* for the recovery of Rs. 738 on the ground that the Official Assignee had granted him a good title in respect of *J's* half-share, but he had lost that half share and therefore the Official Assignee was liable to him in damages. This suit was instituted without notice under S. 80 :

Held that the suit was not barred by res judicata. The cause of action in the previous suit was different from that in the subsequent suit.

[P 223 C 1]

Held further that the Official Assignee in executing the deed of release was not doing an act in his official capacity. The claim against him was not a claim against him personally, but a claim against him as representative of *J's* estate. Therefore no notice was required to be given under S. 80 to the Official Assignee before the suit was instituted : *A I R 1934 P C 96, Rel. on.*

[P 223 C 2; P 224 C 1]

K. S. Krishnaswami Iyengar and N. C. Vijayaraghavachariar — *for Appellant.*

V. Ramaswamy Iyer — *for Respondent.*

Leach C. J. — The plaintiff sued the Official Assignee as representing the estate of one Janaki Ammal to recover the sum of Rs. 738.8-0 with interest which he had paid to him on 9th September 1931. He averred that circumstances had arisen since the payment was made which entitled him in law to recover this amount. It is necessary in order to understand the position to go into the early history of this matter. In 1900 a piece of immovable property in Madras was purchased in the names of the plaintiff's father (one Duraiswami) and Janaki for a sum of Rs. 200. The plaintiff's father was the brother of Janaki's husband. Duraiswami having died, the plaintiff instituted in the City Civil Court, Suit No. 437 of 1927, for partition of this property and for recovery of the half-share which he said he was entitled to as his father's heir. Janaki defended the suit. She claimed that she was entitled to the whole of the property and alleged that her husband was the purchaser of the property having bought it in her name and in Duraiswami's name benami. This question was not fought out, and on 10th February 1928, the parties came to terms. A compromise decree was then passed in accordance with the arrangement arrived at. Under this decree the plaintiff was to pay Rs. 700 to Janaki for her interest in the property which she was required to quit on 1st March 1928. Janaki had, in fact, mortgaged this property to one Dhanalakshmi in 1926, and had purported to charge the whole of it. She kept this fact from the plaintiff who agreed to the terms above-mentioned in entire ignorance of the fact that there was this mortgage in favour of Dhanalakshmi. Janaki delivered possession of the property to the plaintiff by the due date. On 20th September 1928 the plaintiff paid Rs. 700 into Court. But as he had in the meantime discovered that the property had been mortgaged to Dhanalakshmi, he asked the Court to prohibit Janaki from withdrawing the money from the Court until further orders. The application was granted.

On 19th August 1929, the plaintiff instituted Suit No. 424 of 1929 in the City Civil Court impleading both Janaki and Dhanalakshmi. He asked for a declaration that the mortgage was invalid. Janaki took no part in this suit. The judgment was delivered on 26th August 1930, the Court holding that the mortgage was good to the extent of Janaki's share, and as the plaintiff had no objection to taking that share subject to the mortgage there was a decree on this basis. Dhanalakshmi was also agreeable to her mortgage being limited to Janaki's moiety. In spite of having accepted this position, Dhanalakshmi resiled from it and filed an appeal to this Court. In this appeal she contended that she was entitled to a charge on the whole of the property and refused to recognize the position of the plaintiff. It is not surprising in view of what had happened in the trial Court that this contention did not prevail, the appeal being dismissed on 2nd September 1932. On 10th April 1931, a petition was filed for an order of adjudication in insolvency against Janaki and she was adjudicated on 27th of that month. On 9th April 1931, the plaintiff had withdrawn from the Court the Rs. 700 which he had paid under the consent decree passed in Suit No. 437 of 1927. The next day, the Official Assignee wrote informing him that he proposed to move the Court for an order directing him to bring the money into Court. The reply was that as Dhanalakshmi was entitled to a mortgage decree on a moiety of the property, he was entitled to recover the Rs. 700 plus interest, and he wanted the Official Assignee to give him an indemnity against any claim being made by Dhanalakshmi. The Official Assignee by letter dated 31st August 1931, refused to give the indemnity but by 9th September 1931, the plaintiff and the Official Assignee had come to terms. On that date a deed of release was executed by the Official Assignee in favour of the plaintiff in respect of Janaki's half-share in the property and the plaintiff paid to the Official Assignee the sum of Rs. 738.8.0. It is necessary to refer to a covenant in this document as the plaintiff contends that the Official Assignee did in fact indemnify him in respect of any claim by Dhanalakshmi. This covenant reads as follows :

> The releasee is at perfect liberty to enjoy the property without any let, hindrance or claim on the part of the said Janaki Ammal, the insolvent, or anyone claiming under the said Janaki Ammal.

The plaintiff says that Dhanalakshmi's claim under her mortgage was a claim which in law was made under Janaki. On 11th August 1931, that is a month prior to this release deed, Dhanalakshmi instituted proceedings in execution of her mortgage decree. On that date she applied for leave to bid at the auction. The learned Judge before whom the application came held that there was no need for any sale at all in view of the Official Assignee having executed the release. He forgot, of course, the position of Dhanalakshmi in the matter. He accordingly passed an order dismissing her application for sale. An application by way of revision petition to this Court followed and the order dismissing the application for sale was set aside and the sale application restored to the file. The execution proceedings subsequently took their normal course and the half share was purchased by a third party for over Rs. 1000. That was on 6th March 1933.

The position therefore was this: The plaintiff had paid to the Official Assignee Rs. 738.8.0, in consideration of the Official Assignee releasing to him Janaki's interest in the property and he got nothing for it, because the property had got into the hands of a third party as the result of the execution proceedings. Accordingly on 2nd May 1932, the plaintiff filed Suit No. 406 of 1932 in the City Civil Court against the Official Assignee in order to recover the Rs. 738.8.0. The basis of this suit was that the release had no legal effect, and therefore was null and void. In these circumstances he said that he was entitled to a refund of the money. Judgment was given in this suit on 12th May 1933, the Court holding that the plaintiff was not entitled to recover because he made the payment with his eyes open. He knew all about Dhanalakshmi's mortgage and he had taken the release for what it was worth at his own risk. It contained no covenant for indemnity and no cause of action was therefore shown in the plaint. This view was upheld by this Court on appeal on 3rd August 1934. The learned Judges were of opinion that the payment made by the plaintiff to the Official Assignee was one of a purely voluntary nature. Then followed the suit out of which the present appeal arises. Here the plaintiff claimed that he was entitled to recover

the Rs. 738.8.0 plus interest, on the ground that the Official Assignee had granted to him a good title in respect of Janaki's half share, but he had lost that half share and therefore the Official Assignee was liable to him in damages. The learned trial Judge held that the plaintiff was entitled to succeed on this basis and granted him a decree for the amount claimed.

The Official Assignee challenges the correctness of this decree on three grounds: (i) that the plaintiff was precluded by the doctrine of res judicata from instituting the suit; (ii) that no notice had been given by the plaintiff under S. 80, Civil P. C. and therefore the suit had not been correctly launched; and (iii) that the learned trial Judge had wrongly awarded interest to the plaintiff. There is no substance in the plea that Suit No. 406 of 1932 stands as a bar to the present suit. As I have already indicated that suit was filed on the basis that the deed of release was of no legal effect. The suit out of which this appeal arises is based on the plea that the document is a valid document and that the plaintiff is entitled to damages for the breach of a covenant contained in it. The causes of action in the two suits are entirely different. The doctrine of res judicata can have no application in such circumstances.

Turning now to the second contention of the learned advocate for the appellant, S. 80, Civil P. C., provides that no suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to or left at the office of a Secretary to the Local Government or the Collector of the District, and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. The section also states that the plaint shall contain a statement that such notice has been so delivered. For the purpose of dealing with this argument, we will take it that the correspondence which passed prior to suit did not give the notice required by this section, and it is common ground that the Official Assignee is a 'public officer' within the meaning of the section. In the course of the arguments, we were referred to a number of cases decided by the Calcutta High Court and by the Bombay High Court. The Calcutta High Court has for many years taken the view that this section applies to cases founded on contract as well as to cases in tort. The Bombay view has been that the section only applies to action founded on tort But the position has been clarified by a recent decision of their Lordships of the Privy Council in 61 Cal 470[1] and it is now settled that the section covers cases both in contract and in tort. This decision also shows that in the present case the Official Assignee in executing the deed of release was not doing an act in his official capacity. Further, the suit is not against him in respect of any act done by him in that capacity. In the case mentioned above, a common manager of an estate appointed under the Bengal Tenancy Act, 1885, executed with the sanction of the Court, a mortgage which provided for re-payment of the debt on a specified date. Before that date he died and another manager was appointed. The debt not having been paid, the mortgagee, without giving notice, sued the new manager to enforce the mortgage. Their Lordships held that notice was not necessary under S. 80, because assuming that a common manager is a public officer, the suit was not for an act purporting to be done in his official capacity. Failure to pay the debt when due was not an "illegal omission" so as to be an "act". Sir George Lowndes delivered the judgment and at p. 475 of the report he observes:

> It is also difficult to see how mere omission to pay either interest or principal could be an act purporting to be done by the manager in his official capacity. The mortgage imposed no personal liability upon the manager, but merely provided that, if payment was not made, the mortgagee would be entitled to realize his dues by sale through the Court and this was all that the appellant sought by his suit. The manager for the time being no doubt had an option to pay in order to save the sale, but failure to exercise an option is not in any sense a breach of duty. The appellant made no claim against respondent 1 personally. He was there only as representing the estate of which the sale was sought. In their Lordships' opinion such a suit is not within the ambit of S. 80 and no notice of suit was required.

In the case before us, the claim against the Official Assignee was not a claim against him personally, but a claim against him as representative of the estate of Janaki Ammal, and throughout the case he

1. Revatimohan Das v. Jatindramohan Ghosh, (1934) 21 A I R P C 96=148 I C 482=61 I A 171=61 Cal 470 (P C).

merely occupied the position as the representative of that estate. Therefore we hold that no notice was required to be given under S. 80 to the Official Assignee before the suit was instituted. Consequently we consider that it was properly launched. The objection with regard to interest also fails. An examination of the judgment shows that the learned Judge did not award to the plaintiff any sum of money as interest. He awarded him the amount claimed on the ground that he had in fact lost property of that value and in doing so we consider he adopted the right attitude. The appeal therefore fails and must be dismissed with costs. No orders in the Letters Patent appeal.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 224

NEWSAM J.

Minor Pappu Reddi and another — Petitioners.

v.

Appaji Nayakkar and others — Respondents.

Civil Revn. Petn. No. 198 of 1935, D/. 30th September 1937.

Hindu Law—Alienation — Father—Alienation without consent of existing coparceners — Alienation is voidable at their instance — Right to challenge alienation is confined to coparceners alive on date of alienation.

An alienation of joint family property made by a Hindu father without the consent of the coparceners existing at the time is voidable at their instance. Where the only other coparcener in existence besides the father at the time of the alienation is a minor son, the son alone has a right to sue to avoid the alienation of his share of the family property. His right to sue is personal to him, but if his suit is successful, the property is gained back for the family and enures for the benefit of all future members. If he dies without suing, the property is lost to the family for ever. The right to challenge alienations of family property is and must necessarily be confined to the coparceners alive on the date of the alienation. Therefore if he dies without suing, a brother born after alienation but before his own death cannot sue. [P 224 C 2]

The consent, the prolonged carelessness or the death of all other coparceners who were alive when family property is alienated by a Hindu father — these three things finally deprive the family of all right to challenge such an alienation : *A I R 1936 Mad 440* and *A I R 1925 P C 33, Rel. on.* [P 224 C 2]

T. L. Venkatarama Iyer — *for Petitioners.*

A. Swaminatha Iyer and S. Tyagaraja Iyer — *for Respondents.*

Order. — The correct position, it seems to me, may be thus stated. An alienation of joint family property made by a Hindu father without the consent of the coparceners existing at the time is voidable at their instance. Where the only other coparcener in existence besides the father at the time of the alienation is a minor son, the son alone has a right to sue to avoid the alienation of his share of the family property. His right to sue is personal to him, but if his suit is successful, the property is gained back for the family and enures for the benefit of all future members. If he dies without suing, the property is lost to the family for ever. The question raised in this case is whether such a son's right to sue on behalf of the family can be exercised by a brother born after the alienation but before his own death. I am of opinion that it cannot, for the reason that the right to challenge alienations of family property is and must necessarily be confined to the coparceners alive on the date of the alienation. They alone are affected. They represented the family on that date. The interests of future members of the family were theirs and must continue to be in their hands only. They have power to ratify and power to challenge and death may rob them of either power and may rob their family of the only representatives competent to protect it in this respect. But it is plain that their power and their responsibility to succour the family fortunes must die with them, and it is just that alienations should be perfected by the death of all the coparceners in whom lay the power to ratify or to challenge or by their prolonged neglect or by their positive assent.

The consent, the prolonged carelessness or the death of all other coparceners who were alive when family property is alienated by a Hindu father—these three things finally deprive the family of all right to challenge such an alienation. This view, it seems to me, receives support from 59 Mad 667[1] at p. 677, 47 All 165[2] and all the other cases quoted to me. I agree with the lower Court that the plaint disclosed no cause of action. I dismiss this petition with costs.

C.R.K./R.M. *Petition dismissed.*

---

1. Visweswara Rao v. Surya Rao, (1936) 23 A I R Mad 440 = 163 I C 712 = 59 Mad 667 = 70 M L J 360.
2. Ranodip Singh v. Parameshwar Persahad, (1925) 12 A I R P C 33=86 I C 249=27 O C 343=47 All 165=52 I A 69 (P C).

*** A. I. R. 1938 Madras 225**

KING, J.

Dhurwas M. Venkatachalapathi Iyer, Lakshmana Iyer Sons — Appellant.

v.

City Cinema Co. Ltd., through Managing Director J. C. Rajagopala Iyer — Respondent.

Second Appeal No. 956 of 1933, Decided on 27th September 1937, against decree of Dist. Court, Madura, in A. S. No. 2 of 1933.

*** Res judicata — Applicability — Consent decree—When prevents application of doctrine stated — Consent decree deciding disputes finally—It operates as res judicata.**

Consent decrees cannot, merely because they are consent decrees, prevent the application of the doctrine of res judicata. In some cases they do prevent the application of the doctrine but that is because there is nothing to show that the parties in consenting to a decree really intended that the decree should be the final decision of their disputes. [P 225 C 2; P 226 C 1]

The plaintiff, a lessor, asserted in his plaint that the defendant, the lessee, had agreed to pay the Municipal taxes and claimed refund on the ground that he, i. e. the plaintiff, was made to pay and the defendant did not deny that fact in his written statement and a consent decree was passed directing payment of the amount due to the plaintiff by instalments. The plaintiff subsequently instituted another suit against the same defendant for refund of taxes paid by him in subsequent years:

Held* that the defendant not having put the matter in issue in the previous suit by raising it in the written statement must under O. 8, R. 5, Civil P. C., be deemed to have admitted it. Having intended the matter to be decided once for all in plaintiff's favour, he was estopped in the subsequent suit from denying his liability to pay the taxes and hence the decree in the previous suit operated as res judicata : *A I R 1934 Mad 454 and (1926) A C 155, Rel. on. [P 226 C 1, 2]

N. Rajagopala Aiyengar — *for Appellant.*

K. Rajah Ayyer — *for Respondent.*

Judgment.—This appeal is concerned with the lease of a site in Madura by the plaintiff to a Cinematograph Company and with the liability of the latter to pay certain Municipal taxes. Plaintiff claims refund of certain taxes paid on the ground that the liability to pay them rests upon defendant. The agreement between the parties is contained in a lease deed of 4th November 1927. On an interpretation of the terms of this agreement, the two Courts below have come to different conclusions, the learned District Judge holding against the plaintiff. In view of the discussion which is to follow, it is unnecessary for me to discuss this point in detail or to say more than that I agree with the interpretation given by the learned District Judge. A much more important point however follows and that is a plea of res judicata raised by plaintiff. This plea was accepted by the learned District Munsif but rejected by the learned District Judge. The facts are as follows : A previous suit was filed by plaintiff against defendant in August 1928. In that suit plaintiff claimed arrears of rent with interest and also refund of Municipal taxes paid by him on defendant's account for the years 1925.26, 1926.27, 1927.28 again with interest. In the particulars given regarding the latter claim, it is shown that payment of tax for 1927.28 was made on 28th April 1928, the tax receipt being duly filed with the plaint. In para. 4 of the plaint specific reference is made to the agreement, and to defendant's liability to pay "all the taxes relating to the said plot."

To this plaint, defendant filed a written statement. In that written statement he denied nothing, but complained that plaintiff had rushed prematurely to Court without observing his promise to receive "the arrears" in instalments of Rs. 100 over and above the rent as it fell currently due. No reference at all was made to the Municipal taxes. The only contest raised was regarding the liability to pay interest and the Court was asked to pass a decree directing payment of the principal either in instalments or at a year's interval. On this pleading, the suit did not proceed to trial, but by consent a decree was passed for the plaintiff for the amount claimed, with costs, payment to be made at the rate of Rs. 400 a month. On these facts plaintiff claims that liability to pay the Municipal taxes is res judicata. The learned District Judge dismisses this plea in two short sentences :

I do not think this decision will operate as res judicata, for it was a consent decree and the question of liability for taxes was not put in issue by the defendant. It is possible that the defendant may have agreed to pay these taxes for the sake of peace.

It seems to me that this is to deal with the matter far too summarily. It is well known that consent decrees cannot, merely because they are consent decrees, prevent the application of the doctrine of res judicata. Very often, no doubt, they do prevent it, but that is because there is nothing to show that the parties in consenting to a decree, really intended that

the decree should be the final decision of their disputes. *See* 67 M L J 199,[1] where a ryot consented to a decree in return for the plaintiff's promise to release his crops from attachment. In that case the ryot had filed no written statement and had already succeeded in two Courts on the question at issue—the rate of rent. But what are the facts here? The plaintiff asserts in his plaint that the defendant has agreed to pay the taxes. The defendant does not deny that fact. Under O. 8, R. 5 therefore, defendant must be deemed to have admitted it. He does not put the matter in issue because he has no contention to raise. When he consents to a decree, he is thinking no doubt only of the relief of instalments, but he has already decided at the stage of presenting his written statement that the dispute so far as it regards liability to pay the principal amount of the taxes is to be settled in plaintiff's favour without any contest. It is impossible, I think, in these circumstances to hold that defendant did not intend the decree to decide that dispute once for all in plaintiff's favour. It was argued by Mr. Rajah Iyer that defendant ought not to be allowed to take advantage of the fact that the Court did not itself adjudicate this question of liability to raise it in the second suit though he did not raise it in the first. The best answer to this argument is given in the words of the Privy Council in (1926) A C 155[2] at page 165:

> It is settled, first that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result, either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle, namely that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff, and traversable by the defendant has not been traversed. In that case also, a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies, and estoppel occurs.

I am of opinion therefore that in the present case, defendant, by virtue of his pleading in the previous case, was estopped from pleading that he was not liable to pay the taxes in question. In the result the decree of the learned District Judge must be set aside, and the decree of the learned District Munsif restored with costs both here and in the lower appellate Court. Leave refused.

C.R.K./R.M. *Order accordingly.*

---

* A. I. R. 1938 Madras 226

MADHAVAN NAIR J.

Taluk Board, Chidambaram, and others — Appellants.

v.

Varadesesha Iyengar and another — Respondents.

Appeal No. 58 of 1934, Decided on 5th January 1937, against decree of Sub-Judge, Kumbakonam, in O. S. No. 19 of 1933.

*** Mortgage—Suit on — Costs — Court can pass personal decree against non-mortgagor.**

Courts have discretion to pass a personal decree for costs against a non-mortgagor in a suit based on a mortgage: *A I R 1916 Mad 763, Not foll.; A I R 1931 Mad 272; A I R 1932 Mad 155 and A I R 1935 Mad 121, Rel. on.* [P 227 C 1]

P. V. Rajamanner and K. Subba Rao — *for Appellants.*

K. Sankara Sastri and K. S. Champakesa Iyengar — *for Respondents.*

Judgment.—The decision in 29 M L J 120[1] supports the appellant's case that personal decree for costs cannot be passed against a person who is a non-mortgagor in a suit by the mortgagee, but in A I R 1931 Mad 272[2] it was held that such a decree can be passed. In 55 Mad 332[3], 29 M L J 120[1] was considered and explained by the learned Judges. Though the circumstances were somewhat different, the learned Judges held that a decree

1. Appalanarasiah Chetty v. Chittavadu, (1934) 21 A I R Mad 454=151 I C 964=67 M L J 199.
2. Hoystead v. Commissioner of Taxation, (1926) A C 155=95 L J P C 79=134 L T 354=42 T L R 207.
1. Venugopalachariar v. Padmanabha Rao, (1916) 3 A I R Mad 763=30 I C 188=29 M L J 120.
2. Ramakrishna Ayyar v. Raghunatha Ayyar, (1931) 18 A I R Mad 272=131 I C 151.
3. Rajagopalaswami Naicken v. Palanisami Chettiar, (1932) 19 A I R Mad 155=135 I C 578=55 Mad 332=62 M L J 93.

for costs personally against the non-mortgagor can be passed on a mortgage action. In 40 M L W 576[4] the proposition is stated to be an undoubted one, though there is no discussion of the point. I am inclined to agree with the decision subsequent to 29 M L J 120[1] which held that the Courts have a discretion to pass a personal decree against a non-mortgagor.

In the present case, the learned Judge has given reasons for passing the decree. The appeal fails and is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

4. Subramania Ayyar v. Swaminatha Ayyar, (1935) 22 A I R Mad 121=153 I C 1013=40 M L W 576.

A. I. R. 1938 Madras 227

HORWILL J.

President, District Board, Kistna, Masulipatam — Appellant.

v.

Keneru Lakshmayya — Respondent.

Second Appeals Nos. 708 and 709 of 1933, Decided on 13th September 1937, against decrees of Dist. Court, Kistna at Masulipatam, in A. S. Nos. 170 and 162 of 1932.

(a) Estoppel—District Board issuing licenses to motor bus proprietors for period of two months only—Motor bus proprietors accepting licenses with knowledge that they were for two months—They are estopped from denying that District Board could issue licenses for two months—Ultra vires nature of order of issuing license does not affect question of estoppel.

A District Board through its officer issued licenses to the motor bus proprietors for a period of two months only. The motor bus proprietors accepted the licenses with knowledge that they were issued for a period of two months. They subsequently contended that the District Board had authority to issue licenses for a period of one year and could not issue licenses for a temporary period of two months :

Held that the act of the officer was the act of the District Board and hence the ordinary laws of estoppel that arise out of the conduct of principals applied equally well to the contract of this nature entered into by the District Board with the motor bus proprietors who were estopped from denying that the District Board had authority to issue licenses for a period of two months. The ultra vires nature of the order issuing the license did not affect the question of estoppel: *A I R 1925 Cal 1107 and A I R 1928 Mad 164, Disting.*

[P 228 C 2 ; P 229 C 1, 2]

(b) Company—Person entering into contract with company — Contract beyond powers of director — Company ratifying it without knowing it to be ultra vires—Company is not bound by contract (*Obiter*).

Any person dealing with a company is supposed to be acquainted with its articles and memorandum and therefore to be aware of the powers that the directors have. If therefore one enters into a contract with a company and such a contract is beyond the powers of the director, the company cannot be bound by it ; and even if the company subsequently ratifies the contract without knowledge of the fact that it was a contract entered into ultra vires, the company cannot be bound by the contract. [P 229 C 2]

(c) Highway—Owner of motor bus has no common law right to use highway subject to compliance with some formalities—Such right if at all existed, is taken away by Local Boards Act—Owner of motor bus not having authority to use road causing damage to road — Suit by District Board for damages is maintainable.

The owner of motor vehicle has not an unrestricted common law right to use the highway. However assuming that such a right did at one time exist or must be presumed to have existed from the mere fact that a motor bus is a vehicle that runs along roads it is clear that that right was taken away by the Local Boards Act, unless the person who wished to use the highway got permission to do so from the local body having jurisdiction. He did not ever have a right subject only to his complying with some formality. He has no right at all to use the road unless he got permission from the local body to do so. No doubt the District Board has no complete right of property over the roads. The property vested is such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use. The District Board has to spend considerable sums of money in maintaining the road ; and if any person who has no authority to use the road causes damage to that road then the District Board can bring a suit for damage caused to its road by the unauthorised use. [P 230 C 1, 2 ; P 231 C 1, 2]

Y. Govindarajulu — *for Appellant.*

P. Satyanarayana Rao—*for Respondent.*

Judgment. — The District Board of Kistna has brought these suits against the defendants who are motor bus proprietors for a permanent injunction restraining them from plying their motor cars on the roads of the District Board of Kistna without a license, and for recovery of license fees or damages from the defendants for running their respective motor vehicles without licenses. The District Munsif of Masulipatam discussed the various points of law that arose in a very elaborate judgment and came to the conclusion that the District Board was not entitled to an injunction, that they were not entitled to the recovery of license fees as such ; but that there was nothing in law to prevent the District Board from recovering damages for damage to their roads ; and he has assessed the damages on the basis of the license fees which the defendants did not

pay. The District Judge, while agreeing with the trial Judge that the suit was maintainable, held that the action of the District Board in granting temporary licenses was ultra vires and that the defendants, although in fact they only received licenses for two months, must be deemed to have obtained licenses for a full year, as the District Board was not entitled to refuse them licenses for that period. He therefore allowed the appeals and dismissed the suits.

The facts that gave rise to the trouble between the Kistna District Board and the various bus proprietors in the District were that certain proposals had been sent to Government for a modification of the bye-laws, so that a higher rate for license fees might be charged. There was also some question as to the legal position that would arise from a bifurcation of the District Board. While these proposals were pending with the Government, the District Board were unwilling to grant licenses for the full period of a year and granted licenses for two months only, debiting the bus proprietors with one-sixth of the annual rate. Upon the expiry of that two months, the applicants made no application for further licenses, but continued to ply their buses without license until the end of the year. It appears from the correspondence that has been filed that other bus proprietors did apply for renewals of their licenses and were told that license would be granted for the remaining period of the year upon their paying the proportionate share for the remaining months in the year of the new rate of license sanctioned by the Government.

A point was raised in the Courts below whether the District Board, in view of the provisions of bye-law 4, sub-s. 1, could issue licenses for a period less than one year. The District Munsif seemed to think that they could and held that in any event the defendants were estopped from denying the right of the Board, in that they had accepted the licenses. The District Judge thought that there could be no question of estoppel, because the actions of the proprietors in applying for licenses for a year and in running their buses for a year showed that they did not accept the terms of the license, while the evidence let in on behalf of the plaintiff did not show that there was an acceptance of the license for two months. I have been taken through some of the more important evidence on this point and there can be no doubt that the motor bus proprietors in the Kistna District were well aware of the discussions that were taking place in the Council and the proposals to enhance the rates for the granting of licenses. They were also aware, of course, of the proposal to bifurcate the District Board. It is also equally clear from the evidence that the District Board intended to extend the licenses without question subject to the payment of such enhanced license fees as might be sanctioned by the Government. It has been contended that there is nothing to show that the bus owners were able to read the stipulation in the licenses granted that they were good only for two months. In view of the fact that the bus owners had been protesting to the District Board against any enhancement of license fees, the defendants cannot be heard to say that they were not aware of the stipulation of the license. Even if they did not know English, it would be their business to find out what was written in their licenses. After setting out the particulars regarding the description of the vehicle, fees paid etc., there was a note in the license to this effect :

> In view of the fact that revised bye-laws which are sent up for the formal approval of Government will come into operation shortly, and in view of the fact that an elected Board will come into office ere long, this license is granted only from 1st April 1929 to 31st May 1929.

The defendants were therefore well aware of the fact that the District Board purported to issue this license for a period of two months only. Had the defendants refused to accept the license for such a short period, then the District Board would have had the option of either issuing a license for a year or refusing it altogether; and it would appear from the conduct of the officers of the Board and the correspondence that took place that it is probable that the Board would have refused to issue licenses for a whole year in view of the fact that the license fees which were expected to come into force shortly were very much higher than the license fees then current. At any rate, by accepting these licenses, the defendants made it impossible for the District Board to exercise any discretion in this matter, and prima facie they would be estopped from denying that the District Board had authority to issue licenses for a period of two months only. The argument of the learned counsel for the defendants is that

even if it is true that the action of the defendants showed that they accepted the two months' license, there cannot be any question of estoppel if the contract was itself ultra vires of the Board. Considerable reliance is placed on a case, 52 Cal 748[1] at p. 762, where a portion of the judgment of the Lord Chancellor in (1846) 2 Ph 117[2] at p. 123 is referred to :

> If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence.

But Page J. in the Calcutta case[1] adds "but acquiescence cannot rehabilitate or render valid a transaction which is ultra vires and illegal". It is not contended here that a contract which is illegal can be made legal by acquiescence; and the doctrine of estoppel does not depend altogether upon the legality of a contract. Moreover Page J. in considering the facts of that case, came to the conclusion that there was no acquiescence by the parties and that neither of them was aware of the circumstances that would amount to a representation which led one party to do a certain act to his own prejudice. Other cases have also been referred to, of which a typical one is (1899) A C 114[3] at p. 124:

> It is quite clear that a company cannot do what is beyond its legal powers by simply going into the Court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in Court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract. The President, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded.

An extract from Halsbury has also been read somewhat to the same effect. It is clear that what has been considered in Halsbury in the passage referred to and in all the cases above quoted is the liability of a company for an act of its agent or director. Any person dealing with a company is supposed to be acquainted with its articles and memorandum and therefore to be aware of the powers that the directors have. If therefore one enters into a contract with a company and such a contract is beyond the powers of the director, the company cannot be bound by it; and even if the company subsequently ratifies the contract without knowledge of the fact that it was a contract entered into ultra vires, the company cannot be bound by the contract. The present case does not depend upon this principle at all. The District Board entered into the contract by its agents and the District Board did not dispute the liability arising out of the contract. The act of the special officer was the act of the District Board, and therefore the ordinary laws of estoppel that arise out of the conduct of principals apply equally well to a contract of this nature entered into by the District Board through its executive officers with the defendants.

I may refer before leaving this point to a case which I do not think has much importance but deserves mention as the learned counsel for the defendants has stressed it, viz. 53 M L J 810.[4] As this was a criminal case, the learned Judges who decided it were considering primarily what the intention of the accused person was; had the accused person who had applied for the license the right to use a private market? and the decision turned upon the facts that it was a private market and that there was no reason at all why permission to use the market should be withheld, provided that the requirements as to sanitation and so on were complied with. The important section relied on by the accused in that case was one to the effect that if orders on an application for a license are not communicated within 30 days after receipt of the application by the President, the application should be deemed to have been allowed for the year. It was held that the order of the Board was ultra vires and therefore no order at all and that it had therefore to be considered that the license had not been refused. Entirely different considerations arise in the granting of motor bus licenses; and the ultra

1. Gobinda Ramanuj Das v. Ram Charan Das, (1925) 12 A I R Cal 1107 = 89 I C 804 = 52 Cal 748=29 C W N 931.
2. Duke of Leeds v. Earl of Amherst, (1846) 2 Ph 117=10 Jur 956=16 L J Ch 5 = 14 Sim 357 =78 R R 47.
3. G. N. W. C. Ry. v. Charlabois, (1899) A C 114 =68 L J P C 25=79 L T 35.
4. Ellammal v. Emperor, (1928) 15 A I R Mad 164=106 I C 718=29 Cr L J 126=53 M L J 810.

vires nature of an order does not affect the question of estoppel.

The learned counsel for the defendants has sought to uphold the decree of the lower Appellate Court by contending that the suit was not maintainable, a point on which both the lower Courts were in agreement. It is unnecessary for me to discuss in detail the considerable amount of case law that has been referred to in this case, as the learned District Munsif has discussed most of the cases very carefully and has, I think, correctly interpreted them. The line of argument of the learned counsel for the defendants is that the owner of the bus had the Common law right to take his bus over any road he pleased and that the Legislature, by the Local Boards Act, has not taken away that right but has only compelled bus owners to comply with certain formalities —one of them being the taking out of a license. If the license is not taken out, the only remedy of the Board is to take action against the bus owners for failing to comply with the terms of the Act and to ask the Court to invoke the powers given to it under the Act; for the Board has no cause of action outside the Local Boards Act. I cannot accept the correctness of the contention that the owner of a motor bus has a common law right to take his bus over any road subject to compliance with a formality. When the common law right to use of the roads was being built up, there were of course no motor cars in existence; and it was always understood that the right to the road was one to use it in some recognized and usual manner. If in those pre-motor car days, some vehicle had been driven at a high speed along the roads and caused as much damage as a motor car would do to any ill-constructed road, I doubt very much whether it would have been held that the owner of such a vehicle had the common law right to do what he did and to cause unusual destruction to the road. When motor cars first came into existence, it was incumbent upon an owner to arrange that a man should walk in front of the car as a warning that a dangerous vehicle was coming. Obviously that prevented any excessive speed on the part of the motor car and the motor car could not have done any more damage than any other carriage or cart. As the speed of motor cars increased, the control of the use of these cars increased with it; and I doubt whether at any time the motor vehicle has had an unrestricted common law right to use the highway. However assuming that such a right did at one time exist or must be presumed to have existed from the mere fact that a motor bus is a vehicle that runs along roads, it seems clear to me that that right was taken away by the Local Boards Act, unless the person who wished to use the highway got permission to do so from the local body having jurisdiction. He did not in my opinion ever have a right subject only to his complying with some formality. He had no right at all to use the road unless he got permission from the local body to do so, although Courts have held that permission should not be withheld except for good reason.

In the present case there was no question of withholding permission, for no permission was sought for. Most of the cases referred to in connexion with the remedy of the Board against a person who fails to take out a license are cases in which the local bodies have been given some power to regulate certain acts within their jurisdiction; and it has been held that where a body has been given certain powers under a statute its remedy for disobedience of the orders of the body with regard to those acts must be sought within the Act itself. (1902) 2 Ch 182[5] is a fair example of the type of cases on which the defendants rely. There, the owners of a certain piece of land erected houses; but did not make allowance for roads through the estate of the nature required by the bye-laws of the borough. The borough thereupon brought a suit for an injunction restraining the defendants from proceeding any further with their work and for a declaration that the borough was entitled to pull down any work begun or done by the defendants in contravention of the bye-laws. It was held on the facts of the case (1) that the defendants were not laying out or intending to lay out the highways as new streets within the meaning of the bye-laws; (2) that the bye-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the Attorney-General; and (3) that no such declaration as asked for ought to be made. It is partly on account of these cases that the learned District

5. Devonport Corporation v. Tozer, (1902) 2 Ch 182=71 L J Ch 754=86 L T 612.

Munsif refused to grant the declaration and injunction prayed for by the District Board. But it was not considered either in that case or in any of the cases referred to what rights the body would have had if its private property were damaged. If the running of the defendants' bus was a nuisance to the public, and the rights of the public were in some way infringed by the continual running of these buses without license, then, as was actually the case in (1931) 1 Ch 121,[6] the Advocate-General could bring an action on behalf of the public. The question whether the civil rights of a local body had been infringed did not there come up for discussion. The principle that the learned counsel for the appellants seeks to apply has been very well set out in the extract from 31 Bom 604[7] and 50 Mad 91.[8]

> Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of the Act, then, except so far as is otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case, there is no ouster of the jurisdiction of the ordinary Courts; for they never had any.

The Local Board however do not contend that there is anything in the Act which empowers them in a case like the present to oust the jurisdiction of the Civil Court. They merely rely on the fact that they, like any private person, have a right to bring a suit against any person who does damage to their property, and the damage alleged in the present case is that of the wearing out of the roads which are the property of the District Board. No doubt the District Board has no complete right of property over the roads. As was said by King J. in 69 M L J 269[9] at page 273,

> The property vested is such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use.

The District Board has to spend considerable sums of money in maintaining the road; and if any person who has no authority to use the road causes damage to that road, then I can see no reason why the District Board should not bring a suit for damage caused to its road by the unauthorized use. I therefore agree with both the lower Courts that the suit as framed for damages was maintainable. The last question that arises for consideration is the quantum of damages to which the plaintiffs are entitled. The learned Munsif thought that the amount of the license fee was a very good guide to the Court in arriving at a reasonable estimate of the damages. Unfortunately, no satisfactory evidence has been let in on this head. The report by the District Board Engineer to the Municipality recommending certain rates to be adopted in licensing buses has been referred to; but the District Board Engineer himself has not been examined. The document, even if admissible, can have little value. One naturally presumes that in the granting of a license the local body not only allows for any injury that may result to its road by the use of the bus, but also for the pay of the staff whose time is taken up in dealing with licenses, for office expenses and so on, and for some reasonable profit to assist the general revenues of the local body. According to the report of the District Board Engineer, the license fee collected from buses and cars is insufficient for the maintenance of roads, but there is no evidence in support of this. I see therefore no ground for thinking that the actual damage caused to the road by the running of the defendants' buses for ten months was greater than the amount of license fee that they had already paid, which was that for a full year at the old rates.

I therefore find on this point that the plaintiffs have not proved that they are entitled by way of damages to any larger sum than what they have already been paid by way of license fees. On that ground the suit has to be dismissed; but as most of the discussion in three Courts has been taken up by a consideration of technical pleas relating to the maintainability of the suit and other issues arising out of the written statement, with regard to which the defendants have been unsuccessful, the parties will be ordered to pay each his own costs in all the Courts.

C.R.K./D.S. *Suit dismissed.*

---

6. Attorney-General v. Sharp, (1931) 1 Ch 121=99 L J Ch 441=143 L T 367=94 J P 234=28 L G R 513=74 S J 504=46 T L R 554.
7. Bhaishankar v. Municipal Corporation of Bombay, (1907) 31 Bom 604=9 Bom L R 417.
8. Venkata Siva Rao v. Rama Krishtnayya, (1926) 13 A I R Mad 246=92 I C 790=50 Mad 91=50 M L J 148.
9. Jagannadharajugaru v. Taluq Board, Rajahmundry, (1935) 22 A I R Mad 810=157 I C 918=69 M L J 269.

A. I. R. 1938 Madras 232

VENKATARAMANA RAO J.

M. C. T. M. Chidambaram Chettiar — Appellant.

v.

Rangaswami Tevar and others — Respondents.

Second Appeals Nos. 1353 to 1367 of 1932, Decided on 11th February 1937, against decrees of Dist. Court, East Tanjore at Negapatam, in A. S. Nos. 203, etc., of 1931.

Civil P. C. (1908), O. 21, Rr. 66, 94—Mortgaged property put to sale in execution of mortgage decree—House plots in mortgaged property known as jari manais not mentioned in sale proclamation either by description or by specific survey numbers but included in sale certificate—Plots held not put to sale and suit for eviction of persons in possession of plots did not lie.

Where in execution of a mortgage decree certain house plots known as jari manais, included in the mortgaged property and mentioned in the petition for sale were not mentioned in the sale proclamation either by the description as jari manais or by specific reference to their survey numbers but were included in the Court sale certificate issued to the auction purchaser :

Held that a suit by the auction purchaser for ejectment of persons in possession of the house plots did not lie as those plots had never been put to sale. The Court sale certificate could not confer any title on the purchaser inasmuch as it was only a formal document confirming what was purchased in the Court auction and the purchaser could only base his title to those plots only by virtue of his purchase at the Court auction. [P 232 2; P 233 C 1]

B. Satyanarayana — *for Appellant.*

K. S. Desikan — *for Respondents.*

Judgment. — This batch of second appeals arises out of several suits in ejectment filed by the plaintiff as mirasidar and landholder of the village of Melamarudur against the several defendants who are in occupation of the sites described in the plaints in the several suits filed against them. The case for the plaintiff is that he became the owner of the said village by virtue of a Court auction purchase and that the title to the suit property vested in him thereunder, that the defendants are in occupation of the sites on condition of rendering certain services to the landlord, that they have failed to render such services and therefore they have forfeited the right to remain on the several sites. He therefore claimed to recover possession of the sites after the removal of the superstructures erected on the suit sites. The Court sale was in execution of a mortgage decree obtained by one Somasundaram Chettiar of Devakottah and which was later on assigned to the plaintiff's father.

The main defence is that the defendants have been in possession of the land for generations, that they have got permanent occupancy right therein, that the suit sites were not comprised in the mortgage, that no title passed to the plaintiff under the Court sale and therefore they are not liable to be evicted. One main point in controversy between the parties in both the Courts was whether the sites were actually included in the mortgage. The suit sites comprised distinct survey numbers, but the mortgage did not specifically mention the survey numbers and the description of the sites was as jari manais. Both the Courts concurrently found that they were included in the mortgage and that finding has not been challenged in second appeal. The District Munsif negatived all the contentions raised by the defendants and held that they had no right to remain in the land and gave a decree in favour of the plaintiff. But the learned District Judge dismissed the plaintiff's suit on the ground that no title passed to the plaintiff in the Court sale. It is against this decision that these second appeals have been filed. It seems to me that the view taken by the learned Judge is correct and that his judgment will have to prevail. There is no doubt that the mortgagee obtained a decree for sale of the entire mortgaged property including the suit sites. It is also clear that in the execution petition filed after the final decree for sale of the properties, the plaintiff had asked for the sale of the suit sites, but unfortunately, in the sale proclamation, these sites were not mentioned. The property was divided into 18 lots and each lot was described by specific survey numbers and in none of the descriptions of the several lots were these jari manais included either by their description as such or by specific reference to their survey numbers. The result is that these jari manais were never put up for sale. No doubt the plaintiff purchased all the 18 plots but it does not affect the question whether the said plots were really sold and the plaintiff obtained title thereto by virtue of the auction purchase. The Court sale certificate did really include the plots, but that cannot confer title. The Court sale certificate is only a formal document

confirming what was purchased in the Court auction. The plaintiff can only base his title to the suit property by virtue of his purchase at the Court auction. The defendants who were not parties to execution proceedings are entitled to raise the defence that the plaintiff is not entitled to sue them in ejectment. It may be very unfortunate for the landholder, but he has himself to blame. He should have seen that these plots had been specifically described in the sale proclamation, and if he has failed to do so, he must suffer.

I therefore confirm the decision of the learned District Judge and dismiss these second appeals. It must be stated that this point was neither raised in the written statement nor urged before the trial Court, and it was only allowed in the appellate Court. I had some difficulty in coming to the conclusion whether the view of the learned District Judge was correct without the necessary documents on which the said conclusion should be based. I therefore called for the necessary documents, namely the execution application, the sale proclamation, and the bidding list. I have now satisfied myself after looking into those documents that the conclusion of the learned District Judge was correct. Therefore in the circumstances, I direct each party to bear his own costs throughout. Leave refused.

C.R.K./R.M. *Appeals dismissed.*

---

* A. I. R. 1938 Madras 233

HORWILL J.

Public Prosecutor — Appellant.

v.

Captain R. Rajagopalan — *Accused* — Respondent.

Criminal Appeal No. 316 of 1937, Decided on 11th November 1937, from order of Sub-Divisional Magistrate, Coimbatore, in Criminal Appeal No. 28 of 1937.

*** Motor Vehicles Act (1914), S. 16—Madras Motor Vehicles Rules, R. 30 (a) — Owner of private motor lorry carrying goods for reward on one occasion without license — Offence under R. 30 (1) is committed.**

It may be true that R. 30 (a) was primarily intended to apply to motor vehicles which are used for the express purpose of letting for hire; but even if a motor vehicle is used only once for such a purpose, then on that one occasion it is nonetheless let for hire because the owner does not ordinarily use his lorry for purposes of reward. Hence if a person undertakes to convey goods for reward in his private lorry, on one occasion without license he has let that vehicle for hire and so commits an offence under R. 30 (1). [P 233 C 2; P 234 C 1]

Appellant in *person*.

N. R. Govindachari and S. Rangachari — *for Respondent*.

Judgment.—The accused entered into a contract with the District Forest Officer of the Nilgiris to convey quantities of sandalwood from the Seigur Range in the Nilgiris District to Satyamangalam in the Coimbatore District. For the purpose of fulfilling his contract, he used his registered private lorry and on one of his trips to Coimbatore, the lorry was stopped within that district by the Sub-Inspector of Police, Annur, and when the driver was asked for the "G" permit, it was found that he had none; and he and the owner were therefore charged by the Coimbatore Police under S. 16, Motor Vehicles Act. The owner was convicted by the Sub-Magistrate of Mettupalayam. In appeal the Subdivisional Magistrate of Coimbatore held that the car was actually let for hire within the Nilgiris District and that therefore the Courts of Coimbatore District had no jurisdiction to try the offence, the Subdivisional Magistrate holding that under R. 30 (a), the motor vehicle is prohibited from being let for hire without a "G" permit and as the accused's lorry was let for hire in the Nilgiris he could not be tried at Coimbatore. He therefore allowed the appeal and acquitted the accused.

The Crown have appealed against this acquittal. The order of acquittal is sought to be sustained in this Court not on the ground of jurisdiction, but on the ground that the Legislature did not intend to compel the owner of a private vehicle, who ordinarily uses his vehicle for his own purposes, to take out a license merely because on one occasion he conveyed goods for hire in his private lorry. It may be true that R. 30 (a) was primarily intended to apply to motor vehicles which are used for the express purpose of letting for hire; but even if a motor vehicle is used only once for such a purpose, then on that one occasion it is nonetheless let for hire because the owner does not ordinarily use his lorry for purposes of reward. A number of cases have come before this Court in which the owners of private cars who acquired their cars for their own professional purposes have been convicted because they have received a reward from persons carried in their cars. It has been

held that by so doing the owner was guilty of letting the car for hire. Similarly, if a person undertakes to convey goods for reward in his private vehicle, he has let that vehicle for hire and so commits an offence under R. 30 (1), Motor Vehicles Rules. The conviction of the Sub-Magistrate of Mettupalayam was therefore right and the order of the Subdivisional Magistrate, Coimbatore, allowing the appeal and acquitting the accused was wrong. The Government appeal will therefore be allowed.

It is urged that this is a technical offence, in that the accused did not wilfully infringe any rule and probably honestly believed that he was under no obligation to take out a "G" permit; and that he should therefore be fined only some nominal sum. It seems probable however that the amount of fine that has been levied from him is appreciably less than the amount he would have been compelled to pay for taking out a "G" permit for the period for which he was conveying sandalwood from the Seigur Range to Satyamangalam. In restoring the order of the Sub-Magistrate, the fine inflicted by the Sub-Magistrate, will be re-imposed, not so much as a punishment for innocently infringing a technical rule, but as a sum to be paid to Government towards the loss of license fees.

C.R.K./D.S. *Appeal allowed.*

---

* A. I. R. 1938 Madras 234

BURN AND LAKSHMANA RAO JJ.

Minor S. Venkatasubramania Sarma — Appellant.

v.

United Planters' Association of South India — Respondents.

Appeals Nos. 16 and 56 of 1936, Decided on 23rd September 1937 against order of Sub-Judge, Coimbatore, D/- 26th August 1935.

*** (a) Provident Fund — Employee of company dying while still in service — His contributions to company's provident fund are not liable to attachment to defray his debts.**

An employee of a company died while still in service of the company. After his death, his contributions to the company's provident fund were attached in execution to defray his debts :

Held that under the rules of the provident fund, his contributions to the provident fund were not liable to attachment to defray his debts.

[P 235 C 1]

*** (b) Married Women's Property Act (1874), S. 6—Expression "policy of insurance" does not mean proposal or prospectus—For a policy to come under S. 6, it must appear on face of policy that it is effected for benefit of wife or children.**

Although for certain purposes in cases of dispute between the insurer and the insured, it may be necessary to look into the proposal or the prospectus or even to construe the prospectus as though it were part of the policy, the terms of S. 6 are clear and unambiguous. The expression "policy of insurance" in that section is to be taken in the ordinary meaning of those words, and does not mean the proposal as well as the company's prospectus : *A I R 1936 Mad 635, Rel. on.*

[P 236 C 1]

In order that a policy may come under S. 6, it must appear on the face of the document that the policy is effected for the benefit of the wife, or the wife and children, or any of them. [P 236 C 2]

D. Ramaswamy Aiyengar and T. P. Kannabiran — *for Appellant.*

King and Partridge — *for Respondents.*

Burn J.—These two appeals are preferred against the order of the learned Subordinate Judge of Coimbatore passed on E. P. R. No. 349 of 1935 in O. S. No. 261 of 1934. O. S. No. 261 was a suit filed by the United Planters' Association of South India against a minor, S. Venkatasubramania Sarma, by his guardian. The suit was based upon the allegation that the father of the minor, Sundareswara Sarma, who had been employed as an accountant by the Association had misappropriated Rs. 7500 of the Association's money. A decree was passed in favour of the Association against the separate assets of the deceased Sundareswara Sarma if any in the hands of the minor defendant. The Association got an attachment before judgment of three sums : viz. (1) a sum of about Rs. 5000 representing the contributions of Sundareswara Sarma to the Association's Provident Fund ; (2) an insurance policy of Rs. 1000 and (3) an insurance policy of Rs. 4000. Both the policies are issued by the Oriental Government Security Life Assurance Company Ltd. and copies of the policies were filed as Exs. 1 and 2. The learned Subordinate Judge held that the amount of Rs. 5000 representing Sundareswara Sarma's contributions to the Provident Fund could not be proceeded against and he came to the same decision with regard to the amount of Rs. 4000 due under Policy No. 353009, but he held that the amount of Rs. 1000 covered by Policy No. 123164 could be proceeded against. The learned Subordinate Judge said in his

judgment that it had been fairly conceded on behalf of the defendant that the sum of Rs. 1000 could be proceeded against. Mr. Ramaswami Aiyengar who appears for the appellant in A. A. O. No. 16, says that the guardian of the minor defendant did not give the vakil in the lower Court any authority to make any such concession. We must take the learned Judge's observation as representing the fact that the vakil whether with or without authority did make that concession, but it is not necessary to embark upon a discussion of whether the vakil had authority to make such a concession since we propose to consider that appeal also on its merits. Appeal No. 56 is filed by the Association from the decision of the learned Judge holding that the decree-holder was not entitled to proceed against the amount of the policy for Rs. 4000 and the amount in the Provident Fund.

With regard to the amount in the Provident Fund, we agree with the learned Subordinate Judge. An attempt was made to argue that the deceased Sundareswara Sarma has been dismissed from the Association's service before he died. The learned Subordinate Judge refused to allow that point to be raised before him. He said that if this were the fact, it ought to have been stated when the decree-holder first sought to attach the property. He says in para. 7 that it transpired at the trial that the deceased died while he was still in the service of the Association. This we are told is incorrect, but we note that the judgment in the suit itself begins with a recital that the Association sued to recover a certain sum of money from the son of Sundareswara Sarma, "who was employed under the Association as an accountant from 1927-28 till his death in 1934." We therefore follow the learned Subordinate Judge in declining to allow it to be argued on behalf of the Association that Sundareswara Sarma was dismissed before he died. This being so, we are of opinion that the rules of the Provident Fund are such that Sundareswara Sarma's contributions to the Provident Fund are not liable to attachment to defray his debts any more than the contributions of the Association itself. In fact if it be taken that Sundareswara Sarma died in service, it is not really possible to maintain that his contributions were liable to attachment.

The real contest is with regard to the two policies of insurance. We are of opinion that there is no difference between the two. Both of them are liable for the debts of Sundareswara Sarma, or neither. The learned Subordinate Judge seems to have been influenced by the concession already referred to when he held that the policy for Rs. 1000 could be proceeded against. With regard to the policy for Rs. 4000, he has referred to a pamphlet, Ex. 3, issued by the Oriental Government Security Life Assurance Co. Ltd. In that pamphlet, the policy in the form Ex. 2 is advertised as providing the most practical form of protection obtainable for the wife and family of the assured. The policy is called a perfect protection policy. The learned Subordinate Judge after reading the provisions comes to the conclusion that the policy "is more or less on a line with life assurance policies covered by the Married Women's Property Act and that the policy is covered by the ruling in 55 Mad 171.[1]" S. 6, Married Women's Property Act, is quite definite. It runs as follows :

> A policy of insurance effected by any married man on his own life and expressed on the face of it to be for the benefit of his wife or of his wife and his children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not so long as any object of the trust remains be subject to the control of the husband or to his creditors or form part of his estate.

If the amounts of these policies are to be saved for the minor defendant in this case, it must be because they come strictly within the terms of S. 6, Married Women's Property Act. It will not do to say, as the learned Subordinate Judge says, that these policies are "more or less on a line with Life Assurance Policies covered by the Married Women's Property Act." Now it cannot be disputed that on the face of these policies themselves there is no expression that they are for the benefit of the wife or of the wife and children of the insurer. Mr. Ramaswamy Aiyengar for the appellant in A. A. O. No. 16, realizing this wishes to contend that the policy does not mean merely the policy as issued by the Company but must be taken as including the proposal filled in by the insurer and also if necessary any prospectus issued by the Company. He relies upon the

1. Abhiramavali Ammal v. Official Trustee of Madras, (1932) 19 A I R Mad 220=141 I C 680=55 Mad 171=62 M L J 111.

decision in 25 Mad 183.[2] We are of opinion that this case has no bearing upon S. 6, Married Women's Property Act. Although for certain purposes in cases of dispute between the insurer and the insured it may be necessary to look into the proposal or the prospectus or even, as stated in 25 Mad 183[2], to construe the prospectus as though it were part of the policy, we think the terms of S. 6, Married Women's Property Act, are clear and unambiguous and that the expression "policy of insurance" in that section is to be taken in the ordinary meaning of those words. The provision was passed in order to create a trust in favour of wife or wife and children. For this purpose it is enacted that the policy which is to create such a trust must be "expressed on the face of it" to be for the benefit of the insurer's wife or wife and children. This, we think, is clearly intended as inter alia a measure of protection for persons who might be induced to take an assignment of the policy. If there is an expression on the face of the policy that the policy is for the benefit of the insurer's wife or wife and children, the prospective assignee will be put on his guard. This would certainly not be the case if the term "policy of insurance" were interpreted to mean the proposal as well as the Company's prospectus. This view is supported by the decision of Venkatasubba Rao J. in 71 M L J 39.[3] In that case the amount of the policy was expressed to be payable "to the person or persons legally entitled thereto." In the present case in the column, "to whom payable" in Ex. 2, we find the words :

> The proposer's assigns or his proving executors or administrators or other legal representatives who shall take out representation from any British Court to his estate or limited to the moneys payable under this policy.

There is nothing on the face of either of these policies to indicate that the policies were effected for the benefit of the insurer's wife or wife and children or any of them. Mr. Ramaswamy Aiyengar wishes us to admit in evidence copies of the proposals made by the insurer in pursuance of which these policies were issued. We are refusing to admit those copies since we find that the requirements of O. 41, R. 27, Civil P. C., are not fulfilled. There is no allegation that they were shut out by the lower Court and we do not find them necessary in order to enable us to pronounce judgment. We think it is right to say as Venkatasubba Rao J. said in the case already referred to, that under S. 6, Married Women's Property Act "for a trust to arise it must appear on the face of the document that the policy was effected for the benefit of the wife or the wife and children or any of them." We have been referred to the case decided in 55 Mad 171[1] in which Madhavan Nair J. construed in favour of the wife a life-insurance policy in which it appeared that the amount was payable "to the assured or his wife if he predeceases her." Since those words did appear on the face of the policy in that case we do not think that it is necessary to discuss the judgment of Madhavan Nair J. but we are quite clear that we are not prepared to go even further than he went. It would be necessary to go a great deal further in this case in order to accept the contentions of Mr. Ramaswamy Aiyengar, because neither of the policies in this case mentions the wife or the children of the insurer. It follows that A. A. O. No. 16 of 1936 is dismissed with costs and A. A. O. No. 56 of 1936 is allowed with regard to the amount of the Policy No. 353009 and dismissed with regard to the amount of the Provident Fund. The appellant and the respondent in A. A. O. No. 56 of 1936 will pay and receive costs proportionate to their success.

C.R.K./D.S. *Order accordingly.*

2. Oriental Government Security Life Assurance Co. Ltd. v. Narasimhachari, (1902) 25 Mad 183=11 M L J 379.

3. Krishnamurthy v. Anjayya, (1936) 23 A I R Mad 635=164 I C 465=71 M L J 39.

A. I. R. 1938 Madras 236

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Ramaswamy Chettiar and others — Appellants.

v.

K. S. M. Manickam Chettiar and others — Respondents.

Appeal No. 52 of 1932, Decided on 6th October 1937, against decree of Sub.Judge, Devakottah, in O. S. No. 198 of 1930.

(a) Family Settlement—Consideration.

A bona fide settlement of a family dispute does not require any specific consideration to support it. [P 238 C 2]

(b) Transfer of Property Act (1882), S. 130—Assignment of actionable claim—Particular form or consideration is not essential—Intention to transfer should be clear from language.

Section 130 does not require that the assignment of an actionable claim should be in any particular form or that there should be consideration for it. No particular words are necessary to effect the transfer of a debt or any beneficial interest in moveable property if the intention to transfer is clear from the language used : *30 Mad 75, Rel. on.* [P 238 C 2]

(c) Limitation Act (1908), Art. 60—Sum as deposit with banker in *A*'s name — Subsequent agreement between *A* and *B* arranging portion of deposit to be transferred to *B* the rest going to benefit of *A* — Suit by *A* against banker for recovery of deposit—Art. 60 held applied.

A sum was lying with a banker as a deposit in the name of one *A*. In a subsequent arrangement between *A* and *B*, it was arranged that a portion of the deposit should be transferred to *B* while the other portion should go to the benefit of *A*. Subsequently *A* sued the banker for the recovery of the money lying in his name as deposit :

Held the arrangement did not change the nature of the sum as a deposit with a banker but still remained as a deposit payable at *A*'s demand. Art. 60 therefore was applicable to the suit. [P 239 C 1]

M. Patanjali Sastry and T. K. Sundararaman —*for Appellants.*

V. Rajagopala Ayyar and T. V. Ramiah — *for Respondents.*

Pandrang Row J.—This is an appeal from the decree of the Subordinate Judge of Devakottah dated 22nd February 1932 in O. S. No. 198 of 1930 on his file. The suit was one instituted by the two plaintiffs to recover nearly Rs. 13,000 from defendants 1 to 4. The suit claim was based on a document dated 2nd February 1926, Ex. A. That document was brought about as the result of an arrangement arrived at between the plaintiffs on the one hand and defendant 5 on the other immediately after the death of the sister of defendant 5 who had been married to plaintiff 1 who was then a minor. In fact the case of the plaintiffs was that disputes arose about the properties that had been given to this lady Valliammai Achi at the time of her marriage between plaintiff 1 and defendant 5, each claiming the money as his. This dispute arose before the corpse was removed from the house of plaintiff 1 and a number of caste men and relations acted as panchayatadars and pronounced their opinion in accordance with which the document Ex. A was executed by defendant 5 and plaintiff 2 on behalf of the then minor plaintiff 1 and attested by the panchayatadars, one of whom was defendant 1 with whose firm the moneys had been deposited. Defendant 1 did not contest the suit. Defendant 2 pleaded that he was not a necessary party to the suit. Defendants 3 and 4 put forward the claim of defendant 5 to the moneys in question and defendant 5 was the principal contesting defendant. His case was that, excepting a small portion, the moneys had been given by his family at the time of the marriage and that on the death of the girl without leaving any issue the same should revert to his family according to the custom among the Nattukottai Chetties. As regards Ex. A, defendant 5 completely denied that there was any arrangement as alleged or that he had signed Ex. A. The most important of the issues framed by the Court below were issues 1 to 3 and 7. The first three issues raised the question whether the arrangement relied upon in the plaint and Ex. A were true and whether defendant 5 had consented to it and acquiesced in it. Issue 7 related to the question of limitation. All the important issues were decided in favour of the plaintiffs and the learned Subordinate Judge made a decree accordingly in favour of the plaintiffs and against defendants 1 to 4.

In the present appeal by defendants 1, 3 and 5, the following points have been argued by their learned advocate : (1) that Ex. A is not a binding contract or agreement as it is not supported by consideration and (2) that the suit is barred by limitation. It is hardly possible to question the correctness of the finding of the Court below that Ex. A was actually executed by defendant 5 after the panchayatadars had settled the terms thereof on the date which Ex. A. bears. Defendant 5 who is the only witness examined on his side no doubt denied that he had agreed to any such arrangement or that he signed in Ex. A., but there can be no doubt that his evidence on these points is completely false and so far as this part of his case is concerned, there cannot be the least doubt that it is devoid of truth. The execution of Ex. A by defendant 5 as well as by plaintiff 2 is proved by three panchayatadars, P. Ws. 1, 2 and 4, one of whom, namely P. W. 1 is a man of substance occupying a high rank in society being a Rao Bahadur, M. B. E. and an ex-member of the Legislative Council. Their evidence has been accepted by the Court below and there can be no doubt that their evidence as regards the execution of Ex. A. by defendant 5 is true. In a subsequent document (the execution of which is admitted

by defendant 5, Ex. C) executed a few months afterwards, there is a reference to an amount of Rs. 1100 credited in the name of defendant 5's son in defendant 1's firm which cannot be anything other than a similar amount agreed to be credited to the same person in the same firm according to Ex. A. Defendant 5 is unable to give any account as to where this amount of Rs. 1100 came from or how it came to be credited in the name of his son. Ex. C. therefore furnishes independent evidence in support of the plaintiff's case that defendant 5 executed Ex. A.

On this part of the case, we have not the slightest hesitation in agreeing with the finding of the Court below, viz. that there was a dispute, that there was an opinion expressed by the panchayatadars and that a family arrangement was come to which is embodied in Ex. A, which was signed by defendant 5 and by plaintiff 2 and attested by the panchayatadars. The evidence in the case permits of no other conclusion, viz. that there was a dispute about the money that had been deposited with defendant 1's firm at the time of the marriage in the name of the then minor plaintiff 1 and that this dispute was settled in the manner indicated in Ex. A. As regards the contention that Ex. A is not enforceable against defendant 5 by reason of the absence of consideration therefor, it is sufficient to say that according to Ex. A itself the consideration was the settlement of the dispute that had arisen and the restoration of peace and harmony in the family. In this connexion it must be mentioned that defendant 5 himself is married to the sister of plaintiff 1 and that lady was alive at the time. It was therefore necessary in the interests of family harmony that the dispute should be amicably settled. The mere fact that the claim of one of the parties to the dispute might have had more legal foundation than that of the other does not necessarily show that the dispute was not bona fide or that the arrangement was not a proper family arrangement. There is nothing in the evidence which throws doubt on the bona fide character of the dispute or the propriety of the arrangement. As mentioned already the contest in the Court below was about the truth of the arrangement and the genuineness of Ex. A. Under Ex. A defendant 5 himself got some benefit in the sense that a portion of the money, viz. Rs. 1100 was agreed to be set apart or credited in favour of his son and it was only the balance that was to be drawn by plaintiff 2 for the benefit of plaintiff 1 from the firm with which the money was lying. We are therefore of opinion that Ex. A cannot be considered to be invalid or unenforceable for any alleged want of consideration. The bona fide settlement of a family dispute does not require any specific consideration to support it.

Exhibit A indeed can be viewed in another light viz. in the light of an assignment of an actionable claim within the meaning of S. 130, T. P. Act. The writing that is contained in Ex. A is sufficient to show that the intention of the parties was that one portion of the money lying with defendant 1's firm should belong thenceforward to defendant 5's son and the other portion should belong to plaintiff 1. It must also be remembered that defendant 1 himself was a party to the arrangement in the sense that he acquiesced in it and attested Ex. A. S. 130, T. P. Act, does not require that the assignment of an actionable claim should be in any particular form or that there should be consideration for it. As was observed in 30 Mad 75[1] at p. 77, no particular words are necessary to effect the transfer of a debt or any beneficial interest in moveable property and no particular words are necessary to effect such a transfer if the intention to transfer is clear from the language used.

It is in the light of these general principles that the documents that were the subject matter of discussion in 27 Bom 150[2] and 16 I C 708[3] were considered to amount to assignments. We might refer also to (1886) 17 Q B D 442.[4] The intention that can be gathered from Ex. A is in our opinion fairly clear and that intention was that the money that was lying in defendant 1's firm should be split up into two parts, one of which was to belong to defendant 5's son and the other to the then minor plaintiff 1 for whose benefit it became payable to the order of plaintiff 2. This operates as an assignment of the entire debt in two separate portions to

1. Rama Iyer v. Venkatachalam Pattar, (1907) 30 Mad 75=16 M L J 554.
2. Nandu Bai v. Gau, (1903) 27 Bom 150=4 Bom L R 951.
3. Konijetti Veeraswamy v. Varada Veeraswamy, (1912) 16 I C 708.
4. Harding v. Harding, (1886) 17 Q B D 442=55 L J Q B 462=34 W R 775.

two separate individuals. It is unnecessary to dilate on this aspect of the question because it does not appear to have been considered in the Court below and it will therefore be enough to rest our decision on the basis that Ex. A is something other than an assignment, viz. a family arrangement in settlement of a bona fide dispute.

The other point which raises the question of limitation can be more briefly dealt with. The date of Ex. A is no doubt 2nd February 1926 whereas the plaint was filed on 11th April 1929, i. e. a little more than three years after the date of Ex. A. The question is which is the Article which applies to a claim of the present nature. If it is Art. 60, as found by the Court below, there is no doubt that there is no bar of limitation because no demand was made till 1928. It is however contended that this is not a claim to which Art. 60 can apply but that Art. 115 applies. This Article relates only to claims for compensation for breach of a contract. The present claim is not for compensation but merely to obtain money which is lying with a banker's firm to the credit of plaintiff 1. The original deposit of the money at the time of Valliammal Achi's marriage was undoubtedly a deposit with a banker and this position has not been disputed before us. It is however contended that after the execution of Ex. A the position was radically changed and the money was no longer a deposit with a banker. We fail to see how this transformation can be said to have been effected by Ex. A. On the other hand Ex. A clearly says that the portion of the money that was to go to plaintiff 1 was payable to the order of plaintiff 2 by the firm with whom the money was lying. The original deposit itself was in the name of plaintiff 1 and the arrangement came to nothing more than that a portion of what was deposited should be paid for the benefit of plaintiff 1 and to the order of plaintiff 2. In other words that money still remained as a deposit payable on demand to the order of plaintiff 2. These last words were inserted because plaintiff 1 was a minor and could not draw the money himself. We are of opinion that the lower Court was right in its view that Art. 60 applied to the present suit and that the right to sue did not accrue till there was a demand and a refusal; and if this is the correct view, it is clear that the suit is not barred by limitation. We therefore concur in the finding of the Court below on this point also. The result is the appeal fails and it is dismissed with the costs of the plaintiff-respondents.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 239

BEASLEY C. J.

Padmanabhuni Narasimhadas — Petitioner.

v.

Dist. Board of Kistna, Masulipatam — Respondent.

Civil Revn. Petn. No. 784 of 1935, Decided on 10th December 1936, from decree of Sub-Judge, Bezwada, in Small Cause Suit No. 286 of 1934.

Madras Local Boards Act (14 of 1920), S. 225—Test for applicability of S. 225—Suit for balance of amount due under contract made with District Board to construct culvert on road within its area is not governed by S. 225.

Though a case under S. 225 does not stand to be determined in the light of a somewhat similar provision in the Public Authorities Protection Act in England which no doubt was the parent of the provision not only in the Madras Local Boards Act but also in the Madras District Municipalities Act but is somewhat differently worded being rather more general in its provisions, yet the same principles applicable to English law apply to a case under S. 225. [P 240 C 1]

The real test to be applied for the applicability of S. 225 is whether what was complained of was some act done in pursuance of the statute. To a suit to recover the balance of amount due under a contract made with a District Board to construct a culvert on one of the roads within its area, S. 225 does not apply and hence to such a suit the bar of limitation mentioned in that section does not apply : *C. R. P. No. 1913 of 1934, Rel. on; A I R 1935 Mad 213, Disting.* [P 241 C 1]

G. Krishna Arya and N. Jaganmohan — *for Petitioner.*

A. Lakshmayya — *for Respondent.*

Order.—The suit, the subject of this civil revision petition, was instituted by the petitioner against the District Board of Kistna to recover the balance of an amount due to him under a contract made with that District Board. The contract was to construct a culvert on one of the roads within the area of the District Board. Amongst the defences raised in the suit was one of limitation, it being pleaded that, as the suit had not been filed within six months of the accrual of the cause of action, it was barred by reason of S. 225, Madras Local Boards Act. The lower

Court, after a careful and elaborate examination of the authorities touching this question, held that the case came within the provisions of that section and the suit not having been filed within six months from the date of the cause of action dismissed it as being barred by limitation. In my view that decision was clearly wrong. Whilst this case does not stand to be determined in the light of a somewhat similar provision in the Public Authorities Protection Act in England which no doubt was the parent of the provision not only in the Local Boards Act but also in the District Municipalities Act but is somewhat differently worded being rather more general in its provisions, nevertheless I am of the view that the same principles apply here, although I am not basing my decision upon them. It is conceded here by the learned counsel for the respondent Board who has argued the case with the greatest ability that although under S. 1, Public Authorities Protection Act in England suits arising out of contracts claiming the balance of money due for work done or goods supplied are not protected, he contends that, by reason of the different wording of the Local Boards Act here, a suit as this does come within the provisions of S. 225. Contrasting that section with the somewhat similar provision in the District Municipalities Act, it will be seen that in the latter, suits for damages and compensations are referred to while in the former there is no such limitation and instead the words "no suit or legal proceeding" are used. Contrasting that section with S. 1, Public Authorities Protection Act, I am bound to say that it is certainly more similar to the latter than S. 350, District Municipalities Act.

I am satisfied that such a suit as this does not come within the provisions of S. 225, Local Boards Act. I was referred to a very early decision of this High Court, viz. 2 Mad 124.[1] There the suit was brought to recover from the Municipal Commissioners of Madura the balance of a sum of money due for timber supplied under a contract duly made with them; and it was held that the plaintiff was entitled to sue on the breach of contract without giving notice, such a suit not falling under the provisions of S. 168, Towns Improvement Act (3 of 1871, Madras). The words of that section as they are set out in the judgment are that such notice must be given when a suit "is brought against the Commissioners or any of their officers or any person acting under their direction for anything done under the Act". It is difficult to imagine any more general words than those. Yet, dealing with that section with those very general words, it was held that such a suit as that was not protected by that section. The words there are even more general than those in S. 225 and I find it very difficult to distinguish between a suit claiming the balance of a sum of money due for goods supplied under a contract made with a local Board and a suit claiming the balance of an amount due for work done under a contract made with a Local Board.

In my view, both these suits are indistinguishable in their nature. The learned Subordinate Judge has relied upon amongst other cases 58 Mad 746,[2] a Bench decision of this Court. That was a decision of Varadachariar and Burn JJ. There the claim was a different one to that here. There the suit was filed against the District Board more than six months after the accrual of the cause of action claiming damages on the ground that its President improperly cancelled a contract of lease for one year of the tolls in certain places. It was stated to have been entered into by him with the Board through its Vice-President. The President in performance of what he (the President) thought was his duty under the Madras Local Boards Act, as he interpreted the same, accepted a higher offer by another person and the cancellation of the acceptance of the original offer was the necessary result. It was held that S. 225, sub-ss. (1) and (3), Madras Local Boards Act, applied and the suit was out of time and that, though the distinction between actions on contract and actions independent of contract may be convenient enough as a working rule in such cases, the real test to be applied was whether what was complained of was some act done in pursuance of a statute. It was held in that case that the act done was in pursuance of a statute the right to collect tolls being a special privilege conferred by statute upon local bodies under the terms of S. 106 (1), Madras Local Boards Act,

1. Mayandi v. McQuhae, (1879) 2 Mad 124.

2. Athimannil Muhammad v. Malabar District Board, (1935) 22 A I R Mad 213=155 I C 291=58 Mad 746=68 M L J 125.

being authorized either to manage the collection of the tolls themselves or through their own agency or to lease them out. The facts in that case, in my view, are entirely distinguishable from those here, and in this view I am supported by the recent unreported decision of Venkataramana Rao J. in C. R. P. No. 1913 of 1934. There the plaintiff instituted a suit of an exactly similar nature to this to recover money due to him for work done under a contract with the District Board. The learned Judge says :

The action is thus based upon moneys due and recoverable under a contract. The learned Subordinate Judge non-suited the plaintiff on the ground that the requisite notice under S. 225, Madras Local Boards Act had not been given. In my view, this opinion is unsound. This section was recently interpreted by a Bench of this Court wherein the correct principle of interpretation was laid down thus :

The real test is whether what is complained of is some act done in pursuance of the statute. In cases where there is no dispute as to the existence of a contract, all further rights and liabilities between the parties are governed by the ordinary law relating to contracts, and it is true enough in such case to say that the rights and liabilities of the parties in respect of the contract are matters of ordinary law and not matters governed by the statute.

The learned Judge was there referring to the decision reported in 58 Mad 746.[2] He further on states : "We must take the plaint as it stands and the action was perfectly competent." Taking the plaint as it stands, it is a claim for the balance of an amount due under a contract and all defences which are open to a defendant in such a suit are open to the defendants here. But it is quite obvious that S. 225 does not apply to the case and that there is therefore no different period of limitation than there is to ordinary suits under contracts. For these reasons, I am satisfied that the lower Court's judgment was wrong and must be set aside and the suit remanded to the lower Court for disposal according to law. The petitioner will have his costs here ; and costs in the lower Court will abide the result of the trial.

C.R.K./D.S. *Judgment set aside.*

1938 M/31 & 32

A. I. R. 1938 Madras 241

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

K. Rangaswami Reddiar — Appellant.

v.

K. Venkataperumal Reddiar and another — Respondents.

Appeal No. 388 of 1932, Decided on 5th October 1937, against decree of Sub-Judge, Chingleput, in O. S. No. 11 of 1930.

Court-fees Act (1870), S. 17 — Cause of action based on deed of settlement — Two reliefs claimed in respect thereof, one on footing of validity and other on footing of invalidity of deed—Such reliefs are not distinct subjects.

The test which is sometimes laid down in order to ascertain whether two or more claims constitute different subjects within the meaning of S. 17, viz. whether different suits might have been instituted in respect thereof, is not decisive one : *A I R 1930 Mad 833 (F B), Foll.* [P 242 C 1]

Where a cause of action was based on settlement deed and two reliefs were claimed in respect thereof, one on the footing of the validity of the deed and the other on the footing of its invalidity :

Held that the two reliefs claimed did not constitute two distinct subjects within the meaning of S. 17. [P 242 C 2]

K. S. Champakesa Ayyangar — *for Appellant.*

A. Srirangachari — *for Respondents.*

Judgment.—The main point in this appeal is what is the court-fee payable on the plaint. As a result of two decrees obtained in two suits, O. S. No. 15 of 1912 on the file of the Court of the Subordinate Judge of Chingleput, and O. S. No. 47 of 1910, on the file of the District Court of Chingleput, one Krishna Reddy was entitled to recover possession of certain immovable properties from defendants 1 and 2 on payment of a certain sum of money to them. Some time after these rights were finally ascertained by the said decrees, he surrendered the rights so obtained by those decrees in favour of defendants 1 and 2 for a sum of Rs. 22,000 by a deed of settlement dated 27th June 1927. It is this deed of settlement that the plaintiff as the reversioner of the said Krishna Reddy after his death, seeks to set aside. The plaintiff's case is that the said deed of settlement was brought about by fraud, coercion and undue influence practised upon Krishna Reddy and therefore it should be declared not binding on the plaintiff. He also claims an alternative relief that, if the deed is found to be valid, the plaintiff should be given a

decree for Rs. 22,000 being the consideration for the deed as the said amount was not paid to the said Krishna Reddy. There is also a further relief claimed by the plaintiff, viz. a claim for specific performance based upon an agreement alleged to have been executed by Krishna Reddy in favour of the plaintiff. The plaintiff valued the claim at the sum of Rs. 22,000 and paid court-fee thereon, viz. Rs. 1222-7-0. Dispute as to the question of the proper court-fee having been raised, the learned Subordinate Judge went into the matter and came to the conclusion that all the three reliefs claimed in the plaint must be valued separately. He therefore directed the plaintiff to pay additional court-fees on the alternative relief for Rs. 22,000 and also on the claim for specific performance. The result of this decision was that the plaintiff had to pay an additional court-fee of Rs. 3104-14-9. The plaintiff was given a fortnight for the payment of the said court-fee. He was unable to pay that sum within the time allowed and the learned Subordinate Judge by his order dated 29th March 1932, rejected the plaint. And this appeal is filed against that order.

So far as the learned Judge's direction directing the plaintiff to pay court-fee on the claim for specific performance is concerned, it is absolutely correct and its correctness has not been challenged before us. But the main point argued by Mr. Champakesa Aiyangar is in regard to the direction to pay additional court-fee on the sum of Rs. 22,000, the alternative relief claimed in the plaint. The view taken by the learned Subordinate Judge is that it must be considered to be a distinct subject within the meaning of S. 17, Court-fees Act. We are not inclined to accept this view as correct. The cause of action is the execution of the deed of settlement and two reliefs have been claimed in respect thereof, one on the footing of the validity of the deed and the other on the footing of its invalidity. The test which is sometimes laid down in order to ascertain whether two or more claims constitute different subjects within the meaning of the S. 17, Court-fees Act, viz. whether different suits might have been instituted in respect thereof, has not been held to be a decisive one by the Full Bench of this Court, *see* 54 Mad 1[1] by which we are bound. In view of this decision, as the cause of action is based on the settlement deed, we are not inclined to consider that the reliefs claimed are distinct subjects within the meaning of the said section. We therefore think that the court-fee paid for the claim under Cl. 22-A of the plaint is quite sufficient and the plaintiff need not pay additional court-fee for the alternative relief.

Then the question is, what is the relief which the plaintiff is entitled to in this appeal, he having failed to pay the additional court-fee in time? The amount that was directed to be paid by the order of the lower Court is Rs. 3104-14-9. If the plaintiff had not been directed to pay additional court-fee on the alternative relief, the plaintiff perhaps might have been able to comply with the order in so far as it directed additional court-fee on the claim for specific performance. In the view we have taken in regard to the court-fee on the alternative prayer, we feel that we ought to allow the plaintiff some time for the payment of the additional court-fee on the claim for specific performance as directed by the lower Court and that it is not proper to reject the plaint on the ground of non-compliance with the order. We therefore set aside the order of the lower Court and direct it to receive the plaint on the plaintiff paying the additional court-fee on the claim for specific performance within one month from the date of the receipt of this order in the lower Court. In default of this payment, this appeal will stand dismissed. We also direct that the appellant should pay the costs of this appeal to the respondents. The appellant will be entitled to a refund of the court-fee paid in this appeal but only on his complying with the order of this Court by paying the additional court-fee in the lower Court within the time allowed.

C.R.K./D.S. *Order set aside.*

1. *In re* Parameswara Pattar, (1930) 17 A I R Mad 833=130 I C 742=54 Mad 1=59 M L J 469 (F B).

A. I. R. 1938 Madras 242

VENKATARAMANA RAO J.

Adam Haji Peer Muhammad Issac Sait — Appellant.

v.

Pattakkarantavita Kunkan and others —Respondents.

Second Appeal No. 258 of 1933, Decided on 20th August 1937, against decree of District Court, North Malabar, in A. S. No. 194 of 1932.

(a) Malabar Law—Tarwad — Incidents of, explained—Comparison with Mitakshara law.

A Malabar tarwad or tavazhi is a corporate unit just like the Mitakshara joint Hindu family. The members are joint in food, worship and estate but the property held by them is impartible except with the consent of all the members. No individual member has any definite share therein nor can he enforce a right to a share by partition. The mode in which the proprietary right is enjoyed is by participating in the enjoyment of the family property, and provision is made sometimes for maintenance and other expenses which in law are strictly in exercise of a proprietary right. The right of management is vested in the senior male member called karnawan who has got certain rights of alienation analogous to the powers possessed by a manager of a joint Hindu family. His right to management is unrestricted except in cases where he is guilty of waste or makes some alienations not for the benefit of the family when the junior members of the family have got a right to interdict by taking appropriate proceedings in a Court of law. The right possessed by an individual member enures only for his life. Neither the principle of the right of representation nor the principle of survivorship as known to Mitakshara law exists but the birth or the death of a member may affect the other members in the extent of beneficial enjoyment of the tarwad property or the death of a member leaving property which lapses to the tarwad may enable the other members to share the enjoyment thereof also with the rest of the tarwad property. The rights and obligations flow out of the status of being a member of a tarwad. Once it comes to an end by any means known to the law, they can neither be enjoyed nor enforced. [P 244 C 2]

(b) Malabar Law—Tarwad — Conversion — Effect of—Status as member and incidents of Tarwad are severed — Words "tenancy-in-common" are hence not properly applicable.

Under the strict Hindu law, converts not only become divided in status but forfeit all rights to their tarwad property; but Act 21 of 1850 preserved their right to the property in that they could still continue to possess the rights incidental to their ownership, that is the right to have provision made for their residence and maintenance from and out of the property possessed by the tarwad at the date of the conversion and any additions made thereto with the income thereon. But the Act does not preserve their status as a member of the tarwad or the incidents appropriate to and dependent thereon. The use of the terms, 'tenancy-in-common' and 'survivorship' with reference to the members of a Malabar tarwad is not strictly accurate. What does really happen on conversion is that the joint status is severed and the property possessed by the tarwad cannot thereafter be held by the remaining members of the tarwad along with the convert as members of a tarwad: *A I R 1921 Mad 224 (F B), Expl.*; *9 M I A 539 (P C) and 1913 M W N 886, Ref.* [P 245 C 1, 2]

(c) Malabar Law—Tarwad—Gift—Presumption that donees take property with incidents of tarwad — Gift to members some of whom are converts — Property taken as tenants in common and each donee can claim separate share.

Where there is a gift to persons who are members of a Malabar tarwad, a presumption is raised that the donees are intended to take the property with the incidents of tarwad property. But where the gift is to members some of whom have been converted and as such cannot be members of a tarwad they take the gift as tenants-in-common and each one can claim his separate share: *A I R 1916 Mad 391 (F B), Ref.* [P 245 C 2; P 246 C 1, 2]

P. Govinda Menon — *for Appellant.*

C. S. Krishnamurthy—*for Respondents.*

Judgment.—The question in this second appeal is what is the nature and extent of interest possessed by defendant 2 in certain properties, one of which is a boat, the subject matter of this appeal, left by one Kunhikutti. The plaintiff, defendant 2, and the deceased Kunhikutti formed members of a tavazhi following the Marumakkathayam law. Before his death, the said Kunhikutti disposed of his properties by a registered will dated 27th December 1923. His object was to benefit the members of his tavazhi. This is clear from the following preamble to the will:

> I should make certain settlements regarding the claimants who are to enjoy the ownership right of my self-acquired properties after my death.

After stating that the property possessed by him was his self-acquired property and that it should be enjoyed by him till his death, he specifies the persons to whom it should go after his death thus:

> And after my death, my brother (1) Amabadi, (2) younger brother Chandu, (3) nephew Maniokam's son Raman alias Joseph Sadanandan, (4) younger brother Kunkan, (5) younger brother Ryru, (6) younger brother Sankaran, (7) Achuthan alias Benjamin Sadanandan, (8) nephew Kunhi Pennu's son Andi, (9) Kunhi Pennu, (10) Cheeru, (11) Korumbi, (12) Kunhi Pennu, (13) Kaliyani, (14) Madhavi and the Santhanams of the female members among them who are already born and who are yet to be born, are the claimants of the said properties.

(No. 1 Amabadi is defendant 2 in the suit.) Then he provides for the maintenance and enjoyment of the said property thus:

> My representative No. 1 is to hold the said properties and cause them to be held. He should pay the jenmi purappad, effect renewals of the said properties by entering into agreement with the jenmis, manage the odams (boats) and the nets, hold the mudaruthi pattam, collect the outstandings to be recovered, effect repairs to the nets whenever they get damaged, manage the Sardine Press and take the proceeds and protect the other members according to the income and enjoy the said properties. And after the death of No. 1, the male members out of the members from No. 2 onwards aforesaid and after their death the male issues in the females who are now living and those that are to be born should manage the properties according to their seniority. And in default of male issue, the females, according to their seniority, should hold the properties and cause them to be held according to the Marumak-

kathayam law of inheritance and take the income therefrom and enjoy the same. And when it becomes necessary that a loan had to be raised, all the then members, both male and females who have attained their majority, should join together and execute a document under their joint signatures And all the debts and alienations otherwise incurred or effected will not be binding either on the properties or on other members and they will not be liable therefor. As the major income to protect the members aforesaid are to be derived from the boats and nets, the male members and other than Nos. 3, 7 and 8 should exert themselves to the top of their capability in the management and work and protect the members of the family as aforesaid. In case the remaining members are not prepared to do so, such anandiravans should be excluded from the properties by a registered notice executed jointly by all the remaining members. And if they are so excluded, they will be devoid of any right over the said properties and on the annual income therefrom.

Nos. 3 and 7 referred to above are the sons of two of his nephews, namely Joseph Sadanandan and Benjamin Sadanandan who are Christians by religion. On a reading of the will, there can be no doubt that what the testator intended was that the property should be owned and enjoyed by all the members of the tavazhi to which he belonged and that it should be possessed and managed after the manner of tarwad property in accordance with the rules of the Marumakkathayam law by which he was governed, with certain restrictions in regard to the management regarding loans and alienations. It is also evident that the testator regarded the said Joseph and Benjamin as members of his tavazhi and intended to benefit them. The question now is has defendant 2 any individual interest in the properties devised? Can defendant 1 seize and sell the boat in execution of a decree obtained against defendant 2? The contention of the plaintiffs is that the properties are devised to the tavazhi as such, that defendant 2 has no individual interest therein which could become the subject of sale and the attachment of this boat by defendant 1 is invalid and inoperative. The crucial question is, was the property taken by defendant 2 and other legatees as tavazhi property or as tenants-in-common owning a several share therein? This again is dependent on another question whether the legatees were members of a tavazhi. The lower Court answered the question in the affirmative relying on 44 Mad 891.[1] This is canvassed by Mr. Govinda Menon on behalf of defendant 1. His argument is that two of the legatees, who are admittedly Christians on the date of the will cannot be members of the tavazhi along with the other legatees; that they cannot together in law form a tavazhi and that the view of the lower Appellate Court that in spite of the conversion to Christianity a person can continue to be a member of a tavazhi is unsound and the gift therefore is not to the tavazhi as such.

To test the soundness of this contention, it is necessary to examine what the legal effect of the conversion of a member of a tarwad or tavazhi on the holding of the property by such a tavazhi or tarwad is. A Malabar tarwad or tavazhi is a corporate unit just like the Mitakshara joint Hindu family. The members are joint in food, worship and estate but the property held by them is impartible except with the consent of all the members. No individual member has any definite share therein nor can he enforce a right to a share by partition. The mode in which the proprietary right is enjoyed is by participating in the enjoyment of the family property, and provision is made sometimes for maintenance and other expenses which in law are strictly in exercise of a proprietary right. The right of management is vested in the senior male member called karnawan who has got certain rights of alienation analogous to the powers possessed by a manager of a joint Hindu family. His right to management is unrestricted except in cases where he is guilty of waste or makes some alienations not for the benefit of the family when the junior members of the family have got a right to interdict by taking appropriate proceedings in a Court of law. The right possessed by an individual member enures only for his life. Neither the principle of the right of representation nor the principle of survivorship as known to Mitakshara law exists, but the birth or the death of a member may affect the other members in the extent of beneficial enjoyment of the tarwad property or the death of a member leaving property which lapses to the tarwad may enable the other members to share in the enjoyment thereof also with the rest of the tarwad property. The rights and obligations flow out of the status of being a member of a tarwad. Once it comes to an end by any means known to the law, they can neither be enjoyed nor enforced. Conversion to any alien religion is one of the modes which

1. Pathumma v. Raman Nambiar, (1921) 8 A I R Mad 224=64 I C 676=44 Mad 891=41 M L J 243 (F B).

puts an end to the status. The effect of conversion with reference to the position of an undivided family governed by Hindu law is thus stated by their Lordships of the Judicial Committee in 9 M I A 195[2] at page 237 thus :

> The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must .... be dissolved.

They again observe :

> Parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the status of an undivided family, is the creature of, and must be governed by, the Hindu law ..... Parcenership may be put an end to by a severance effected by partition ; it must, as their Lordships think, equally be put an end to by severance which the Hindu law recognizes and creates.

It therefore cannot be disputed that the tie which bound the tavazhi together, on conversion of the said two members, so far as they are concerned, became dissolved and they could no longer be members of the tavazhi. Their rights and obligations incident to their status as members of the tavazhi must therefore cease. If the strict Hindu law be applied, they would not only become divided in status but would forfeit all rights to their tarwad property ; but Act 21 of 1850 preserved their right to the property in that they could still continue to possess the rights incidental to their ownership, that is, the right to have provision made for their residence and maintenance from and out of the property possessed by the tarwad at the date of the conversion and any additions made thereto with the income thereon. But the Act does not preserve their status as a member of the tarwad or the incidents appropriate to and dependent thereon. To illustrate, if a member of a tarwad dies leaving his self-acquired properties undisposed of, they lapse to the tarwad and any member of the tarwad gets the benefit of such acquisition but the convert by ceasing to be a member of the tarwad cannot participate in the enjoyment of the said property by reason of the severance of the status. In 1912 M W N 386,[3] a Division Bench took the view that on conversion the incident of survivorship would no longer subsist, the convert becomes a tenant-in-common and is entitled to claim partition. This view was dissented from in 44 Mad 891[1] where it was pointed out that Act 21 of 1850 does not enlarge the rights which a member had before conversion and what was impartible cannot be rendered partible by reason of the conversion. The use of the terms, "tenancy-in-common" and "survivorship" with reference to the members of a Malabar tarwad, if I may say so with respect, is not strictly accurate. What does really happen on conversion is that the joint status is severed and the property possessed by the tarwad cannot thereafter be held by the remaining members of the tarwad along with the convert as members of a tarwad. The decision in 44 Mad 891[1] does not lay down that in spite of conversion, a member continues to be a member of a tarwad as assumed by the learned District Judge. Again, where there is no right to partition, there is no right of survivorship. In a Mitakshara undivided family, it is the right to partition which determines the right to take by survivorship. The right possessed by an individual member in a Malabar tarwad ceases with his life and there is no devolution of an undivided interest as in a Mitakshara family. Even if the principle of survivorship is held applicable to a Malabar tarwad, it can only subsist so long as the undivided status subsists. As observed by their Lordships of the Privy Council in 9 M I A 539[4] at p. 611, *according to the principles of Hindu law, there is coparcenership between the different members of a united family and survivorship following upon it.* (The italics are mine). From this, it follows that if there is no united family, there can be no survivorship. This is also the view of the Division Bench in 1912 M W N 386,[3] where the learned Judges observe at page 390 thus :

> The incident of survivorship was one which attached to the property on account of its being owned by the members of a joint Hindu family. When the Hindu family ceased to exist, the incident of survivorship ceased to exist.

Act 21 of 1850 cannot preserve the right which is contingent and dependent on the continued subsistence of a particular relationship which is not saved by the Act. The observation of Wallis C. J. in 44 Mad 891[1] that survivorship is not lost is obiter and if I may say so with respect, not correct. Thus the correct legal position occupied by the members of the tavazhi to which the testator belonged on the date of

2. C. Abraham v. F. Abraham, (1861-63) 9 M I A 195=1 W R 1=1 Suther 501=2 Sar 10 (P C).
3. Kunhichekkan v. Lydia Arucanden, (1912) M W N 386=14 I C 480.
4. Katama Natchiar v. The Raja of Shivaganga, (1861-63) 9 M I A 539=2 W R 31 (P C).

the will is that the two members who became converts do not belong to the said tavazhi and the legatees specified in the will together cannot and do not form a tavazhi. Where there is a gift to persons who are members of a Malabar tarwad, a presumption is raised that the donees are intended to take the property with the incidents of tarwad property: 39 Mad 317[5]. As Srinivasa Ayyangar J. points out in that case, which was a case of a gift by a member of a Malabar tarwad to his wife and children :

> It is not the giving of properties by a person to his wife and children that constitutes them a tarwad or tavazhi, but that if properties are given to a wife and children following the Marumakkathayam law, they as a tavazhi hold those properties with the incidents of tarwad property.

The gift under such circumstances is presumed to have been made to an entity which is called a tarwad or tavazhi. In the present will, there are no express words conferring the property on the tavazhi as such. Of course all the legatees mentioned therein, but for the conversion of the two members, will together constitute the tavazhi. But if in law they could not form a tavazhi, the presumption should not be given effect to. The operative portion of the gift must therefore be construed as a gift to certain named or existing legatees and persons to be born. The gift to unborn persons cannot take effect but the gift cannot fail on that account. The named legatees and such of the children of the female members who were alive on the date of the death of the testator will take the properties as tenants.in.common. Though the primary intention may have been to benefit the members of the family as such, there is also a secondary intention to benefit those who can take. The limitations and restrictions in regard to the holding and enjoyment of the property would be invalid as the testator cannot by any act of his constitute certain members into a tavazhi for the law would not permit such a thing and it is not open to him to tie up the property in the manner he has chosen to do. In this view, defendant 2 will be entitled to a several share and whether it is 1/14th or still less will depend upon whether there was any issue born to the female legatees who were alive on the date of the death of the testator.

In this view it is unnecessary for me to consider the argument based on S. 39 of the Marumakkathayam Act which confers a right of partition on individual members of a tarwad in cases where there is any change of religion. Mr. Krishnamurti advanced a contention that even assuming the two convert members could not be members of the tavazhi after their conversion, the rest of the members constitute a tavazhi and must be deemed to have continued as such and the gift therefore must be construed as a gift to the tavazhi and the two converts. I am not inclined to agree with this contention. From the language employed in the will it is clear that no distinction was drawn between the members who were converts and the other members in regard to the nature of the gift and there was no intention to treat the members other than the two convert members as an entity. In the result, I set aside the decree of the learned District Judge and hold that defendant 1 is entitled to attach and sell defendant 2's interest in the suit property in execution of the decree obtained against him. The respondents will pay the costs of the appellant here and in the Court below. (Leave refused.)

C.R.K./B.D. *Appeal allowed.*

5. Chakkra Khannan v. Kunhi Pokker, (1916) 3 A I R Mad 391=30 I C 755=39 Mad 317=29 M L J 481 (F B).

---

* A. I. R. 1938 Madras 246

KING J.

P. Gopalaratna Iyengar—Petitioner.

v.

A. Rajaratna Mudaliar—Respondent.

Civil Revn. Petn. No. 451 of 1936, Decided on 5th October 1937, from decree of Dist. Munsif, Ranipet, in Small Cause Suit No. 294 of 1935.

*** (a) Vendor and Purchaser—Agreement to purchase property—Mere fact that deposit is demanded by vendor implies that it should be forfeited if contract is broken.**

It is a well known principle of law that if a purchaser, on agreeing to purchase any property agrees also to pay, and does pay a deposit, that deposit is to be regarded as security for the fulfilment of the contract. Though there may be nothing specific about forfeiture, the mere fact that a deposit was demanded carries with it the implication that it should be forfeited if the contract were broken, unless purchaser proves an agreement to the contrary. [P 247 C 1, 2]

(b) Deed—Construction—Sale — Recital in sale deed that price is to be paid before Sub-Registrar—Implication.

Where it is recited in the document of sale itself that the consideration is to be paid before

the Sub-Registrar, it implies of course that it is to be paid within four months. [P 247 C 2]

(c) Contract — Construction — Expression "regard the contract as at an end", meaning.

The expression "regard the contract as at an end", means some mutual agreement between parties to the contract that both of them no longer consider it necessary to go through with their transaction. It cannot be applied to the mere mental realization by one party of the fact that other party has broken the contract or to a party's failure to sue for damages or specific performance: *A I R 1935 Mad 903, Dissenting.* [P 247 C 2]

V. T. Rangaswami Ayyangar and T. T. Vijayaraghavan—*for Petitioner.*

Syed M. Ahmad—*for Respondent.*

Order. — This petition is concerned with an agreement between plaintiff and defendant that defendant should sell certain property to plaintiff for Rs. 2500. The undisputed facts of the case are that defendant executed a sale deed on 22nd May 1932, received Rs. 100 as an advance towards the purchase price, and handed over the sale deed to plaintiff. Subsequently the sale deed was returned by plaintiff to defendant and the four months' time for registration passed without any further payment on plaintiff's part. In 1935, plaintiff filed the present suit to recover the Rs. 100 from defendant with interest and also the charges he had incurred in purchasing the stamp. He based his claim upon a repudiation of the contract by defendant, who, he said, asked for the return of the sale deed in order to sell the property to some one else. The learned District Munsif refused to believe this allegation on plaintiff's part, and held that defendant's evidence that plaintiff returned the sale deed because he was unable to find the purchase money was true. He nevertheless gave plaintiff a decree for the refund of Rs. 100 on the grounds : (i) that there was no agreement that it should be forfeited if plaintiff broke the contract ; (ii) that no time was stipulated within which the transaction was to be completed, and (iii) that defendants "treated the contract as at an end".

I am unable to accept any of these reasons as justifying the lower Court's decree. The first appears to be a finding of fact but is not really so. It is a well-known principle of law that if a purchaser on agreeing to purchase any property agrees also to pay, and does pay a deposit, that deposit is to be regarded as security for the fulfilment of the contract. Here there is no doubt that the deposit of Rs. 100 was insisted upon by the defendant as a term of the contract. The lower Court holds the view that because no terms were reduced to writing, defendant should not be believed when he says that the deposit was to be forfeited, but even if defendant has in this instance gone too far, and in fact nothing specific was said about forfeiture, the mere fact that a deposit was demanded carries with it the implication that it should be forfeited if the contract were broken, unless plaintiff proves an agreement to the contrary. This he has made no attempt to do. The second reason I am unable to understand. Plaintiff admits in cross-examination that it was recited in the document itself that the consideration was to be paid before the Sub-Registrar, which implies, of course, that it was to be paid within four months. Plaintiff does not assert that this clause in the sale deed was not meant to be operative.

For its third reason, the lower Court relies upon a ruling reported in A I R 1935 Mad 903.[1] That is a ruling which, with respect, I find it difficult to appreciate. It proceeds upon no basis of facts proved, lays down the law theoretically as to the conditions upon which a purchaser who has broken his contract may recover an advance which he has made, and then gives a decree not for the refund of any such advance, but allowing the purchaser four months' time to complete his payment of the purchase price. I am unable to see how this case can govern the case with which I am now dealing, where plaintiff does not ask to be permitted to make further payment. If it does govern the present case, it still remains to analyze what is meant by the expression, "regard the contract as at an end". To me, it seems to mean some mutual agreement between plaintiff and defendant that both of them no longer consider it necessary to go through with their transaction. It cannot be applied to the mere mental realization by the defendant of the fact that plaintiff has broken the contract or, in my opinion, to defendant's failure, to sue for damages or specific performance. Is defendant who holds in his hands a deposit liable to forfeiture, to be compelled to institute legal proceedings against a purchaser who has no money with which to pay him and as the evidence in this case shows, no property on

1. A. K. Oosman v. Gurtajee Coovarjee, (1935) 22 A I R Mad 903=158 I C 827=69 M L J 536.

which to raise any money ? I am accordingly of opinion, and as I said before, that none of the lower Court's reasons can be supported as justifying its decree, and must allow this petition and dismiss plaintiff's suit with costs throughout.

C.R.K./D.S. *Petition allowed.*

✻ A. I. R. 1938 Madras 248

LEACH C. J. AND MADHAVAN NAIR J.

Rajah Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu of Venkatagiri — Petitioner.

v.

N. V. Rama Naidu and another — Respondents.

Criminal Misc. Petn. No. 1084 of 1937, Decided on 12th October 1937.

✻ **Contempt—Contempt of Court—Kinds stated—Article in news paper making certain accusations against party to suit pending decision and prejudicing public against him—Article amounts to contempt of Court—Fact that trial Judge would not be affected by article or belief of writer of article that it would not prejudice fair trial of suit would not excuse offence.**

All publications which offend against the dignity of the Court, or, are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds—namely those which (1) scandalize the Court ; or (2) abuse the parties concerned in causes there ; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall, libels on the integrity of the Court, its Judges, Officers, or proceedings ; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending. For example, attacks on or abuse of a party, his witnesses or solicitor, constitute contempts, though a mere libel on a party not amounting to an interference with the course of justice, does not, the party being left to his remedy by action. [P 249 C 1]

The fact that the trial Judge would not be affected by the article has no bearing on the matter and such belief on the part of the person committing the offence would not excuse the offence. [P 249 C 2]

Where two persons published in a newspaper an article which stated the case of the defendants in a suit instituted by a Raja against certain ryots and was pending decision in the Court and inferred that it was true and accused the Raja, the plaintiff in the case, as having ruined the defendants and of having concocted false criminal cases against them and further accused the plaintiff of using his influence maliciously and to the detriment of the defendants and closed the article with an appeal for assistance for defendants :

Held that the article in question amounted to a contempt of Court and the fact that the writers of the article believed that the said article would not prejudice the fair trial of the suit would not excuse the offence : *(1742) 2 Atk. 469* ; *(1930) 2 Ch 368* ; *A I R 1932 Mad 26 and (1839) 2 Beav 129, Rel. on.* [P 249 C 1]

M. Patanjali Sastri and P. S. Raghavarama Sastri — *for Petitioner.*

B. Somayya — *for Respondents.*

Leach C. J. — This is an application by the Rajah of Venkatagiri for an order against the respondents for contempt of Court. The petitioner is the plaintiff in a suit in the District Munsif's Court, Nellore, for an injunction restraining 40 inhabitants of Venkatagiri from entering the petitioner's forests and cutting firewood therein. The defendants claim that they have the right to cut firewood there and to sell it. They base this right on grant, custom and prescription. The suit was filed in June last and on 27th August the following article appeared in the 'Zamin Ryot' which is published in Nellore :

HELP THE ARAVA-MALAS OF VENKATAGIRI.

Means of livelihood enjoyed for generations deprived by the estate.

Appeal by Kamatam Shunmugam, M. L. A.

There are about 500 families of Harijans in Venkatagiri. During the time of Chevi Reddi, the original ancestor of the Rajahs of Venkatagiri estate, one Yachadu, the original ancestor of Malas, sacrificed his life as offering at the bidding of Bhairavamurthi (deity) in order to provide the estate with money. In pursuance of the (last) favour asked for by Yachadu prior to the sacrifice, whenever marriages take place in the house of the estate (people) even to this day, they first perform the marriage of one among the Malas, take the holy rice showered on the (bridal) couple and thereafter perform their own marriages. Out of such Malas, about 300 families have been serving the estate for the past about 29 generations, as grooms, keepers of the elephants and as servants getting fodder to the said animals. The salaries paid to them are not even enough to satisfy their barest necessities. Consequently, they have been, in addition to their salaries, eking out their livelihood by bringing and selling dry firewood from the forests situate in Venkatagiri. None of the late rulers of the estate ever raised any objection in regard to this. Since about one year, the estate has been selling firewood by opening a firewood depot and has (thereby) not only ruined the occupation of these people, but also caused an injunction order to be issued against them. Now the estate has prepared some (kind of) statements and while forcing them to sign or affix their marks therein, dismissed from service 40 persons who did not do so. When they go to the small villages near by to gather green and dry grass with a view to sell the same and earn a living, they are setting up the raiyats to obstruct these people in the respective villages. Every now and then criminal cases are being concocted and filed and these people are sent to the prisons. The estate, besides not only ruining their occupation in this manner, has also been putting them to considerable trouble and loss by maliciously using their entire influence. Civil cases are going on between

the two parties. Certain kind-hearted advocates are conducting the proceedings on behalf of the Malas free (of costs). Until the cases are disposed of, the said 300 families have to suffer for their food and raiment. I therefore pray that countrymen, who have the welfare of the poor at heart, will naturally render assistance to these people, either in cash or paddy or any other article necessary for their life. Kind-hearted donors are requested to send in their contribution to the following persons :

(1). Arava Surayya, Kapidipalem, Nellore.

(2). Arava Padanarasayya, Yeguvapalem Venkatagiri Town.

The author of the article is respondent 2, who is a member of the Madras Legislative Assembly. Respondent 1 is the editor of the paper. The petitioner complains that the article constitutes gross contempt of Court, and we consider this to be the case. The article states the defendants' case and infers that it is true. It then accuses the petitioner of having ruined the defendants and of having concocted false criminal cases against them. It further accuses the petitioner of using his influence maliciously and to the detriment of the defendants. The fact that the article closes with an appeal for assistance for the defendants does not help the respondents. This appeal could have been made without the accusations which preceded it. The law is quite clear and it is stated thus at p. 91, Edn. 3 of Oswald's Contempt of Court :

All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds—namely those which (1) scandalize the Court ; or (2) abuse the parties concerned in causes there ; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall, libels on the integrity of the Court, its Judges, Officers, or proceedings ; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending. For example, attacks on or abuse of a party, his witnesses or solicitor, constitute contempts, though a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action.

In (1742) 2 Atk 469=26 E R 683,[1] Lord Hardwicke observed :

Nothing is more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented ; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

And he added :

There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

In (1930) 2 Ch 368[2] at page 376 Maugham J. observed :

I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to for a like reason.

The fact that the trial Judge would not be affected by the article has no bearing on the matter, as was pointed out by this Court in the case in 55 Mad 262.[3] The defence set out in the affidavits is that the respondents did not regard the article as being of a nature which would prejudice the fair trial of the suit and they offered to express their regret if the Court were of a contrary opinion. The belief of the respondents does not excuse the offence. Lord Langdale, M. R. in (1839) 2 Beav 129=48 E R 1129,[4] said :

Whatever might have been his belief at the time he published these articles, that belief will not protect him from the consequences, if his publication has been of such a nature as to disturb the free course of justice. The effect of such publications would seem to be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone. What I am to consider is, whether these papers are or are not calculated to disturb the free course of justice.

At a later stage in the case, Lord Langdale observed :

I am surprised that a gentleman of education and science should think that it was serving the cause of truth and justice, or likely to benefit the gardeners, whose interest he professes to advocate, to publish articles of this description pending the progress of a cause.

The respondents have appeared before us and the Court having informed them that it considers that the article does constitute grave contempt, they have expressed their regret for their action. In these circumstances we do not consider it necessary to take any action in the matter

1. In Re Read and Huggonson ; Roach v. Garvan, (1742) 2 Atk 469=26 E R 683.

2. In re the William Thomas Shipping Co. Ltd., (1930) 2 Ch 368=99 L J Ch 560.

3. Sathappa Chettiar v. C. Ramachandra Naidu, (1932) 19 A I R Mad 26=1932 Cr C 6=136 I C 311=33 Cr L J 270=55 Mad 262=61 M L J 848.

4. Littler v. Thomson, (1839) 2 Beav 129=48 E R 1129.

beyond ordering the respondents to pay the costs of the petitioner, which we fix at Rs. 100.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 250

VENKATASUBBA RAO AND NEWSAM JJ.

Kovalakudi Singam Iyengar and others — Appellants.

v.

K. Kasturiranga Iyengar and others — Respondents.

Appeal No. 267 of 1931, Decided on 29th September 1937, against decree of Dist. Court, Trichinopoly, in O. S. No. 3 of 1929.

(a) Words and Phrases—'Sukhavasi,' meaning.

The word "Sukhavasi" means "one who lives in comfort without any particular employment." [P 250 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 73 (3)—Suit by worshippers of temple against Sukhavasis for declaration that latter are not entitled to receive fixed share in prasadams and for injunction restraining trustees from allowing such claim —Such suit does not come within purview of S. 73 (3).

The words 'further or other relief' in S. 92, Civil P. C. must on general principles of construction be taken to mean relief of the same nature as those described in Cls. (a) to (g). In enacting S. 92, the Legislature could not have intended to include relief against the third parties under the general words "further or other relief." The same reasoning applies to S. 73 (3), Madras Hindu Religious Endowments Act : *A I R 1928 P C 16, Foll.* [P 251 C 2]

There is a marked difference between the wording of the relevant part of S. 73 (3), Madras Hindu Religious Endowments Act, and the corresponding portion of S. 92 (2), Civil P. C. Under the latter provision, the suits contemplated are those filed claiming any of the reliefs specified in the section. But the words in S. 73 (3), Madras Hindu Religious Endowments Act are much wider and more comprehensive : *A I R 1934 Mad 126, Rel. on.* [P 251 C 2]

In a suit by worshippers of a temple against Sukhavasis, the right of the trustees or the Committee to make charitable doles, including the giving of doles to the Sukhavasis, was not questioned and it was not sought to fetter their discretion in any way. What the worshippers sought was to have their right declared as against the Sukhavasis (strangers to the trust) and to restrain the trustees from giving and the Sukhavasis from receiving fixed share of prasadam :

Held that the suit did not come within the purview of S. 73. The further relief claimed against the trustees was merely ancillary to and consequential upon the declaration and did not alter the character of the suit. [P 252 C 1]

V. N. Venkatavaradachariar and R. Gopalachariar — *for Appellants.*

S. T. Srinivasagopalachariar, K. R. Rangaswami Iyengar and A. Sriranga-chariar — *for Respondents.*

Venkatasubba Rao J. — The learned District Judge has in respect of almost every question of fact decided in favour of the plaintiffs, but has come to the conclusion that the suit is not maintainable by reason of Cl. 3 of S. 73, Hindu Religious Endowments Act (Madras Act 2 of 1927). The question to be decided in the appeal is, whether the view of the learned Judge that the suit is barred by the provision referred to above can be sustained. The suit has been brought by certain five worshippers in the Sri Ranganathaswami Temple at Srirangam, with the consent obtained of the Board of Commissioners. The object of the suit is to get a declaration in respect of a class of persons known as Sukhavasis. The plaintiffs complain that these Sukhavasis have been asserting a claim to a certain fixed share of the prasadams offered to the deity, and that in assertion of that right, they have gone the length of claiming a cash payment in lieu of their share of the prasadam when that is not available. The questions which the learned Judge had to decide were : (1) whether the Sukhavasis had been in enjoyment of the allowances, as alleged by them, continuously for such a period, as would serve to raise a presumption of a legal origin, and (2) whether the emoluments were attached to the performance of any religious office, service or duty in the temple in question. On both these matters, the learned District Judge in a lucid and closely reasoned judgment, has recorded findings, as already stated, against the defendants. We may incidentally observe here, that the word "Sukhavasi" means "one who lives in comfort without any particular employment." (Tamil Lexicon published by the University of Madras). The respondents' counsel has not challenged these findings of fact, and the question that now has to be decided therefore is one of law, namely whether or not the suit is barred under S. 73 (3) of the Act.

The lower Court has, in our opinion, been misled by the clumsy drafting of some of the paragraphs in the plaint. There were three sets of defendants impleaded; first, the trustees of the temple, secondly, the members of the Trichinopoly Hindu Devasthanam Committee, and thirdly, the

Sukhavasis. On a close examination of the plaint, it is perfectly clear that it is not sought to fetter the discretion of the trustees in doling out the offerings to such persons as they think deserving; the Sukhavasis are under no particular disability, and they may, like any other worshippers or pilgrims, receive, and be given, the prasadam. It is the right put forward by the Sukhavasis to a fixed share that has been objected to. To claim a right to charity is a contradiction in terms, and what the Sukhavasis have been getting according to them, are not charitable doles but perquisites, which could be claimed as a matter of right, attached as they are, to the performance of certain services. Unfortunately however, the wording of the plaint seems to suggest that the suit was intended to prevent the Sukhavasis getting any charity whatsoever, as though they were marked out for some special penalty.

A brief reference to the facts that immediately preceded the institution of the suit, will serve to make the prayers in the plaint clear. The Sukhavasis are of the Vadagalai persuasion and their claim to a fixed share was generally looked on with disfavour by the Tengalais. The plaintiffs suggest that in dealing with the claim put forward by the Sukhavasis, the trustees or the members of the Committee are generally swayed by sectarian motives. It seems unnecessary to go into this question, nor would it be right on the material before us to say that the plaintiffs' complaint is justified. What really happened however was this: In several judicial proceedings the right of the Sukhavasis was negatived. In 1926, the Religious Endowments Board likewise refused to recognize the right. In 1927 the Devasthanam Committee, when considering the budget proposals, also declared against the right claimed; but in 1928 they revised their decision and resolved to make provision in the budget for payments to the Sukhavasis. Four out of the five trustees of the temple dissented from the Committee's view, and the plaintiffs as worshippers claim in the suit several reliefs including an injunction restraining the trustees and the members of the devasthanam committee from recognizing the right put forward by the Sukhavasi defendants. There is also a declaration that has been prayed for, but the prayers have been so worded as to suggest, as already stated, that the Sukhavasis are to be deprived of any share in the offerings.

Now that the misapprehension has been got rid of, does the provision referred to oppose any bar to the maintainability of the suit? S. 73 was in some respects recently amended; but the provision in force when the suit was filed, was as it stood before the amendment. For the present purpose, this makes little difference, and as the learned Judge rightly points out the reliefs mentioned in the section do not cover any of the reliefs claimed in the suit. It has been held by the Judicial Committee in 55 I A 96,[1] that the words 'further or other relief' in S. 92, Civil P. C. must on general principles of construction be taken to mean relief of the same nature as those described in Cls. (a) to (g). Both the reasoning and the conclusion of their Lordships applied to the provision in question, which has been modelled on the aforesaid section of the Code. It has been further held in the same case, that in enacting S. 92, the Legislature could not have intended to include relief against the third parties under the general words 'further or other relief'.

Applying the same reasoning, the question we have to decide is whether the words of the present provision can have the effect of abolishing or extinguishing substantive rights possessed under the law. As was pointed out in 57 Mad 362,[2] to which one of us was a party, there is a marked difference between the wording of the relevant part of S. 73 (3) and the corresponding portion of S. 92 (2). Under the latter provision, the suits contemplated are those filed claiming any of the relief specified in the section. But the words in the present Act are much wider and more comprehensive, for what is declared is, "No suit in respect of the administration or management of a religious endowment shall be instituted" except as provided by the Act. The learned Judge has held that as the reliefs claimed are not covered by those in the section, the suit does not lie. The short answer to that argument is, that the present suit is entirely outside the scope of S. 73. The suit, if its scope is properly understood, is not 'in respect of the administration or management' of the temple in question. The right of the

1. Abdur Rahim v. Muhammad Barkat Ali, (1928) 15 A I R P C 16=108 I C 361=55 Cal 519=55 I A 96 (P C).
2. Vythilinga Pandarasannadhi v. Ranganatha Mudaliar, (1934) 21 A I R Mad 126=150 I C 448=57 Mad 362=66 M L J 98.

trustees or the committee to make charitable doles—including the giving of doles to the Sukhavasi defendants—is not questioned; it is not sought to fetter their discretion in any way whatsoever. No question has been raised involving the 'administration' or 'management' of the temple either by the trustees or by the committee. What the plaintiffs seek is, to have their right declared as against certain third parties, that is to say, strangers to the trust (that being the true position of the Sukhavasis). Such a suit, it seems to us, does not come within the purview of S. 73 and cannot be said to be barred by its provisions. The further relief prayed for that the trustees and the members of the committee shall be restrained from giving and the Sukhavasis from receiving, is merely ancillary to and consequential upon the declaration. That in our opinion does not alter the main character of the suit. In this view, the obtaining by the plaintiffs of the sanction of the Board was a superfluous act; but that makes no difference.

The appeal is allowed and the plaintiffs will have a decree in the terms mentioned above. As to costs, the order made by the lower Court will stand, and in this Court the only order we propose to make is, that the plaintiffs will be paid a consolidated amount of Rs. 350 (Rupees three hundred and fifty only) as costs of the appeal from the temple funds. The memorandum of objections is dismissed. No costs.

Newsam J.—I agree entirely. There is nothing in S. 73 of Act 2 of 1927 to preclude the Court from granting a decree declaring that "Sukhavasis" are not as of right entitled to receive a fixed share of the prasadams and an injunction restraining the trustees from allowing such a claim by making cash payments to them as such or in lieu of any so-called vested interest in the offerings. On the findings of the learned trial Judge, which are unchallenged and which we accept, the plaintiffs must at least succeed to this extent. But obviously no decree can be passed restraining the right of the trustees to distribute prasadams by way of charity to any persons whom in their discretion they deem to be worthy recipients. S. 73, as I understand it, limits the powers of the Court to interfere with the administration and management of religious endowments and restricts the right of suit of persons interested to such matters as appointing and removing a trustee, vesting property in a trustee, determining what sum should be allocated to a particular purpose, and kindred matters. But for obvious reasons, Courts are prevented by this section from accepting any invitation to interfere with the details of administration or to fetter the discretion of trustees in minor matters. The machinery is provided in the Act itself for the control of trustees of temples by committees and by the Hindu Religious Endowments Board. I respectfully agree with my learned brother as to the terms of the decree which should be passed in this suit.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 252

LEACH C. J. AND BURN J.

S. G. Bakthavatsalu Naidu — Petitioner.

v.

Salem Municipality — Respondent.

Civil Misc. Petn No. 171 of 1937, Decided on 21st October 1937, for review of Judgment of High Court, D/- 18th September 1936.

Provincial Small Cause Courts Act (9 of 1887), S. 25—No decree or order passed by trial Court—Only one issue decided by it—High Court cannot take action under S 25.

The High Court can only act under S 25 where a decree or order has been passed. Where no decree or order has been passed by the trial Court and all that it has done is to try only one of the issues, it is not open to the High Court to proceed under S. 25. [P 253 C 1]

D. Ramaswamy Ayyangar — *for Petitioner.*

V. C. Veeraraghavan for P. Chakrapani Ayyangar — *for Respondent.*

Leach C. J.—The petitioner was the plaintiff in a Small Cause suit in the District Munsif's Court of Salem in which he sued to recover a sum of Rs. 184-8-0 as damages from the Salem Municipality for wrongful distraint. There were three issues framed: the first was whether the suit was in time; the second had reference to the question of the illegality of the distraint; and the third concerned the question of damages. The District Munsif held that the suit was not barred by the law of limitation and adjourned the further hearing of the suit to another date. The respondent council then applied to this

Court for an order revising this finding. The matter came before Cornish J., who held that the District Munsif was wrong in his decision on the question of limitation. The learned Judge found that the suit was time-barred and dismissed it. Unfortunately the petitioner was not represented at the hearing, and he applies for review of the order of Cornish J. on the ground that it is wrong and that this is seen from the record itself.

The contention is well founded. S. 25, Provincial Small Cause Courts Act, states that the High Court for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes is according to law, may call for the case and pass such order with respect thereto as it thinks fit. The Court can only act under this section where a decree or order has been passed. In this case no decree or order had been passed. All that the District Munsif had done was to try one of the issues, and his decision meant that the suit had to proceed. It is therefore quite clear that there was no basis for the application which the Municipal Council made and the learned Judge was wrong in considering it. His order will therefore be vacated and the application of the Municipal Council dismissed. The suit will be tried by the District Munsif according to law. The petitioner is entitled to his costs.

C.R.K./R.M. *Order set aside.*

A. I. R. 1938 Madras 253

VENKATASUBBA RAO AND MADHAVAN NAIR JJ.

Gutta Venkayya and others — Appellants.

v.

Punyamurthula Venkata Rattama and others — Respondents.

Letters Patent Appeals Nos. 355 to 365 and 309, 390, 391 of 1926, Decided on 1st October 1937, against the judgment of Jackson J., D/- 10th November 1926, *reported in A I R 1927 Mad 331.*

(a) Grant—No presumption that inam grant comprises both melvaram and kudivaram.

There is no presumption that an inam grant comprises both the melvaram and the kudivaram. Each case must be dealt with upon its own facts with special regard to the evidence and circumstances therein : *A I R 1922 P C 292, Explained.* [P 254 C 1]

(b) Practice — Judgment — Contents of — Appeal - Question of fact.

It is not incumbent upon the Appellate Court to repeat in extenso the arguments of the trial Judge which it accepts, but the party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. [P 254 C 1]

P. V. Rajamannar — *for Appellants.*

V. V. Viyyanna — *for Respondents.*

Order.—This is a Letters Patent Appeal from the judgment of Jackson J. The decree of the trial Court dismissing the suit was confirmed by the Subordinate Judge. In second appeal to this Court, the plaintiff succeeded. The Munsif as well as the Subordinate Judge found that the defendants have no occupancy rights either under the Estates Land Act or independent of it, but nevertheless dismissed the suit on the ground that the plaintiff did not make out a right to eject. In second appeal Jackson J., accepted the findings of the lower Courts in regard to occupancy rights both within and outside the Act, but differing from the lower Courts held that the plaintiff was entitled to a decree for possession. We have heard an argument from Mr. Venkataramana Rao on the question whether the plaintiff has or has not a right to eject, granting that the defendants are bound by the findings in regard to occupancy rights. On this point, on account of the course we propose to adopt, we wish to express no opinion at present. It is contended for the defendants that on the question of occupancy rights, the findings of the lower Appellate Court, as they stand, cannot be accepted. The first question in regard to those rights, which the learned Subordinate Judge had to decide was, was the grant made to the inamdar, the plaintiff's ancestor, of both the varams or of melvaram alone ? The learned Subordinate Judge whose finding on a question of fact is final, starts the discussion of the evidence with a wrong statement of the law. He says that there is a presumption that an inam grant comprises both the melvaram and the kudivaram. This is how he states the law :

The decisions of the Privy Council reported in 41 Mad 1012[1] and 43 Mad 166[2] are clear autho-

1. Suryanarayana v. Patanna, (1918) 5 A I R P C 169=48 I C 689=45 I A 209=41 Mad 1012 (P C).
2. Venkatasastrulu v. D. Seetharamadu, (1919) 6 A I R P C 111=51 I C 304=43 Mad 166=46 I A 123 (P C).

rities to show that the presumption of law in the case of an inam grant was that both melvaram and kudivaram were granted. These two decisions were discussed in the Full Bench ruling in 44 Mad 588[3] and the same conclusions were arrived at. It lay, therefore, on the defendants who set up occupancy rights that only the melvaram was given to the original grantee and that they had permanent rights of occupancy in the lands. Such a presumption of law is not rebutted in this case.

This was the view of the law taken at that time by the Madras High Court and the Subordinate Judge was bound to give effect to that view. He is not therefore to blame for the course he adopted. But since then, the Privy Council has clearly held that the view taken by our Court in the Full Bench case referred to by the Subordinate Judge is wrong. In 49 I A 286,[4] the Judicial Committee laid down the law thus in unequivocal terms :

> It will be noticed that neither in 45 I A 209[1] nor in 47 I A 76[5] is there a suggestion of a presumption in favour of the inamdar or pattadar on the one side or the ryot on the other. It was further distinctly pointed out in 46 I A 123[2] at p. 128, the passage already cited, that each case must be considered on its own facts.
>
> * * * *
>
> A Full Bench of the Madras High Court however has in a recent case, 44 Mad 588,[3] held that underlying the exposition of their Lordships, such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with upon its own facts, with special regard to the evidence and circumstances therein.

The question then is, does the wrong assumption of the lower Appellate Court vitiate its finding or not ? We entirely agree that it is not incumbent upon the Appellate Court to repeat in extenso the arguments of the trial Judge which it accepts. But the party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. In this case the point is either one of fact or is a mixed question of law and fact. The discussion of the Subordinate Judge is extremely brief and we are not entitled to speculate that, if he had applied the right rule of law, he would still have agreed with the District Munsif. On the contrary, the Subordinate Judge, while pointing out that the presumption may be rebutted, observes that on the facts of the present case it was not. What view he would have taken of the evidence, if he had not approached it from a totally wrong standpoint, we are not in a position to say. First, as regards, therefore, occupancy rights within the Act, we set aside the finding in para. 7 of the judgment of the lower Appellate Court.

Then as regards occupancy rights independent of the Act, the judgment of the Subordinate Judge is equally open to attack. The District Munsif in a judgment unnecessarily long, devotes several paragraphs to the discussion of the question ; have the defendants made out their case with reference to a lost grant or usage or prescription ? Under each of these headings, he considers the question. The Subordinate Judge completely misunderstands the District Munsif. There are just three lines in his judgment which bear on this point and his reasoning and conclusion are contained in this short passage. We may quote his very words :

> The lower Court also showed in para. 22 of its judgment that the defendant could not have obtained permanent rights by prescription, I hold therefore that the defendants had no occupancy rights : Para. 9.

Is this not a thorough misunderstanding of the judgment of the trial Court ? The Subordinate Judge has overlooked the discussion on the question of lost grant as also on the question of usage. Even on the point of prescription, he has nothing more to say than that he agrees with the lower Court. It is impossible to accept this finding as final in a second appeal. We therefore set aside that finding also. We call upon the lower Appellate Court to rehear the appeal in regard to these two questions and write a fresh judgment containing findings as regards existence of occupancy rights within and independent of the Act, on the evidence already on the record. Findings shall be returned in six weeks from this date. Objections 10 days thereafter. All the questions that arise in the appeal will be argued on the receipt of the findings.

C.R.K./D.S. *Case remanded.*

---

3. Muthu Goundan v. Perumal Iyen, (1921) 8 A I R Mad 145=63 I C 790 = 44 Mad 588= 40 M L J 429 (F B).

4. Chidambara Sivaprakasa Pandarasannadhigal v. Veerama Reddi, (1922) 9 A I R P C 292 = 68 I C 538=45 Mad 586=49 I A 286 (P C).

5. Sethuratnam Iyer v. Venkatachala Goundan, (1920) 7 A I R P C 67=56 I C 117 = 47 I A 76=43 Mad 567 (P C).

A. I. R. 1938 Madras 255

HORWILL J.

Arumugham Chettiar and others — Appellants.

v.

Mariappan Chettiar — Respondent.

Second Appeal No. 597 of 1936, Decided on 7th September 1937, against decree of Sub-Judge, Ramnad at Madura, in A. S. Nos. 10 and 30 of 1935.

(a) Civil P. C. (1908), O. 2, R. 2 — *D* selling land to *P* without disclosing prior encumbrances on it — Land sold in execution of mortgage decree — *P* purchasing it through benamidar *K* — *P* suing *D* for damages falsely alleging that *K* had purchased land and dispossessed him — Suit dismissed on ground that cause of action alleged was false — *P* bringing another suit for damages for being compelled to pay money to mortgagee to prevent dispossession — Suit held not barred under O. 2, R. 2.

D sold a piece of land to *P* and in his sale deed failed to disclose prior encumbrances on the land. The mortgagee whose debts had not been disclosed got the property sold in execution of his decree and *P* purchased it through a benamidar *K*. *P* later on sued *D* for damages falsely alleging that *K* had purchased the property and dispossessed him. The suit was dismissed on the ground that the cause of action alleged therein was false. *P* again sued *D* for damages for having been compelled to pay money to mortgagee to prevent his dispossession. *D* contended that the suit was barred under O. 2, R. 2 :

Held that the second suit was not barred under O. 2, R. 2. Although the two causes of action arose out of the breach of one covenant in the sale deed, there were two distinct and independent events referred to in the two suits—in the first, that the plaintiff had been dispossessed and in the second, that on a date anterior to the allegation in the first suit he was compelled to pay off the mortgagee's claim to prevent his dispossession. *P* could not have filed one suit on the two causes of action because the facts alleged in the two suits were entirely inconsistent with one another and the two claims could not have been tried together in the same suit : *1 I C 319, Disting.*

[P 256 C 1, 2]

(b) Contract—Breach—Sale of land—Mere failure to disclose encumbrances does not give vendee cause of action—Cause of action arises only when vendee is dispossessed or required to pay more money.

The mere fact that there are encumbrances on the property sold which have not been disclosed does not give the vendee a cause of action. It is only when he is dispossessed or is compelled to pay some money that he ought not to have been called upon to pay that a cause of action arises.

[P 256 C 1]

K. V. Sesha Iyengar — *for Appellants.*

N. R. Govindachari — *for Respondent.*

Judgment. — The defendant sold a piece of land to the plaintiff and in his sale deed failed to disclose some prior encumbrances. The mortgagees, whose debts had not been disclosed, brought suits for sale, with the result that the property that had been sold to the plaintiff and was actually in his possession was brought to sale in execution of one of the decrees, and the plaintiff himself purchased the property through a benamidar, Kaliyanandi Chettiar. Instead of bringing a suit for damages as a result of his having been compelled to pay the decree debt, he falsely pleaded in O. S. No. 521 of 1930 that Kaliyanandi Chettiar had purchased this land and had dispossessed the plaintiff. The District Munsif found that the plaintiff's statements of fact were false, but he nevertheless gave a decree because a breach of the covenant had occurred and the plaintiff had suffered damages. In appeal the Subordinate Judge rightly pointed out that the plaintiff's case as it stood, was a false one and that his suit had either to be dismissed or the lower Court would have to allow the plaintiff to amend his plaint. The Subordinate Judge did not say and could not say that the District Munsif should have suggested to the plaintiff that his plaint should be amended and that if the plaintiff had followed up the suggestion the amendment should have been allowed. The amendment of the plaint could not have been allowed ; for, if it had, it would have altered the whole nature of the suit. That suit having been dismissed, the plaintiff has brought the present suit on the true cause of action, viz. his having been compelled to pay a sum of money to the mortgagee in order to prevent his dispossession. It is now contended by the defendant that because of the prohibition in O. 2, R. 2 the plaintiff's suit must be dismissed as in the prior suit he should have put forward the very claim that he has put forward now.

Mr. Sesha Iyengar for the appellants has placed a considerable reliance on 1 I C 319[1] in which it was held that if a number of covenants of a contract are broken, the breaches of that contract may be sued on in the same suit, and that if the plaintiff sued on one cause of action only he is prevented by O. 2, R. 2 from bringing a fresh suit on the other causes of action. There can be no doubt at all that the principle there laid down was correct:

1. Rajah Bahadur Shiv Lal v. Raja Veppa Pampanna, (1909) 1 I C 319=11 Bom L R 46.

but it can only be applied to cases where breaches of the several covenants in the contract occur in the course of the same transaction. If in the present case the defendant had covenanted to give peaceful possession and enjoyment to the plaintiff and at the same time had guaranteed that the land was free from encumbrances, and the plaintiff had afterwards been dispossessed, then it would have been incumbent on him to have filed a suit on the breach of both the covenants for peaceful possession and for a title free from encumbrances. If however the two covenants were broken on two different occasions, then there will have been two causes of action and two suits would be maintainable. In the present case there was only one covenant or at any rate only one covenant has been referred to in the judgments of the Courts below and in the arguments of the learned counsel for the appellants viz. the covenant that the land was free from encumbrances. There are however two distinct and independent events referred to in the two suits. In the first suit, the plaintiff stated that he had been dispossessed and his dispossession was a cause of action ; while in the second suit he stated that at a time anterior to the date on which he had formerly said that he was dispossessed, he was compelled to pay off the mortgagee's claims. There were thus two causes of action, although they arose out of breaches of the same covenant. As Mr. Sesha Iyengar has himself pointed out, the mere fact that there are encumbrances which have not been disclosed does not give a vendee a cause of action. It is only when he is dispossessed or is compelled to pay some money that he ought not to have been called upon to pay, that a cause of action arises. There were therefore two distinct causes of action in the two suits.

This is sufficient to dispose of the appeal; but it has been argued that the test to be applied is whether the plaintiff could have filed one suit on the two causes of action. Even if this is the test the appellant would fail ; for, the plaintiff clearly could not have done this as the facts alleged in the two suits were entirely inconsistent with one another. He could not in the same suit have said that Kaliyanandi Chettiar had purchased the land and that he had been dispossessed and in another paragraph have said that he purchased the land himself and was never dispossessed. It is therefore clear that the two claims could not have been tried together in the same suit. The present suit was therefore maintainable and this appeal is accordingly dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 256

BURN AND LAKSHMANA RAO JJ.

V. E. N. K. R. M. A. Ramanathan Chettiar Hukdar of Nagappa Chettiar Kattalai (in Sri Meenakshi Sundareswaral Devasthanam, Madura) — Appellant.

v.

Madura Sri Meenakshi Sundareswaral Devasthanam by its trustee, R. Duraiswami Naidu — Respondent.

Appeal No. 14 of 1935, Decided on 27th August 1937, against order of Sub-Judge, Ramnad at Madura, D/- 8th August 1934.

Civil P. C. (1908), S. 92 — Scheme suit — Scheme decree is not executable.

In a scheme suit under S. 92, when once a decree settling a scheme has been passed, the Court has done its duty and is not to be called upon in the execution department to make the scheme work: *A I R 1936 Mad 581, Approved.*

[P 256 C 2]

M. Patanjali Sastry — *for Appellant.*

K. Rajah Ayyer — *for Respondent.*

Judgment.—In our opinion the learned Subordinate Judge took the correct view both as to the general principle and as to the particular case. There may have been some divergence of view in this Court in the past, as Mr. Patanjali Sastri contends, but latterly the trend of the decisions has undoubtedly been towards the view that once a decree settling a scheme has been passed, the Court has done its duty and is not to be called upon in the execution department to make the scheme work : *vide* 59 Mad 751.[1] With due respect to the learned Judges who have taken the other view, we think this is correct, and see no sufficient reason to accept Mr. M. Patanjali Sastri's suggestion that the case should be laid before a Full Bench.

In this case before us, we agree with the learned Subordinate Judge that the decree itself does not even purport to be executable. It provides in para. 4 that

1. Vaithilinga Mudaliar v. Sri Thyagaraja Swami Devasthanam, Tiruvarur, (1936) 23 A I R Mad 581=165 I C 820=59 Mad 751= 71 M L J 87.

the Manager shall deposit the Kattalai funds (over Rs. 1000) in a bank, but it makes no provision for the decision of any dispute between the Manager and the hukdar as to the amount due to be deposited. In para. 9 it is ordered that there shall be an annual audit but no provision is made for scrutiny of the auditor's report by the Court or for enforcing any conclusions arrived at by the auditor or the Court. As the learned Subordinate Judge observes there is nothing of an executable character in either para. 4 or para. 9 of the decree. This appeal is accordingly dismissed with costs.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1938 Madras 257

VENKATASUBBA RAO AND NEWSAM JJ.

Katamberi Chuzhlai Bhagawati Amma's owner, Uralan and Manager Samanthan Karakkattiathil Kammaran Nambiar and another — Appellants.

v.

Valia Ramunni and others — Repondents.

Appeal No. 407 of 1931 and Civil Revn. Petn. No. 1695 of 1930, Decided on 19th August 1937, against decree of Sub-Judge, Tellicherry, in O. S. No. 20 of 1928.

(a) Res Judicata — Bar of—Suit by person filling dual position of karnavan of tarwad and uralan of dewaswom against another shrine claiming homage including certain payments from defendant shrine — Same relief claimed in previous suit—But in previous suit uralan figuring as plaintiff suing through dewaswom, while in latter suit, dewaswom figuring as plaintiff suing through the uralan — Both suits identically same — Parties to both suits cannot be regarded as different parties — Subsequent suit is barred by res judicata.

Where a suit is brought by a person filling the dual position of the karnavan of a tarwad and the uralan of a dewaswom against another shrine claiming that the defendant shrine is a subsidiary shrine owing allegiance to its suzerain—the plaintiff dewaswom—and bound to render it homage inter alia by making certain recurring payments and where another suit was previously instituted against the same shrine claiming the same relief but in the previous suit the trustee, i. e. the uralan figured as plaintiff suing on behalf of the institution and in the latter suit the institution figures as plaintiff suing through its trustee (who happens to be the same person in both suits) and the right put forward by the trustee was, in both the suits on behalf of the dewaswom and not in his capacity as the karnavan of his tarwad and not only are the two shrines plaintiff and defendant respectively in both the suits but are represented by the same individual and the reliefs claimed in both suits are not only substantially but identically the same, the parties in both the suits cannot be said to be different parties and the latter suit is barred by the principle of res judicata: *A I R 1925 P C 139 and A I R 1927 P C 128. Disting.* [P 258 C 2 ; P 259 C 1]

(b) Res Judicata—Constructive—S. 11, Suits Valuation Act, and S. 21, Civil P. C., embody principle of res judicata—Suit instituted in Court having no pecuniary jurisdiction to try it—No objection raised by either party as regards jurisdiction of Court to try suit—Parties are precluded in subsequent suit between them, based on same cause of action, and involving same relief from contending that subsequent suit is not barred as former suit was tried by Court having no pecuniary jurisdiction to try it.

Section 11, Suits Valuation Act, and S. 21, Civil P. C. embody the principle of constructive res judicata and propound that unless objection to the pecuniary or territorial jurisdiction of a Court is taken by the parties at the earliest possible opportunity and unless the want of jurisdiction has resulted in failure of justice, the principle of constructive res judicata will apply. Where a suit is instituted in a Court which has no pecuniary jurisdiction to try it and no objection is raised by the parties as regards the jurisdiction of the Court to try the suit and the suit is tried and decided by the Court, it cannot be contended by either party in a subsequent suit between the same parties based on the same cause of action and claiming the same relief that the subsequent suit is not barred merely because the former suit was tried by a Court which had no pecuniary jurisdiction to try it unless it is shown that the want of jurisdiction has resulted in failure of justice. The principle of constructive res judicata will apply in such case : *A I R 1920 Mad 1019 (F B)* ; *A I R 1925 Mad 117* ; *A I R 1926 Mad 421* ; *A I R 1927 Mad 627* ; *A I R 1929 Lah 449 and A I R 1924 All 388, Rel. on* ; *Case law discussed.* [P 262 C 1]

(c) Suits Valuation Act (1887), S. 11—S. 11, Suits Valuation Act, and S. 21, Civil P. C., are exceptions to fundamental rule of law that judgment of Court without jurisdiction is nullity and that want of jurisdiction cannot be waived.

Per *Venkatasubba Rao J.* — Section 11, Suits Valuation Act, and S. 21, Civil P. C., are exceptions to the fundamental rule of law that a judgment of Court without jurisdiction is a nullity and that want of jurisdiction cannot be waived. The principle which both the sections embody is that these defects are not fundamental in character and are no more than mere irregularities in the exercise of jurisdiction. [P 259 C 2; P 261 C 1]

(d) Jurisdiction—Objection to.

An objection to jurisdiction which a defendant is precluded from raising is not open to a party who was the plaintiff in the previous suit. [P 261 C 1]

(e) Res Judicata —Applicability —Principle cannot be evaded by literal and narrow application of special section.

The fundamental principle of res judicata that no litigant can ever have the same case tried twice is not to be evaded by a literal and a narrow application of a special section. [P 262 C 2]

Advocate General and P. Govinda Menon — *for Appellants.*

T. R. Venkatarama Sastri, M. C. Sridharan and C. Govindan — *for Respondents.*

Venkatasubba Rao J. — The question raised in this appeal is whether the present suit is barred by res judicata by reason of the decree in O. S. No. 847 of 1923. The bar that is pleaded is not confined to any particular matter in issue but extends to the entire claim. The suit has been brought by one Rayarappan Nambiar, who fills the dual position of (1) the karnavan of Karakath Idam and (2) the Uralan of Kadamberi Dewaswom where the presiding deity is Bhagavati; in other words, the plaintiff's right to hold the trusteeship of the temple arises from his being the manager of his tarwad. Several reliefs are claimed in the plaint, over what is alleged to be a subsidiary shrine known as Muttappan Devestanam, under the control of one Valia Ramunni, the karnavan of a Thiya Tarwad, and as such, the 'Mattyan' or the head, of the shrine in question. The plaintiff's case shortly is that the defendant shrine is a subsidiary temple owing allegiance to its suzerain, the Kadamberi Dewaswom, and bound to render it homage inter alia by making certain recurring payments. There are some other reliefs which are claimed, to which it will become necessary to refer presently. The question is, whether either of the two grounds taken by the learned Advocate-General is well founded, namely first that the parties to the present and the previous suit are different and secondly that the previous suit was tried by a Court which had no jurisdiction to try it. As to the former contention, it is urged that in the present action the right put forward is that of the deity, whereas in the previous suit, the karnavan was asserting his private or individual right. The argument however proceeds upon a thorough misreading of the two plaints. There has been disingenuous attempt in the plaint to make it appear that the present claim differs from the old one which however has not succeeded. In spite of the wilful confusion that has been introduced, the two claims are not only substantially but identically the same. On the previous occasion, the trustee was described as the plaintiff suing on behalf of the institution; in the present plaint, the institution figures as the plaintiff suing through its trustee. This is a distinction without a difference; even otherwise, almost every paragraph of the previous plaint shows that the right put forward by Rayarappan Nambiar (the same person as the present plaintiff) was then, as now, on behalf of the Devaswom and not in his capacity as the karnavan of his tarwad. The matter is so patent and so manifest that it would be a waste of time to refer in any detail to the relevant passages. Not only were these two very shrines the plaintiff and the defendant in the previous suit, but they happened to be represented by the same individuals as at present. I fail to see what principle can be deduced from either of the two cases cited by the learned Advocate-General, which can possibly be applied to the facts here. In the first case, 52 I A 245,[1] all that was held was, that a Hindu idol is a 'juristic entity' and has a juridical status with the power of suing and being sued.

The conception of a family idol as a moveable chattel, capable of being treated as property, is not warranted by the authorities and is opposed to principle; that is the gist of the decision. There was a dispute in regard to a right claimed by one of the parties, to remove the idol from the allotted place of worship, and the only matter decided was, that there was a broader question, which the action raised, than the mere establishment of individual rights, namely that relating to the interests of the deity. It was therefore held that a disinterested third party, other than either of the contesting claimants should act as the next friend of, and appear for, the idol. It is difficult to discover any principle laid down here applicable to the facts of the present case. Nor does the second case cited, 54 I A 238,[2] appear to have any application. The question turned entirely on the construction of the pleadings in the earlier litigation. Both the plaintiffs and the defendants had been described as the shebaits of the gods and the Judicial Committee naturally enough found it difficult to treat the idol as the party (p. 245). Their Lordships expressly declare that owing to the nature of the earlier litigation, it was not thought neces-

1. Pramatha Nath Mullick v. Pradhyumna Kumar Mullick, (1925) 12 A I R P C 139=87 I C 805=52 I A 245=52 Cal 809 (P C).
2. Radha Binode Mandal v. Gopal Jiu Thakur, (1927) 14 A I R P C 128=101 I C 873=54 I A 238=54 Cal 770 (P C).

sary to make the gods, the plaintiffs in the subsequent suit, parties to the previous suits (p. 246). The facts here as already shown are entirely different. The former suit, as the present one, was filed on behalf of the Kadamberi Devaswom and in both the suits the plaintiff is virtually the goddess Bhagavati, the deity in that temple. The contention therefore that the operation of res judicata is excluded by reason of the parties being different entirely fails.

Now turning to the second contention, it is based on a totally wrong assumption. There is a relief claimed in the present plaint (that is the one material to the present contention), namely that the defendant should be directed to surrender the land where the temple stands, along with the improvements effected thereon. In the plaint, the value of the buildings inclusive of the improvements, has been stated to be upwards of Rs. 13,000. There is a definite averment made in para. 3 (vi) that the plaintiff is entitled to the improvements without being liable to pay for them. Now the learned Advocate General says that in the former suit also a similar claim had been made. There has been some debate as to the correct rendering of of the relief No. (a) in the previous plaint (see p. 194, documents paper) but whichever of the two rival renderings is accepted, it is clear that there was no claim made in the earlier suit to the improvements. On the contrary, there is a definite offer in the former plaint to pay for the improvements, in the alternative, the plaint goes on to say that the defendant should be directed to demolish and remove the buildings which constitute the improvements. Surely, this cannot be construed as a claim to improvements, which naturally enough were not even valued in that plaint. Upon the claim made and upon the valuation given of the reliefs, the Court that had jurisdiction was the Munsif's Court and the suit was rightly filed and tried by that Court. Now on these facts, it is perfectly obvious that the present claim to the improvements is barred either under S. 11, Expln. (4), Civil P. C., or under O. 2, R. 2. It is in order to get over this difficulty that the learned Advocate General has been constrained to contend, quite wrongly as I have said, that even in the previous plaint the improvements had been claimed. The next step in his argument is, that the former suit, understood as comprising a claim to the improvements, was beyond the pecuniary jurisdiction of the District Munsif who tried it ; the decision in such a suit is incompetent and cannot operate as res judicata.

Granting for a moment that the construction sought to be placed upon the previous plaint is correct, is the learned Advocate-General's contention valid in law ? It is a fundamental rule that a judgment of a Court without jurisdiction is a nullity and that want of jurisdiction cannot be waived. To this rule there are two exceptions recognized by the Indian Law: S. 11, Suits Valuation Act, deals with defects of jurisdiction due to wrong pecuniary valuation and S. 21, Civil P. C. makes a like provision when the place of suing has been wrongly chosen. Put in another way, there is a distinction between inherent incompetency in a Court and irregular exercise of jurisdiction and under the Indian Statute Law, the two defects mentioned above are treated as irregularities which can be waived. The argument pressed upon us, that beyond the terms of the two sections, the exceptions they embody can have no operation. This contention has been overruled in regard to S. 21, Civil P. C. by several decisions of our Court. In 43 Mad 675,[3] it was held that the objection to jurisdiction having been waived, the waiver extends to execution proceedings. In that case a wrong Court passed the final mortgage decree without objection and when it was sought to be executed, the defendant objected to its validity. Sir John Wallis C. J. delivering the judgment of the Full Bench, held that the effect of S. 21 is that objections which the Appellate or revisional Court is precluded from allowing, must be considered cured for all purposes. In 47 M L J 448[4] the Court which passed the final decree without objection had ceased to have jurisdiction over the mortgaged property. In a suit brought to set aside the decree on the ground that it was void for want of jurisdiction, it was held that S. 21, Civil P. C., enacts an exception to the general rule and that the plea of want of territorial jurisdiction may be waived. As I observed then, if in appeal or revision the decree cannot be impeached, it stands to reason that it should not be allowed to be attack-

3. Zamindar of Ettiyapuram v. Chidambaram Chetty, (1920) 7 A I R Mad 1019=58 I C 871 =43 Mad 675=39 M L J 203 (F B).
4. Chockalingam Pillai v. Velayudha Mudaliar, (1925) 12 A I R Mad 117=87 I C 152=47 M L J 448.

ed in a subsequent suit brought to set it aside (p. 459). This was the view taken by Phillips J. and myself, but as we differed on a question of fact, there was a Letters Patent appeal filed. Two of the Judges who heard it agreed with our view although the other member refrained from expressing any opinion. In 49 Mad 746,[5] the sale of the mortgaged property was ordered without objection by a Court which had ceased to possess territorial jurisdiction. The validity of the sale was assailed by the judgment-debtor in an application subsequently made by him to set it aside. After referring to S. 11, Suits Valuation Act, and S. 21 of Civil P. C., I went on to observe :

> By virtue of these sections, certain defects of jurisdiction are put on a par with 'irregularities in the initial procedure'. In regard to the pecuniary jurisdiction of a Court, S. 11, Suits Valuation Act, and in regard to its territorial jurisdiction S. 21, Civil P. C., recognize that there may be a waiver on the part of the defendant and that the absence of jurisdiction does not render the decree a nullity : see p. 750.

In this case it will be seen that the principle of waiver was pushed much further than in the two cases already noticed; the objection waived was not to the "place of suing" to which alone S. 21 refers, the defect of jurisdiction having occurred in the course of execution. In 50 Mad 882,[6] the principle laid down in the two last mentioned cases was affirmed, the Court holding that the omission to object to jurisdiction estopped the mortgagor from disputing the validity of the final decree. The learned Judges further held a point with which we are not here concerned that though the final decree could not be attacked, the mortgagor was not estopped from objecting to the jurisdiction of the Court to order a sale, meaning presumably that the objection could be taken before the sale was ordered but not after the event. The principle laid down in 47 M L J 448[4] has been adopted by the Lahore High Court in A I R 1929 Lah 449,[7] where it is observed that S. 21 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the place of suing. The learned Advocate-General seeks support for his argument in some decisions of the Calcutta High Court to which Mukherjee J. was a party. After referring to the exception created by the two sections mentioned above the learned Judges (Mukherjee and Chotzner JJ.) observe :

> This exception cannot obviously be so interpreted as to have wider application than what is justified by its terms: 27 C W N 542[8] at page 547.

In that case, in execution of a decree certain property was sold by a Court which had no jurisdiction over it. A subsequent suit by the purchaser for recovering the property was dismissed on the ground that the sale had been held by a Court without jurisdiction. This decision, it will be seen, is in direct opposition to 49 Mad 746[5] already cited. There is yet an earlier case of the Calcutta High Court, 38 Cal 639,[9] which is frequently cited in this connexion. There owing to the undervaluation of the suit, the appeal was heard by the District Court, instead of by the High Court, which passed a decree by consent. In a subsequent suit brought for a declaration that the consent decree was a nullity, the learned Judges, Mukherjee J. being one of them, observed:

> If a Court has no jurisdiction, its judgment is not merely voidable but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been.

This statement, so far as it goes, is with great respect, unexceptionable, and the real question that arose in the case, as the judgment itself points out, was whether a stranger was bound by the decree in question. The learned Judges say:

> We are not now called upon to consider what the effect of such lack of jurisdiction would be upon the decree, in so far as the parties thereto were concerned : Page 668.

There is nothing in the positive language of this judgment which supports the contention. A Bench of the Allahabad High Court was in favour of preferring the narrower view of the principle underlying S. 21 and refused to follow the Madras decisions: 53 All 560.[10] Finally, it may be pointed out that in Mulla's Civil Procedure Code, the

5. Rajagopala Pandarathar v. Thirupathia Pillai, (1926) 13 A I R Mad 421=95 I C 12=49 Mad 746=50 M L J 161.
6. Satrucherla Sivakanda Raju v. Rajah of Jeypore, (1927) 14 A I R Mad 627=103 I C 245 =50 Mad 882=52 M L J 605.
7. Parshottamdas v. Radhakishan, (1929) 16 A I R Lah 449=120 I C 279.
8. Kunja Mohan Chakravarthi v. Monindra Chandra, (1923) 10 A I R Cal 619=77 I C 263 =27 C W N 542.
9. Rajalakshmi Dasi v. Katyayani Dassee, (1911) 38 Cal 639=12 I C 464.
10. Raghubir Saran v. Hori Lal, (1931) 18 A I R All 454=131 I C 248=53 All 560=1931 A L J 240.

learned author expresses the opinion that the Madras view is sounder in principle than that taken in the decision referred to above to which Mukherjee J. was a party (Commentaries under S. 21). To treat want of territorial or pecuniary jurisdiction as amounting to inherent incompetency seems incompatible with the idea underlying the two statutory provisions mentioned above. These sections provide that even had the objection not been waived, that is to say had been taken in the Court of first instance, the presence of a further element is essential, namely that there has been a consequent failure of justice. The principle that they appear to embody is, that these defects of jurisdiction are not fundamental in character and are no more than "irregularities in the exercise of jurisdiction." 50 Mad 882,[6] decided by their Lordships of the Judicial Committee, does not, as explained in several cases, lend the slightest support to the Advocate General's contention. The general rule, as already stated, is that consent cannot give jurisdiction; but Ss. 21 and 11 provide exceptions to that rule. The effect of that decision is, that the operation of S. 21 of the Code being excluded in the case of scheduled districts where the lands were situated, the objection was not to the nullity of the order on the ground of want of jurisdiction.

That territorial and pecuniary jurisdiction stand in this respect on the same footing has not been disputed, although most of the decided cases refer to the principle embodied in S. 21 alone. However there is a direct decision of the Allahabad High Court, where the question was one of pecuniary jurisdiction, which supports our view: 46 All 250.[11] Finally, this case differs from the usual type, as it was the plaintiff himself who on the former occasion invoked the jurisdiction of what he now contends was the wrong Court: see 47 M L J 448.[4] An objection which a defendant is precluded from raising, is *a fortiori* not open to the party who was the plaintiff in the previous suit. In the result, the contention of the learned Advocate-General that the present suit is not barred by res judicata fails. The lower Court, although it came to the conclusion that the suit was barred by res judicata, went into issues of fact and recorded findings against the plaintiff. We should have also dealt with the questions of fact raised but for the statement of the learned Advocate-General filed in Court, to the effect that in the view we have taken on the point of res judicata, the merits of the case need not be gone into.

Lastly remains the application made by the plaintiff to the lower Court under O. 2, R. 4, Civil P. C. which has been disallowed by that Court. This forms also the subject of C. R. P. No. 1695 of 1930 posted before us along with this appeal. We substantially agree with the reasons given by the lower Court. Moreover it would be futile for the plaintiff to urge that to the main claim obviously barred by res judicata, he should be permitted to tack on other claims of a subordinate nature. In the result, both the appeal and the C. R. P. are dismissed with costs. Under R. 46 (2), Appellate Side Rules, we allow in the appeal two sets of fees, the respondent having been represented by more than one counsel. The counsel's fee in the C. R. P. is fixed at Rs. 25.

Newsam J.—It was practically admitted and indeed it would be extremely difficult to deny that the two suits are between the same parties and that the identical reliefs were prayed for in both suits. In both, the plaintiff sues in a dual capacity as karnavan of his family (tarwad) and Uralan (owner and manager) of the goddess Bhagavathi and her property. Both suits were inspired by feudal intolerance and flavoured with the jealousy of a goddess. Both were brought with a view to the suppression of a lesser deity, owned and managed by the karnavan of a so-called upstart family, inferior in caste, prestige and status to the plaintiffs. Though both the plaintiff devaswom and the defendant institution have been declared to be public temples, it is indeed almost inconceivable to the karnavan of a Malabar family that a temple built by his ancestors on the family paramba should ever be anything but family property. Even a cursory analysis of the plaints will show that both suits are identical.

The real argument was that the present suit is not barred because the former suit was tried by a Court which had no pecuniary jurisdiction to try it. It will be assumed for this purpose that if the plaintiff appellant had valued the former suit properly it would have been a suit beyond

11. Khudaijatul Kubra v. Mt. Amina Khatun, (1924) 11 A I R All 888=80 I C 413=46 All 250=22 A L J 122.

the pecuniary jurisdiction of a District Munsif. S. 11, Suits Valuation Act, as I understand it, applies the major principle of constructive res judicata to suits valuation, just as S. 21, Civil P. C. applies that same principle to the question of the territorial jurisdiction of Courts. These two matters are primarily the province of parties; within limits a party may choose his own forum, e. g. by undervaluing or overvaluing his claim or by suing in one District or in another. That being so, S. 11, Suits Valuation Act, and S. 21, Civil P. C., propound the salutary and indeed quite inevitable maxim that unless objection to the pecuniary or territorial jurisdiction of a Court is taken by the parties at the earliest possible opportunity, the principle of constructive res judicata will apply. That is to say, the objection may not be taken at any later stage in the suit. And even if the objection is taken at the earliest possible moment and overruled, it cannot prevail in appeal unless such want of jurisdiction has materially affected the result. From this, it is obvious that the jurisdiction of a Court is only artificially limited by minor considerations such as the value of the suit or the place where the cause of action arose. Inherent defects stand on an entirely different footing. For example, if a Court not empowered to grant divorces were to pass a decree nisi, its decree would be void ab initio. Such inherent want of jurisdiction is not curable by consent of parties. But, as I have said, parties have been given a limited right to choose the forum which shall hear their causes and when once they have chosen they must abide by their choice. If it were otherwise, Courts would be at the mercy of parties, litigant, would become mere arenas for preliminary trials of strength. It has been argued further that S. 11, Suits Valuation Act, and S. 21, Civil P. C., must be strictly construed. They bar the plea being taken in the subsequent stages of the same suit; but do not in terms bar another suit. This argument I have already answered. As soon as it is realized that these two sections are applications of the general principle of constructive res judicata to the valuation of suits and to the place of suing, it becomes rather absurd to attempt to detract from a principle so wide and universal as the rule of res judicata. Indeed if the plea is barred in subsequent stages of the same suit it necessarily follows *a fortiori* that another suit is barred. The suggestion made really amounts to this—that these two sections merely render the first suit in all its stages meaningless, empty and theoretical, while leaving it open to the parties to file another and a real suit. That is a fantastic interpretation. No litigant can ever have the same case tried twice. That is the fundamental principle of res judicata, not to be evaded by a literal and a narrow interpretation of a special section. I agree with my learned brother on all points and in the decree proposed.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 262

FULL BENCH

LEACH C. J. VARADACHARIAR AND MOCKETT JJ.

Abubacker Labbai — Petitioner.

v.

Chinnathambi Rowther — Respondent.

Madarsa Labbai and another — Sureties.

Referred Case No. 4 of 1936, Decided on 6th December 1937.

Stamp Act (1899), Sch. 1, Art. 40—Security bond executed under S. 21 (1), Provincial Insolvency Act, should be stamped under Art. 40 and not under Art. 57.

A security bond executed in pursuance of an order of Court under Section 21 (1), Provincial Insolvency Act, hypothecating also immovable property, should be stamped under Art. 40, and not under Art. 57 of Sch. 1: *A I R 1931 All 189 and I L R (1937) 1 Cal 375, Rel. on; A I R 1936 Lah 45 (S B), Disapproved.* [P 263 C 2]

Govt. Pleader — *for the Government.*

Leach C. J. — The following question has been referred to the Court under S. 57 of the Stamp Act, by the Board of Revenue as the Chief Controlling Revenue Authority of the Presidency:

Whether the document, a security bond for Rs. 4500 executed in pursuance of an order of the Court of the Subordinate Judge of Tiruvarur, hypothecating also immovable property, should be stamped under Art. 40 of Sch. 1, or under Art. 57 of Sch. 1, Stamp Act.

These Articles correspond respectively to Arts. 33 and 46, Madras Stamp Amendment Act of 1922. The facts are shortly these. One Abubacker Labbai applied in the Court of the Subordinate Judge of Tiruvarur under the Provincial Insolvency Act to be adjudged an insolvent, and under S. 21 (1) of that Act was required to give a bond

with two sureties for his due appearance in the insolvency proceedings. A bond was accordingly executed by two sureties in favour of the sheristadar of the Court in the sum of Rs. 4500 and was stamped under Art. 57, Stamp Act, or rather, under the corresponding Article of the Local Act. The Central Board of Revenue have asked the Court to decide whether this is correct. If Art. 57 does not apply, the only other Article which can, is Art. 40. This is common ground.

Article 40 prescribes the duty to be paid on a mortgage deed not being an agreement relating to deposit of title deeds, pawn or pledge, a bottomry bond, a mortgage of a crop, a respondentia bond and a security bond. Art. 57 prescribes the duty payable in respect of a security bond or mortgage deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract. It is said that Art. 57, and not Art. 40, applies because the bond in question is a surety bond for the due performance of a contract. S. 2 (h), Contract Act, defines a contract as being an agreement enforceable by law.

The Lahore High Court held in 17 Lah 74,[1] that a bond of this nature is a bond for the due performance of a contract and consequently is to be stamped under Art. 57. In that case the bond differed materially from the bond we are now considering. The bond in the present reference was not executed by the debtor, but merely by the sureties. In the Lahore case, the bond was executed by the debtor as well as the sureties. This decision followed a previous decision of the Lahore Court in 15 Lah 78,[2] which concerned a bond given under O. 41, R. 5, Civil P. C.

The Allahabad High Court has taken a contrary view : 52 All 844.[3] A Full Bench consisting of Kendell, Young and King JJ. held that the bond given under O. 41, R. 5, was not a bond for the due performance of a contract, because there could be no contractual relation with the Court. An agreement amounting to a contract must be entered into by the parties with the object of creating contractual relations between themselves and this was impossible when the Court was concerned. A Bench of the Calcutta High Court in 40 C W N 1281[4] expressed a similar opinion, and expressly held that the word 'contract' used in Art. 57 means a contract as defined in S. 2 (h), Contract Act.

We agree with the decisions of the Allahabad and Calcutta High Courts. As the Privy Council pointed out in 46 I A 228=42 All 158,[5] the Court is not a juridical person and is incapable of contracting. Moreover in circumstances such as these there is nothing in the nature of a contract with the Court. When a debtor applies to be adjudicated an insolvent, he is required by law to attend before the Insolvency Court when required. It is not a matter of agreement ; it is his duty to be there and if he does not attend when he should attend, the Court can compel his attendance. In this case the sureties did bind themselves to the sheristadar that the insolvent would attend when called upon, but their obligation was not an obligation connected with the performance of a contract by the insolvent. For the reasons indicated, we are of the opinion that Art. 40, not Art. 57, is the appropriate Article. We answer the reference accordingly.

C.R.K./B.D. *Answer accordingly.*

1. In re Stamp Duty on Security Bond executed by Murad Ali, (1936) 23 A I R Lah 45=160 I C 276=17 Lah 74=38 P L R 469 (S B).
2. Tulla Shah Ram Saran Shah v. Ghulam Hussain, (1933) 20 A I R Lah 1004=147 I C 671=15 Lah 78=36 P L R 441.
3. In re Stamp Reference by the Board of Revenue, (1931) 18 A I R All 189=131 I C 675=52 All 844=1931 A L J 41 (F B).
4. Akshay Zamindary Ltd. v. Ramanatha Burman, (1936) 40 C W N 1281=64 C L J 439=I L R (1937) 1 Cal 375.
5. Raj Raghubar Singh v. Jai Indra Bahadur Singh, (1919) 6 A I R P C 55=55 I C 550 =46 I A 228=42 All 158=22 O C 212 (P C).

A. I. R. 1938 Madras 263

HORWILL J.

Ayimbati Thottathil Narikkot Cheriya Krishnan Nayar — Appellant.

v.

Puthan Peetikayil Charichil Pallikkal Moideen and others — Respondents.

Second Appeal No. 587 of 1936, Decided on 29th September 1937, against decree of Dist. Court, North Malabar, in A. S. No. 240 of 1935.

Malabar Tenancy Act (14 of 1930), S. 33— Tenant—Power of purchasing landlord's rights — Tenant being mortgagor with lease back —

—Tenant can redeem portion of mortgaged property — No distinction made between ordinary tenant and tenant being mortgagor with lease back.

Under S. 33, Malabar Tenancy Act, a tenant has the right to purchase the landlord's right in the property in his occupation. The Legislature probably did not intend the section to protect the tenant who was a mortgagor with a lease back of the property. Yet if provisions of law made by the Legislature actually apply to a case, Courts cannot avoid giving effect to them merely because the Legislature did not contemplate such an application. If under S. 33, a tenant is given a right to redeem a portion of the mortgage only, he cannot lose his rights because it is probable that the Legislature did not have such a case in mind when they drew up the present Act. The definition of 'kudiyuruppu' in S. 3 (m) and of 'tenant' in S. 3 (v) and S. 33 do not distinguish an ordinary tenant from a tenant who is a mortgagor with a lease back. And although in some respects the mortgage and the lease back may be considered to be one transaction, yet they operate separately and a tenant is nonetheless a tenant because he is also the mortgagor and provisions of S. 33, are applicable to him. [P 264 C 2]

P. Govinda Menon — *for Appellant.*

Judgment.—The appellant usufructuarily mortgaged certain property to one Moosan, the predecessor-in-title of the respondents. On the same day the land was leased back to the appellant; and so the appellant retained possession of the whole of the property mortgaged. Subsequently, he sub-leased a greater portion of the property to defendant 5. The respondents then brought a suit to eviot the appellant from the suit plot, whereupon the appellant put in an application under S. 33, Malabar Tenancy Act, to purchase the landlord's right in the property in his occupation. The trial Court found that all the requirements of S. 33 had been satisfied and allowed the petition. In appeal the District Judge felt that the Legislature could not have intended enabling a mortgagor, in circumstances like the present, to avoid his mortgage by a transaction of this kind and that S. 33 was intended to protect tenants, who had long been in possession and had been forced to construct houses or buildings, from eviction from those buildings. He therefore allowed the appeal and dismissed the petition. Hence this appeal by the present appellant.

It is with a great deal of reluctance that I have to disagree with the learned District Judge, because I think he is right in his opinion that the Legislature did not intend to protect tenants of this kind. As a mortgagor he ought in equity to be compelled to redeem the whole of the mortgage. By putting in this application under S. 33, he is enabled to redeem only a portion of the mortgage and thus to avoid the ordinary provisions of the law. However even if the Legislature did not intend S. 33 to be applied to a case where the tenant was the mortgagor of property leased back to him, yet if provisions of law made by the Legislature actually apply to a case, Courts cannot avoid giving effect to them merely because the Legislature did not contemplate such an application. If the appellant, under the plain wording of S. 33, is given a right to redeem a portion of the mortgage only, he cannot lose his rights because it is probable that the Legislature did not have such a case in mind when they drew up the present Act. I have read carefully the definitions of 'kudiyiruppu' in S. 3 (m) and of 'tenant' in S. 3 (v) and S. 33, and I find myself unable to distinguish the present case from one in which the tenant was not also the mortgagor. If *A* had mortgaged the property to Moosan and Moosan had leased it to the appellant, who subsequently subleased a part of it to defendant 5, then undoubtedly the appellant would have the right under S. 33 that he claims; and the relation of the appellant to Moosan and his successors seems to me to be precisely the same as it would have been if the mortgagor had not been the appellant. Although in some respects the mortgage and the lease back may be considered to be one transaction, yet undoubtedly they operate separately and the appellant was nonetheless a tenant because he was also the mortgagor. The appeal is therefore allowed with costs in this Court and in the lower Appellate Court and the order of the District Munsif restored.

C.R.K./B.D. *Appeal allowed.*

---

* A. I. R. 1938 Madras 264

FULL BENCH

LEACH C. J. VARADACHARIAR AND MOCKETT JJ.

In the matter of G, a Pleader, Mannargudi.

K. Sambasiva Ayyar — Complainant.

Decided on 6th December 1937.

*** Legal Practitioners Act (1879), S. 13 — Misconduct—Suggesting bribe to be offered to officials is grave misconduct—Fact that proceedings were instituted as result of grudge makes no difference in gravity of offence.**

For a member of the Bar to suggest that an official or any one should be bribed amounts to professional misconduct and professional misconduct of grave nature. The fact that bribes of this nature have been given by others is no excuse. The fact that proceedings of this nature are instituted as the result of a grudge makes no difference to the gravity of the offence and cannot be pleaded in excuse. [P 265 C 1, 2]

N. Rajagopala Ayyengar for Advocate-General — *for the Crown.*

A. K. Balakrishnan — *for the Pleader.*

K. Soundararaja Ayyangar — *for Complainant.*

Leach C. J. — Mr. N. G., a pleader, practising in the Court of the District Munsif of Mannargudi, has been charged with professional misconduct and the District Judge of West Tanjore has submitted to this Court his report on the inquiry. The charge against the respondent was that he wrote to one Ramachandra Ayyar, a vakil's clerk at Tanjore, to obtain surreptitiously a copy of the judgment in S. C. S. No. 541 of 1925 on the file of the District Munsif's Court, Mannargudi, by offering some inducement or bribe to the record clerk of the District Court. The learned District Judge has held the charge to be proved, but in the circumstances of the case has suggested that a suspension for a period of 2 or 3 months or a severe warning would meet the case. The letter on which the complaint was based reads as follows :

Plaintiff's witnesses, K. Sambasiva Ayyar (Ettakkudi Sambu). In the judgment of the above suit, it has been said that Sambu has given false evidence and that he is not honest. So the judgment in the said S. C. No. 541 of 1925 is necessarily required. Sambu has been committed to the Court of Session, Tanjore. The case is posted for hearing on 31st August 1936 in the Court of the Assistant Sessions Judge. Can we get the above judgment? Give something to the record clerk and ascertain. If you write to me that the above judgment can be got, I shall at once send there Sakti Ammal with money for expenses. Please write a reply to me regarding the above judgment before the coming Tuesday or Wednesday. Let no one know that I have written this letter. Please at once make enquiries in Court and write a reply to me.

We are unable to read this letter as meaning that the respondent was intending to obtain a copy of the judgment referred to surreptitiously. But it certainly does contain instructions to a vakil's clerk to give to the record clerk a bribe for supplying information with regard to the record. For a member of the Bar to suggest that an official or anyone should be bribed amounts to professional misconduct, and professional misconduct of grave nature. The fact that bribes of this nature have been given by others is no excuse. In this case the learned District Judge has suggested that a lenient view should be taken because the respondent has been a member of the legal profession for 25 years and has hitherto held an unblemished record. We will accept this recommendation of the learned District Judge and in view of the past record of the respondent we will not impose the penalty which the offence deserves. We consider that in this case a suspension from practice from now until the end of January 1938 will be sufficient, and the respondent will be suspended for this period. But we wish it to be clearly understood that we regard offences of this nature as being grave offences and in future the punishment will be made to fit the offence. I will add that the fact that proceedings of this nature are instituted as the result of a grudge—as appears to be the case here — makes no difference to the gravity of the offence and cannot be pleaded in excuse.

B.D./R.K. *Pleader suspended.*

A. I. R. 1938 Madras 265

VENKATARAMANA RAO J.

Perumal Ayyar — Appellant.

v.

Ramasubramanian Chettiar — Respondent.

Second Appeal No. 306 of 1933, Decided on 26th July 1937, against decree of Sub-Judge, Ramnad at Madura, in A. S. No. 101 of 1932.

(a) Guardian and Ward—Debts contracted by guardian — Testamentary guardian of minor incurring debt on behalf of minor in course of business started by father — Guardian is personally liable—Creditor is also entitled to have decree against assets of business on showing that guardian has right of indemnity in respect of such assets.

Where a guardian of the minor constituted under the will of the father continues the business started by the father properly as per directions in the will and incurs debt on behalf of the minor in the course of carrying on such business, the creditor is entitled to have recourse against the assets of the business in addition to proceeding against the guardian personally. But before the creditor can get a decree directly against the assets it must be shown that the guardian has a right of indemnity in respect of such assets and the principle upon which the creditor is given a decree against the estate is by working out the principle of subrogation by which the creditor is allowed to stand in the shoes of the guardian.

But even this right of indemnity of the guardian will again be dependent upon the fact that on the taking of accounts of the transactions during the period of his guardianship there is nothing due and owing by him to the estate in respect of any of his transactions : *35 Cal 320 Rel. on.* [P 266 C 2]

(b) **Civil P. C. (1908), O. 6, R. 17 - Suit against two defendants alleging them to be partners in business—Amendment of plaint on basis that defendant 1 is carrying on business as guardian of defendant 2—Amendment can be allowed if it is in accordance with facts set out in plaint.**

In the interests of justice even where a question of limitation might arise a Court can allow the amendment. [P 267 C 1]

Where a suit was instituted against two defendants alleging that they were partners in the business and all the necessary facts and circumstances under which the suit debt was incurred were clearly set out in the plaint and the amendment as sought and allowed by the lower Court was in accordance with the true facts that defendant 1 carried on the trade as guardian of defendant 2 in pursuance of a direction in the will of the father :

Held that the amendment was properly allowed : *A I R 1921 P C 50, Rel. on.* [P 267C 1]

B. Sitarama Rao — *for Appellant.*

T. M. Krishnaswami Iyer and N. Sivaramakrishna Iyer — *for Respondent.*

Judgment.—This second appeal arises out of a suit upon a promissory note executed in favour of one Nagaswami Ayyar, the assignor of the plaintiff by A. T. R. S. Paramasivam Chetti. It is found on the evidence that A. T. R. S. is the vilasam of a firm carried on on behalf of defendant 2 Ramasubramania Chettiar. The father of Ramasubramania Chettiar was carrying on this business and before his death he left a will dated 30th October 1920 in and by which he appointed Paramasivam Chettiar as the guardian of his minor son Ramasubramania Chettiar and directed him to continue the business and conduct it so as not to cause loss to the minor. In pursuance of the same, the said business was conducted in the name and vilasam of the A. T. R. S. The debt sued on was admittedly incurred in the course of the said business and the binding character of the debt was not disputed by defendant 2 at the hearing of the appeal before the lower Court. The first Court exonerated defendant 1 and gave a decree against defendant 2 against the joint family properties. This decree is obviously unsustainable because it would not be open to the father of defendant 2 to appoint a testamentary guardian in respect of the joint family properties and it would not be open to such a guardian to deal with the joint family properties which had devolved upon the minor by right of survivorship. It is open to a father to appoint a testamentary guardian in respect of the self-acquired properties which a minor may inherit. There is no evidence before me that the trade which was being carried on by the father during his lifetime and continued after his death was not the acquisition of the father. It must therefore be taken that Paramasivam Chetti carried on the business properly in pursuance of the direction under the will. If a debt was incurred by him during the course of the business, he would be personally liable but a creditor is entitled to have direct recourse against the assets of the business. But before he can get such a decree, it must be shown that the guardian has a right of indemnity in respect of such assets and the principle upon which the creditor is given a decree against the estate is by working out the principle of subrogation by which the creditor is allowed to stand in the shoes of the guardian. As pointed out by Mukerjee J. in 35 Cal 320[1] at p. 327, it would have to be proved that the guardian is entitled to indemnity against the estate of the infant for the whole of his transactions during his guardianship. No doubt, having regard to the admission of defendant 2 in this case that the debt is a binding one, the guardian will prima facie be entitled to the right of reimbursement. But the right of reimbursement will again be dependent upon the fact that on a taking of account of the transactions during the period of his guardianship, there is nothing due and owing by him to the estate in respect of any of his transactions. Unfortunately by not understanding the correct position of the law, defendant 1 was exonerated from the suit and a decree was passed by the first Court against defendant 2's joint family assets and in the appeal preferred therefrom by defendant 2, defendant 1 was not made a party to the appeal and even in the second appeal before me, the appellant has not chosen to make defendant 1 a party to the appeal. But that would not preclude me from giving a decree directly against the assets if, as I have stated, it has been proved that defendant 1 was entitled to indemnity against the estate on an account being taken. Unfortunately no materials have

1. Bhawal Sahu v. Baijnath Pertab Narayan Singh, (1908) 35 Cal 320=12 C W N 256.

been placed in this case and I am not in a position to give that decree in the state of the evidence on record.

There is another point which was decided against the appellant in this case namely that the learned District Munsif allowed an amendment in the case which, it is contended, he ought not to have done. The nature of the amendment is this. The suit was filed against both defendants 1 and 2 originally on the footing that defendants 1 and 2 were partners in the said business but all the necessary facts and the circumstances under which the promissory note was executed and the debt was incurred were clearly set out in the plaint and the amendment sought was in consonance with the true view of facts that defendant 1 carried on the trade in pursuance of the direction under the will of the father of defendant 2. I think the amendment has been properly allowed. In the interests of justice even where a question of limitation might arise a Court can allow the amendment: vide 48 Cal 110.[2] In the result the second appeal fails and is dismissed with costs.

C.R.K./K.B. *Appeal dismissed.*

2. Charan Das v. Amir Khan, A I R 1921 P C 50=57 I C 606=48 Cal 110=47 I A 255 (P C).

A. I. R. 1938 Madras 267

BEASLEY C. J.

P. S. Ramaswami Iyer and another — Petitioners.

v.

Al. Sp. Pl. Subramanian Chettiar, Agent, Lakshmanan Chettiar, Banker — Respondent.

Civil Revn. Petns. Nos. 1702 and 1703 of 1935, Decided on 17th February 1937, from orders of Dist. Court, Coimbatore, D/- 27th July 1935.

(a) Provincial Insolvency Act (1920), S. 25 (1) — Dismissal of petition on statement by creditor that debt had been paid is one under S. 25 (1).

Where an insolvency petition is dismissed by the Court upon the statement by the creditor that his debt had been paid and that the petition should be dismissed, such dismissal is one under S. 25 (1) of the Act as it comes within the words "for any other sufficient cause" of that section. [P 268 C 2]

(b) Provincial Insolvency Act (1920), S. 26— Applicability—Whether petition was frivolous or vexatious need not be decided at the time of its dismissal under S. 25 (1)—Court can do so on separate application.

For the application of the provisions of S. 26 of the Act it is not necessary that at the time of dismissal under S. 25 (1) itself the Court should be satisfied that the petition was frivolous or vexatious. The Court can consider the matter on a separate application even though it did not do so at the time of the dismissal of the petition under S. 25 (1). [P 268 C 2]

(c) Provincial Insolvency Act (1920), S. 26— 'Debtor' need not in reality be debtor — Application by creditor against him makes him debtor.

The word "debtor" in S. 26 of the Act means any one against whom an insolvency application has been presented by a creditor. The person applying for compensation under that section need not in truth be a debtor at all. [P 268 C 2]

(d) Provincial Insolvency Act (1920), S. 26— Debt by Hindu father binding on family— Demand by creditor — Alienation of large portion of family property by father together with sons after demand—Petition in insolvency by creditor against father and sons— Debt paid and petition dismissed under S. 25 (1) — Petition against sons held not frivolous and vexatious and no compensation could be recovered by them.

A creditor in whose favour a Hindu father had executed a promissory note found to be binding on the family presented a petition in insolvency against the father and his two sons to have them declared insolvents. About 4 months later, on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under S. 25 (1). The sons claimed compensation under S. 26 of the Act. It was found on evidence that the debt was one binding on the family for which the son's share could be made liable and that within ten days immediately after a notice demanding payment of the debt was made by the creditor the sons together with their father had set about alienating a large portion of the family properties and that they had no ready money to pay the debt:

Held that under the circumstances the creditor had sufficient grounds to reasonably suppose that fraud was being attempted by the sons also and therefore it could not be held that the petition of the creditor against the sons was frivolous or vexatious and that therefore no compensation was recoverable: *Case law referred.* [P 270 C 2]

N. Sivaramakrishna Iyer — *for Petitioners.*

P. S. Sarangapani Iyer — *for Respondent.*

Order.—The respondent presented a petition in insolvency against a Hindu father and his two sons to have them declared insolvents. The two sons are the petitioners. Their father executed a promissory note in favour of the respondent for Rs. 1500 on 6th June 1931. On 4th March 1932 the respondent made a demand upon the father for payment of the promissory note debt. Between that date and 14th March 1932, there were a series of alienations of joint family property, the

petitioners with their father being parties to these alienations. On 27th June 1932 the respondent presented the insolvency petition already referred to on the ground that the father in his capacity as family manager has executed the promissory note in question and alleging that the debt was binding on all the members of the family and that the debt had not been discharged in spite of repeated demands. He alleged that the three respondents to the insolvency petition had brought about a number of sales in favour of their relations, friends and others quoting fictitious debts. This petition was returned on the ground inter alia that the creditor must state how respondents 2 and 3 to the petition were liable to be adjudged insolvents. It was represented with the following endorsement :

> Respondent 1 is the family manager. Respondents 2 and 3 are liable for the debt and they have joined respondent 1 in fraudulently dealing with the property. They are therefore liable to be adjudged.

On 30th November 1932 the creditor filed a statement to the effect that his claim was satisfied and that the insolvency petition might therefore be dismissed. On 1st December 1932 the petitioners put in an application for compensation under S. 26, Provincial Insolvency Act, and the Additional Subordinate Judge on 2nd December 1932 passed the following order on the insolvency petition :

> Petitioner's vakil files memo that claim is satisfied and that the petition may be dismissed. Respondents press for costs. So the point whether this petition was filed on sufficient grounds has to be gone into. Respondents 2 and 3 have filed a petition for compensation. For enquiry, 20th January 1933.

On the application for compensation the following order was made : "Counter in a week. Enquiry 20th January 1933." Later, the matter came up before Mr. Narayana Menon, the then Additional Subordinate Judge, whose predecessor had passed the orders to which I have referred. As regards the father, he passed the following order :

> Respondent 1 admittedly owed the money to the petitioner when the insolvency petition was filed. He had also admittedly alienated a major extent of his properties. Respondent 1 did not pay the petitioner's debt for nearly four months after the alienation. The petitioner had therefore some justifiable apprehension that the alienation was intended to defeat him. Respondent 1 paid the debt due to petitioner after filing of the insolvency petition. In these circumstances I order respondent 1 to bear his costs.

With regard to the petitioners he held that on the face of the insolvency petition they were not necessary parties and could not be adjudged insolvents as they were not personally liable and he ordered the creditor to pay their costs. It is clear that the creditor's statement where he says that the debt had been settled by payment asks for a dismissal of the petition. I think that it must be taken that the petition was dismissed under S. 25, Provincial Insolvency Act and it is not suggested by Mr. K. S. Jayarama Iyer for the respondent that it could be dismissed under any other section though he contends that it was merely withdrawn and not dismissed. With this contention I do not agree as in my view this comes within the words of the section "or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition." The petition having been dismissed under S. 25 (1), the debtor is entitled to apply for compensation under S. 26 (1) but Mr. Jayarama Iyer argues that the provisions of S. 26 can only be applied if at the time of dismissal under S. 25 (1) the Court is satisfied that the petition was frivolous or vexatious and that it does not have in view a subsequent enquiry into that matter. No such restriction, in my view, is to be gathered from the words of the section. The Court can, in my opinion, consider the matter on this application even though it has not done so at the time of the dismissal of the petition under S. 25 (1). Next Mr. Jayarama Iyer contends that the petitioners were not entitled to apply under that section, because they were not "debtors." This argument is founded on the petitioners' own case that they were not personally liable for the debt, it having been contracted by their father. I think this contention is unsound and that 'debtor' in the section means any one against whom an insolvency petition has been presented by a creditor and that the person applying for compensation need not in truth have been a debtor at all. Suppose, for example, that some one wishing to harass another files an insolvency petition against that other person falsely alleging that he is indebted to him and his petition is on that ground dismissed, why should not the alleged debtor be entitled to have compensation awarded to him under S. 26 (1) instead of being driven to the expense of a suit ? In my opinion, the petitioners were 'debtors' within the meaning of the section. The applications were considered by the learned Subordinate Judge who

held that the petition was not dismissed under S. 25 (1) and therefore the applications under S. 26 (1) could not be entertained and that it was not open to the Insolvency Court to enquire into the matter further. For the reasons I have already given the opinion of the learned Subordinate Judge was wrong. On appeal, the learned District Judge held that the applications were rightly dismissed, the Court having in his opinion rightly exercised its discretion, to refuse to award compensation. He also agrees with the Subordinate Judge that S. 26 is intended to meet cases where a creditor's application has not only been dismissed on the merits after taking evidence but also held to be frivolous or vexatious, i. e. the present petition was not dismissed under S. 25 (1). My view upon the law which is contrary to that of both the lower Courts does not however dispose of these petitions as, in my opinion, the applications for compensation stood to be dismissed upon the facts already on the record. In para. 13 of his order the learned Subordinate Judge says :

> It is not necessary to state anything further on these petitions but this : I am in no way persuaded, having regard to the records before me and the allegations of the petitioners that the petition filed by the creditor was not justified and that it was fraudulent or frivolous. As it is, we have the fact that in June 1932 the creditor filed the insolvency petition consequent on the fact that there were four alienations by the father and the sons. His claim was satisfied only in November. . . . .

The learned Subordinate Judge who originally dealt with the matter as regards the father as I have already observed stated that the petitioner had some justifiable apprehension, that the alienation was intended to defeat him and he therefore ordered him to bear his own costs. That order does not reflect upon the conduct of the petitioners at all but the learned District Judge in his judgment says :

> A brahmin father and his two sons, one a doctor and the other a lawyer, were heavily involved in debt. The father was personally liable but the family being joint, the sons' shares were also liable. The creditors of the family insisted on the appointment of a trustee to make a rateable distribution of the family assets or that the family should sell its lands etc., in parcels to each creditor according to the amount of his debt. In other words, there was to be a voluntary liquidation.

I doubt very much whether the creditors of the family did insist on the appointment of a trustee. It is merely so alleged in the counter petitions. What the father stated in his statement was that various creditors were pressing for payment of their dues, that he had no ready money on hand, that therefore with a view to pay off all the creditors fully he entered into an arrangement with the creditors with their full consent and co-operation and with the help of respectable mediators, that it was decided under the arrangement that each of the creditors should take a sale of a portion of the family properties equal in value to the debt due to him, that accordingly on 14th March 1932 sale deeds were executed to the creditors in full discharge of their settled debts and that it was clearly recited that a portion of the properties had been reserved for the petitioner in discharge in full of his debt and that the property so reserved was sufficient to the petitioner's knowledge to fully discharge his debt. I must mention here that the creditor in his petition alleged that the property was worthless or inadequate. The father further alleged that the creditor had been throughout made aware of the arrangements and never objected at any time thereto, that he and his sons believed that he would also give effect to it and that they were always ready and willing to execute a sale deed of the property reserved to him. The petitioners filed a joint counter-petition in which they denied that they were heavily involved. Their counter-petition follows closely on the lines of their father's. The creditor in answer to the petitioner's application for compensation denied that he knew or acquiesced in the alleged agreement with the creditors and said that he was never at any time told by anybody about the mediation, which took place behind his back; and the learned counsel for the petitioners was unable to contend before me that any notice of the alleged meeting of the creditors and mediation was ever given to the creditor and I can see no reason for believing that he ever knew of it or afterwards acquiesced in it. The fact that he filed a petition in insolvency indicates the contrary. This alleged arrangement with the creditors was all effected within the space of ten days immediately following on the notice of demand for payment given by the creditor. Certainly on the record before the Court, it is very probable that the whole thing was done behind creditor's back. On the record it seems to me that the Insolvency Court could not find that the petition against the two sons was not put in without some

reason. The legal position with regard to the liability of sons in a Hindu undivided family in respect of a binding family debt incurred by their father to be adjudicated insolvents is even today none too clear though in 61 M L J 518,[1] Krishnan Pandalai J. held that the son of a Hindu father who died after incurring debts upon promissory notes apart from some special circumstances which would make him personally liable for the family debt cannot be adjudged insolvent on account of his liability as a member of the family to pay those debts out of the family properties. In the course of his judgment he refers to an unreported decision in C. M. A. No. 47 of 1916 where it was held that members of joint families liable as such for a family debt but not otherwise are debtors within the meaning of the Insolvency Act and therefore can be adjudged insolvent on those debts. He does not follow that case and refers also to 49 Mad 217,[2] which to some extent followed the unreported decision though the Judges there say that each case would depend upon its circumstances and that, if the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of a joint family insolvents. He also refers to 50 Mad 981.[3] In that case it was held by Odgers and Venkatasubba Rao JJ. that a decree against a son for the debt of his deceased father to the extent of the assets in his hands does not make him (the son) liable to adjudication and he cannot be so adjudicated unless the decree is a personal decree. The conditions necessary to impose a personal liability upon the members of an undivided family in respect of money borrowed for family purposes are stated in 22 Mad 166[4] at pp. 167 and 168. In 44 Mad 810[5] Sadasiva Ayyar and Napier JJ. held that the members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. Although this case was relied upon by Mr. Jayarama Ayyar, I do not think that it is of much assistance. This matter has also been dealt with by Cornish J. in A I R 1936 Mad 64[6], where he holds that the members of the family must be under a personal liability before they can be adjudicated. Even assuming that the petitioners would not be personally liable for this debt and that they could not therefore be adjudicated insolvents in respect of it, I am far from thinking that the petitioning creditor must have known that the sons could not be made insolvents. This was a debt binding on the family for which certainly the sons' shares could be made liable and they together with their father set about alienating a large portion of the family property under circumstances which the petitioning creditor might very reasonably suppose indicated that a fraud upon him was being attempted; and clearly the financial position of the family was such that its debts could not be discharged without such alienations. I am satisfied that there was quite sufficient ground on the facts for the lower Courts' refusal to award compensation. Both the Civil Revision Petitions are dismissed with costs.

C.R.K./S.C. *Petitions dismissed.*

1. Purneyya v. Kottayya, A I R 1931 Mad 788=135 I C 31=61 M L J 518.
2. Muthuveerappa Chettiar v. Sivagurunatha Pillai, A I R 1926 Mad 133=92 I C 603=49 Mad 217=49 M L J 697.
3. Nagasubramania Mudali v. Krishnamachariar, A I R 1927 Mad 922=104 I C 642=50 Mad 981=53 M L J 403.
4. Chelamayya v. Varadayya, (1899) 22 Mad 166=9 M L J 3.
5. Mamayya v. K. R. Rice Mill Co., A I R 1921 Mad 294=63 I C 916=40 M L J 570=44 Mad 810.
6. Krishna Ayyar v. Pierce Leslie & Co., A I R 1936 Mad 64=160 I C 478.

A. I. R. 1938 Madras 270

VENKATARAMANA RAO J.

T. P. Renga Aiyangar and another — Appellants.

v.

Sri Swamy Alagia Nambirayar Temple, Tirukurungudi through its Dharmakartha Sri Perarulala Ramanuja Jeer Swamigal and another — Respondents.

Second Appeal No. 277 of 1936, Decided on 25th March 1937, against decree of Sub-Judge, Tinnevelly, in A. S. No. 123 of 1935.

Religious Endowment—Property dedicated for use of whole Brahmin community as such—Suit by representatives of Brahmin Vadagalai Sri Vaishnavite community claiming exclusive title—Denial of title as claimed in plaint held could not preclude Court from granting relief which they were entitled to get as members of Vadagalai community.

Where the plaintiffs, representatives of the Brahmin Vadagalai Sri Vaishnavite community of a certain place, instituted a suit against the trustees of a temple in respect of property found to have een edicated for the use of the whole

Brahmin community as such of the place and not for the use of the plaintiffs alone, alleging that the property belonged to the plaintiffs alone and was dedicated for their exclusive use :

Held **that the Court was not precluded from granting the relief which they were entitled to get as members of the Vadagalai community though their title as claimed in the plaint was denied and negatived,** [P 271 C 2]

K. V. Sesha Ayyangar and K. Arawamuda Aiyangar— *for Appellants.*

B. Somayya and K. E. Rajagopalachariar — *for Respondents.*

Judgment.—This second appeal arises out of a suit which relates to a Mantapam on the river bank at Tirukarungudi. It was instituted by the plaintiffs for themselves and as representatives of the Brahmin Vadagalai Sri Vaishnavite community at Tirukarungudi. The ground assigned for the suit was that the temple of Sri Swami Alagia Nambirayar temple represented by the present Dharmakarta, defendant 1, set up title to the property and asserted that no other body or person has got any right or title thereto and that no person can use the said Mantapam without leave or license obtained from defendant 1. The claim asserted on behalf of the plaintiffs was a title to the Mantapam on behalf of the Vadagalai community not merely for the performance of sandhya, japam and other ceremonies but they have the exclusive right and control thereof and no other person can use the Mantapam without their consent.

The finding of the learned Subordinate Judge is that this Mantapam has been constructed out of public subscriptions and has been used and enjoyed by every member of the Brahmin community in the village of Tirukarungudi. His finding in substance is that it is a public endowment dedicated to the use of the entire Brahmin community. He also found that the plaintiffs have failed to establish their exclusive right to the Mantapam either in regard to the title set up by them or in regard to the management thereof. He further found that the temple has not established its exclusive right to the possession of this Mantapam. This was also the view of the learned District Munsif who tried the suit. The learned Subordinate Judge however dismissed the suit on the ground that inasmuch as the suit was filed on behalf of only the Vadagalai community, the plaintiffs cannot be given any relief. It seems to me that this view is wrong. The finding of the learned Subordinate Judge as aforesaid is that every Brahmin in the village is entitled to have the use of the Mantapam for the performance of sandhya, japam, purificatory and other customary ceremonies. This he is entitled to do without obstruction from anybody on behalf of the temple or on the part of anybody. The Brahmins in the said village comprise not only Vadagalais but also Smarthas, Thengalai Vaishnavites and Brahmins of other persuasion. The terms "'Vadagalai", "Tengalai", or "Smartha" represent particular sects or groups of Brahmins having tenets of their own. Each forms a distinct group by itself. A Brahmin of the Vadagalai sect as a Brahmin will be entitled to use this Mantapam for performance of the said sandhya, etc. If anybody offers obstruction to the said use or asserts any title or right hostile thereto, he is entitled to have his right vindicated in a Court of law. So it is open to the plaintiffs to institute a suit not only on behalf of themselves but on behalf of the Vadagalai sect which in that village comprises not less than 100 households — to institute a representative suit for getting a declaration that not only the plaintiffs but also every member of the Vadagalai community is entitled to the use of the said Mantapam for performance of the said sandhya, japam, etc. There can be no doubt that all the members of the Vadagalai community in regard to this relief have got a common interest and a common grievance against defendant 1 in so far as their rights are denied. No doubt, the Vadagalai community claimed also in addition to this right, a right to the exclusive title and ownership of the Mantapam. The fact that this title was denied and negatived would not preclude the Court from granting the relief which they are entitled to get as members of the Vadagalai community for the use of the Mantapam for the said purposes.

After hearing the learned counsel on both sides and discussing the matter over with them, the proper order, I think, that should be passed in this case, will be to declare the rights of all the parties and prevent a litigation as far as possible. I therefore propose having this object in view to make the following declarations viz.: (1) that defendant 1, temple, has no title or possession of the suit Mantapam, (2) that as members of the Brahmin community, the plaintiffs and other Vada-

galai Brahmins whom they represent are entitled to use the said Mantapam for performing sandhya, japam, purificatory and other customary ceremonies without any obstruction from defendants, and (3) that the Vadagalai community is not entitled to the exclusive right of the suit Mantapam nor are they entitled to any right of management as set up in the plaint. I direct each party to bear his own costs of this litigation throughout.

C.R.K /D.S. *Order accordingly.*

A. I. R. 1938 Madras 272

GENTLE J.

Most Revd. Dr. L. Mathias, Archbishop of Madras and the President of the Catholic Indian Association and another — Plaintiffs.

v.

Kilachari Agricultural Co-operative Bank — Defendant.

C. S. No. 210 of 1935, Decided on 5th October 1937.

Banker and Customer—Secretary of bank having authority to receive deposits receiving them at depositor's house—Deposits ratified by bank — Certain deposit misappropriated by secretary — Bank is liable to depositor.

Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal unless the agent is in fact unauthorized to do that particular act and the person with whom he is dealing is aware that the agent in doing as he does is exceeding the authority given by the principal. [P 273 C 2]

A secretary and the treasurer of a bank had the authority to receive deposits. He accepted the deposits at the depositor's house and gave him receipts different from the counterfoil. The bank ratified these deposits by paying interest on them and repaying the capital from time to time. One of the deposits was misappropriated by the secretary and the depositor sued the bank for the amount :

Held that the case was *a fortiorari* one of an agent's apparent authority and also of express authority to act in the way which he did. The bank was therefore liable and the fact that the secretary had no authority to issue a receipt different from the counterfoil was no answer to the claim of the depositor : *(1854) 10 Ex 10 and (1912) A C 716, Rel. on.* [P 274 C 2; P 275 C 1, 2]

V. Thayagarajan and G. A. Pais — *for Plaintiffs.*

C. S. Venkatachariar and D. Ramaswami Aiyengar — *for Respondent.*

Judgment —This is a suit in which the plaintiffs are suing the defendants for a sum of Rs. 5300 together with interest which it is alleged was deposited by the plaintiffs or by those in whose shoes the plaintiffs now stand with the defendant Bank upon fixed deposit for a specified period and at the end of that period the money was not returned to the plaintiffs. In the written statement in addition to formal matters such as not admitting the allegations it is alleged that the one who received the actual deposit was not authorized by the defendants so to do and was acting outside his authority when he accepted the deposit from the plaintiffs, that under the rules and bye-laws of the defendant Bank the panchayatdars have a discretion to accept or not to accept a deposit of every description before the Bank is bound by the deposit and that the mere receipt by the person who in fact received this money, viz. the secretary, would not constitute a valid deposit and that the panchayatdars did not indicate their acceptance of the deposit. In other words it is alleged in the written statement that the secretary of the defendants was acting outside the scope of his apparent and obvious authority to the knowledge of the defendants when the money deposited was paid and further that the Bank have not under its rules and bye-laws accepted responsibility for this deposit to the knowledge of the defendants. On behalf of the defendants no evidence has been called and at the close of the plaintiff's case I was asked to adjourn the further trial for the defendants to be able at a future date to call evidence in support of their case. I refused the application firstly because this case has been notified for some two or three weeks as being in the list for trial and parties should be ready for trial. If of course a witness is ill or is unable to be here naturally one adjourns a case to enable the evidence of that witness to be called. Secondly the application, made when it was, in my view, had no support or justification for the grant of an adjournment.

The facts are as follows : The Catholic Indian Association of Southern India had funds at their disposal which apparently they desired to invest upon fixed deposits at profitable rates of interest. At all relevant times Mr. Thambi Pillai was the Honorary Secretary of this Association, and it was he who in fact made the deposit, the subject matter of this suit, as well as other deposits. In all seven deposits

were made by the Association through the gentleman I have mentioned and the method in which they were made was this with the exception of the first one or two. The defendant Bank has its premises at Kilacheri and again at material times the secretary and treasurer was Mr. M. Papayya Naidu. That gentleman was frequently in Madras and when the Catholic Association desired to make a deposit upon fixed deposit with the defendant Bank, the secretary and treasurer of the Bank would call upon Mr. Thambi Pillai. Money would then be handed over in cash to the Bank's secretary and treasurer, and he would in return hand over to the Association's representative a fixed deposit receipt. That fixed deposit receipt obviously comes from a book which is Ex. B.1, and Mr. Thambi Pillai, P. W. 1, said in his evidence which I accept, that so far as his recollection goes, the receipt was always a loose receipt. On this particular occasion, viz. 3rd October 1929, Rs. 5300 was handed over at the request of the Bank's treasurer and secretary, a clerk at the Catholic Association's office filled up the blanks, it was signed by the Bank's treasurer and given in exchange. That was the procedure in certainly five of the seven deposits. In the first two, the deposits were in fact made at Kilacheri by the local Catholic priest who was requested so to do by the authorities in Madras. In respect of all these deposits, interest has been paid by the defendants to the plaintiffs as and when it became due, perhaps a little time following the due date. In respect of all the deposits except the last one, the one concerning this suit, the principal monies have been repaid by the defendants to the plaintiffs, and nothing arises in regard to those six earlier transactions. With regard to the last one Rev. Mora who is the Vicar General to the Archbishop of Madras, who is P. W. 2, has been called, and whose evidence I accept entirely, and he says that in the course of his duties he received interest in respect of the fixed deposit which is the subject matter of this suit and he entered in his books at the time of receipt a record of payment of the interest, and interest was payable in the months of October in the years 1930, 1931, 1932 and 1933, since the fixed deposit was for a term of five years from October 1929 and would be repayable in October 1934, and that interest was paid in cash by the secretary and treasurer of the defendant Bank at the Vicar General's office. Father Mora also says that he received interest upon all the other deposits, six in number, made in the way I have already mentioned, in the same manner, viz. by the secretary and treasurer coming to his office, paying in cash amounts from time to time due in respect of interest on those deposits and that he recorded in his books similarly as he did with this one, receipts of interest. In addition to the deposits which I have already mentioned and made by the plaintiffs or as I said those in whose shoes the plaintiffs stand, the defendants have received other deposits, and they have received them in exactly the same way, viz. their secretary and treasurer, the same man M. Papayya Naidu, going to the houses or offices of the potential depositors, receiving the amount of the deposit, mostly in cash and sometimes by cheque, giving a deposit receipt either loose already filled in or filled in at the house of the depositor, sometimes torn from the counterfoil book, and I think on one occasion a mere acknowledgment was given of the receipt of the money paid and the fixed deposit receipt was sent a day or two later to the depositor from the Bank's premises at Kilacheri. Witnesses P. Ws. 3, 4 and 5 speak to these other deposits which are entirely unconnected with those made by the plaintiffs. Those other deposits mentioned by the three witnesses above have been repaid by the defendant Bank except in regard to one of which there is no evidence that it has been repaid nor is there any suggestion put to the witnesses who spoke about it that the defendants repudiated it on the ground that M. Papayya Naidu had no authority from them when he accepted those deposits.

To this evidence, there is none called in rebuttal or in denial by or on behalf of the defendants. When the learned counsel cross-examined the plaintiffs' witnesses, he never suggested that anything they had said was inaccurate at all. Some of them were asked whether they had read the bye-laws of the defendant bank, and they all denied having read them except P. W. 5, Father Soma, who said that after he had made a deposit he subsequently became a member of the bank and then he did read the bye-laws, but then he was never asked to identify them or to deal with them. He was asked to give what

they contained, but I pointed out to the learned counsel, that if they were written, they would speak for themselves when they were proved in evidence, but no copy was ever put to the witness for him to identify it. It is not contended by the defendants that the man who carried out all these transactions, M. Papayya Naidu, was not their secretary and treasurer nor that he was unauthorized to receive deposits. Undoubtedly, he was the secretary and treasurer and he had authority to receive deposits. It is alleged in the written statement that there was a limitation upon his authority to the extent that he could receive these deposits only at the business premises of the defendant bank and not outside. Firstly, there is no evidence before me that there was any such limitation upon his authority. Secondly, if there was such limitation, then it would be incumbent upon the defendant bank to prove that such limitation was brought to the knowledge of Mr. Thambi Pillai at the time or before he effected the deposit of Rs. 5300, the subject matter of this suit, so that when he paid to the bank's secretary and treasurer that money, he would know that it was being received without any authority from his principal so to receive it in the way it was then being paid to him. As I said, it is not contended that the secretary and treasurer had no authority to receive money and to receive fixed deposit and that he was not their agent so to do and it was not in the course of his employment so to act. Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorized to do that particular act and the person with whom he is dealing is aware that the agent in doing as he does is exceeding the authority given by the principal. This man had authority to receive deposits. Before the one, the subject matter of this suit, evidenced by Ex. A.1, was effected, there were certainly four other deposits made by Mr. Thambi Pillai in the same way as this one was made, viz. either at the house or the office of that gentleman in Madras.

In respect of those four deposits, I say, four, because of the total of seven, two of them were effected at Kilacheri, the defendants had paid before the date of this deposit and have paid since the date of this deposit interest upon those earlier deposits, and they have also at the date or some time thereafter of maturity and the expiration of the period mentioned in the fixed deposit repaid the principal. Therefore upon the evidence before me, not only was there authority which one can describe as apparent, but there was, by the conduct of the defendants in ratifying the deposits accepted by the secretary and treasurer by paying interest and repaying the capital, express notice to Mr. Thambi Pillai. Whilst the principal moneys deposited were not repaid until a year or two after the deposit in question was made, and the re-payment of the principal would not of course be express notice to Mr. Thambi Pillai, but the payment of interest however was so, and the subsequent re-payment of the principal by these defendants shows to me that they expressly authorized their secretary and treasurer to receive deposits in this way. Ex. A-3 a letter from the defendants to the plaintiffs dated 2nd April 1930, signed by the gentleman, who received the deposits but written from the office of the company, deals with all the deposits which have been made up to that time, and it was apparent then that there were negotiations between the parties regarding an earlier repayment than the time fixed. There was no suggestion that that letter was written by the secretary of defendant bank without authority nor that the panchayatdar or those who would be in authority over this man had not the facilities for seeing the correspondence and copies which would be kept in the ordinary way. The question of the responsibility for the return of this fixed deposit arises after 3rd October 1934. In Ex. A.4, dated 12th October 1934, written by the plaintiffs to the defendants, the deposit receipt, Ex. A.1, was sent' and request made for a fresh deposit receipt to be issued. It was contemplated then that the plaintiffs should continue these deposits.

There was no reply from the defendants, but they wrote Ex. A.5 to the Deputy Registrar of Co-operative Societies on 15th October 1934. In that letter, they informed the Deputy Registrar that whilst the deposit receipt records the payment of Rs. 5300 the counterfoil in the book retained among the banks books there is entered a deposit of Rs. 100 in the name of M. Papayya Naidu, the bank's secretary and treasurer, and that no details were

found in their accounts regarding this transaction. Then they ask in what way a reply should be made. The matter apparently was one which was the subject of enquiry or decision by the Registrar of Co-operative Societies. I am not concerned in any way with the result of his decision, whatever it may be. But, from that time, although several letters were written to the defendants by the plaintiffs and by their learned counsel, no real reply was received and never was it suggested to the plaintiffs that when their secretary and treasurer accepted from the plaintiffs this deposit he was acting outside the authority which he had received from the defendants. That allegation appeared for the first time in the written statement in October 1935. Although many defences are raised in the written statement, learned counsel for the defendants told me today that he relies only upon two, and these are as follows : (1) The secretary was not acting within the scope of his authority in issuing a receipt different from the counterfoil ; in other words, in entering apparently the entry of Rs. 100 as received in the counterfoil of A.1 and Rs. 5300 in A.1 itself, he was acting outside the scope of his authority ; (2) that as the defendants are incorporated under the Co-operative Societies Act, they are a Bank and therefore as a Bank, every transaction which they carry out must be carried out by them at their business premises. So far as the first contention goes, I have no evidence as to the scope of this man's authority except that he was appointed and at all material times acted as the secretary and treasurer. He received the deposits in the ways I have mentioned, which deposits were honoured by the defendants by payment of interest and subsequent payment of principal. It may be and probably is true that he had no authority to make different entries in any way upon receipts and upon their counterfoils, but if it is so, that can be no answer to the claims of the plaintiffs. I have dealt earlier with the responsibility of a principal in regard to the acts of the agent. To my mind, this case is an *a fortiori* one of an agent's apparent authority and also of express authority to act in the way in which he did. So far as the second defence raised is concerned, I was referred to the case in (1854) 10 Ex. 10,[1] in support of the contention made. That case lends not the slightest support to the second defence which is relied upon today and it is abundant authority that the claim of the plaintiffs should succeed. That was a case where a woman paid to the manager of a Bank moneys to be invested upon mortgage security. The Bank manager misappropriated the money, and his principals, the bank, were held responsible. (1912) A C 716[2] was a case in which the managing clerk of a firm of solicitors in England defrauded a lady of property and moneys, and in carrying out the fraud he used his principal's office. The lady concerned believed, as in fact the case was, that the clerk was the principal's clerk, and she also believed that in executing the documents she executed and in following the advice which he gave he was acting for and on behalf of his principals, when he had himself appropriated the proceeds from the property. His principals, although personally entirely innocent, were held responsible for his frauds. I wish to refer only to the words of Willes J., which were cited with approval by Lord Macnaughten in the last named case in which Willes J. said (p. 733) :

> In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.

I merely refer to this in dealing with the question of the responsibility of the present defendants in regard to the moneys received by their secretary and treasurer. It may well be that the secretary and treasurer put that money into his pocket—and from the deposit receipt Ex. A.1 and the counterfoil of that deposit receipt Ex. B.1, the difference between the two amounts would indicate that that is the case—but that does not in any way excuse the defendants being responsible. In my view, as I said earlier, this is an *a fortiori* case of the responsibility of the principals for the acts of their agents. The result is that this suit succeeds, and there will be a judgment and a decree in favour of the plaintiffs for a sum of Rs. 5856 being the amount of principal and interest up to the date of suit, and for interest at the rate of 6¼ per cent.

1. Thompson v. Bell, (1854) 10 Ex 10=2 C L R 1218=23 L J Ex 321=2 W R 559.

2. Lloyd v. Grace Smith & Co., (1912) A C 716=81 L J K B 1140=107 L T 531=56 S J 723=26 T L R 547.

from the date of the institution of the suit up to this day ; the amount of all interest and principal together with all costs, which I award to the plaintiffs, will carry interest at the rate of 6 per cent. Certified for two counsels.

C.R.K./D.S. *Suit decreed.*

A. I. R. 1938 Madras 276
SPECIAL BENCH
LEACH C. J., VARADACHARIAR AND PANDRANG ROW JJ.
In the matter of L, a Pleader, Rajam.
M. Narayanamurti — Complainant.
Decided on 30th November 1937.

(a) Legal Practitioner's Act (1879), S. 13 — Misconduct — *A* obtaining decree against *B* for account — *B* obtaining decree against *A* for maintenance — *C* pleader acting for *B* in maintenance suit — Later on *C* appearing for *A* in execution of *A*'s decree against *B* — *C* held not guilty of misconduct.

A obtained a decree against *B* in a suit for accounts. *B* obtained a decree against *A* for maintenance. *C* who was a pleader for *B* acted for *B* in that suit. Later on *C* appeared for *A* in execution of *A*'s decree against *B*. Question was if *C* was guilty of professional misconduct.

Held suit by *A* against *B* had nothing to do with suit by *B* against *A*, and although it might have been more in keeping with the traditions of the profession, if *C* had not acted for *A*, yet *C* could not be said to have acted unprofessionally. [P 277 C 1]

(b) Legal Practitioner's Act (1879), S. 13 — Misconduct — Purchasing and fraudulently executing decree of client for larger sum amounts to misconduct.

Where a pleader in contravention of R. 16 of the Rules framed under the Legal Practitioners Act purchases a decree obtained by his client, he commits professional misconduct, and more so when he fraudulently tries to execute it for a larger amount than what is actually due. [P 278 C 1]

Advocate General — *for the Crown.*
B. Jagannadha Doss — *for Pleader.*
Kasturi Seshagiri Rao — *for Complainant.*

Leach C. J. — We are called upon to consider the report of the District Judge of Vizagapatam on charges of professional misconduct made against Mr. L, a pleader practising in the District Munsif's Court at Rajam. The petitioner is the son of one Mantripragada Kondamma, and in O. S. No. 657 of 1919 of the Court of the District Munsif of Rajam he sued his mother for an account of the management of his estate during his minority, and on 15th December 1920 obtained a money decree against her. In O. S. No. 834 of 1924 of the same Court the mother sued the son for the recovery of maintenance due to her and for future maintenance. The suit was decreed, but the petitioner appealed first to the District Court and then to the High Court. The appeals were dismissed. Kondamma had sued in forma pauperis and in dismissing the second appeal this Court directed that half the court-fee should be paid by her and half by her son.

The petitioner paid his half of the court-fee, but his mother failed to pay her half and Government attached the decree which she had obtained against her son. The respondent acted for the mother in the suit against the son and was in fact her legal adviser during the years 1924-25. In 1925 he agreed to act for the son, and on 14th December 1932 he filed an application in execution proceedings arising out of the decree obtained by the son against the mother in O. S. No. 657 of 1919. This application was filed the day before the 12 years period of limitation expired.

The fact that the respondent was acting for the son against the mother did not prevent him from acting for the mother against the son in matters connected with her suit for maintenance. On 18th January 1935 he filed in O. S. No. 834 of 1924 a memorandum which purported to show what payments had been made by the son towards the decree obtained by the mother. The payments mentioned in the memorandum were Rs. 375-5-0 on 28th June 1928, Rs. 83-12-0 on 20th March 1928, Rupees 469-13-6 on 21st December 1932 and Rs. 94-1-2 on 1st November 1933. The memorandum concluded with a statement to the effect that after giving credit for these payments the amount due to the decree-holder, that is to the mother was Rs. 282-9-8. This was not correct because the figure Rs. 469-13-6 against the date 21st December 1932 should have been Rs. 639-2-2. In other words there was an under-statement of the position by Rupees 169-4-8. There was not due by the son the sum of Rs. 282-9-8 but only the sum of Rs. 113-5-0.

On 21st July 1935 the respondent bought the mother's decree against her son. The deed of transfer is Ex. 13. It stated that there was due Rs. 376-10-0 by the son to the mother under her decree and the decree was transferred to the respondent for this amount. Having got the

mother's decree transferred to him, the respondent then proceeded to execute it against the son. He attached a house belonging to the son and bought the property in at the Court auction. The sale however was set aside on the son paying into the Court the amount due under the decree. In the execution proceedings the respondent did not make the adjustment in respect of the Rs. 169.4.8 but treated it as being owing by the petitioner which of course was not the case.

As a result of these execution proceedings, the petitioner preferred the complaint in respect of which the charge was framed by the District Munsif of Rajam. There were two charges which may be summarized as follows. (1) The respondent had been guilty of professional misconduct in acting for the petitioner when he had acted for the petitioner's mother against the petitioner. (2) He had with dishonest intent obtained an assignment of the mother's decree and in executing it had suppressed payments made in reduction, thereby committing a breach of trust against the petitioner and a fraud on the Court. The District Munsif held that the charges had not been proved and consequently found for the respondent. The record and the report of the District Munsif were then submitted to the District Judge who made his own report thereon. The District Judge considered that the respondent had been guilty of unprofessional conduct in acting for the son in the circumstances of the case and that he also had been guilty of unprofessional conduct in purchasing the mother's decree and executing it for a sum in excess of what was due. These are the findings which we have to consider.

We consider that the respondent was not guilty of professional misconduct in filing the petition in execution of the petitioner's decree. The petitioner's suit had nothing to do with the mother's suit. It would have shown a spirit more in keeping with the traditions of the profession if the respondent had not acted for the petitioner, but we cannot say that there was anything professionally wrong in so doing. There was no necessity for him to obtain the consent of the petitioner's mother, and there was no likelihood of having to make use of anything obtained by him when acting for the mother.

The second charge however stands on an entirely different footing. R. 16 of the Rules of this Court framed under the Legal Practitioners Act, 1879, states that practitioners of Courts subordinate to the High Court are strictly prohibited from purchasing from their clients or from any other person, any interest in any decree passed by the Court in which they practise. The rules were published on 10th December 1934, but as long ago as 9th June 1870 the High Court had issued a circular to the same effect. S. 136, T. P. Act, prohibits legal practitioners from purchasing or trafficking in any actionable claim and states that no Court of justice shall enforce at the instance of the legal practitioner any such actionable claim. A decree does not come within the category of actionable claims, but the principle involved is the same. The respondent therefore knew or must be deemed to have known that he was acting contrary to the directions of this Court when he purchased the mother's decree against her son. The learned District Judge expresses the opinion that a vakil with sound professional ideas would have revolted instinctively at the idea of taking such a transfer, and I am in agreement with this statement. Not only did the respondent purchase this decree from Kondamma, but he executed it knowing that there was a mistake in the suit register, and that he was not entitled to the sum of Rs. 376.10.0 but that sum less Rs. 169.4.8. That he knew the true position is shown by Ex. B, a letter written on 11th October 1933, at the instance of the respondent to the petitioner. In this letter he specifically refers to the sum of Rupees 639.2.2 which was the amount which should have been recorded on 18th January 1935 instead of the sum of Rupees 469.13.6. In this letter it is stated that "If you pay the said amount (Rs. 123.9.9) accordingly, your decree in full, as well as Rs. 762.11.11 due by you to her up to date, will be satisfied". This shows that he knew the exact position on 11th October 1933 and that the petitioner had only to pay Rs. 123.9.9 to clear off his liability under the mother's decree at that date. That sum of Rs. 123.9.9 was admittedly paid on 30th October 1933.

The respondent has denied the genuineness of Ex. B, and it has been suggested in the course of the arguments that it was forged for the purposes of these proceedings. The respondent denied all knowledge of the documents, but he called his clerk who said that it was in the hand-

writing of his (the clerk's) son-in-law. The son-in-law was then called and he admitted having written the letter and said that he did so at the instructions of the petitioner. If the petitioner were wishing to forge a letter for the purposes of these proceedings (which would in itself be an extraordinary thing to do) I do not consider that he would cause a letter of the nature of Ex. B to be fabricated; moreover, Ex. B sets out in great detail information which could only have been in the possession of the respondent or of his clerk. The letter is a very lengthy one and was written for the purpose of obtaining payment of fees due by the petitioner to the respondent. It was referred to in the complaint itself and I consider that the suggestion that the petitioner induced the son-in-law of the respondent's clerk to fabricate it is too grotesque for serious consideration. We have no hesitation in regarding Ex. B as a genuine document, which means that the respondent instituted execution proceedings against his own client with full knowledge of the real position and obtained from him a larger sum than was in fact due by him. This in itself amounts to unprofessional conduct. But when it is coupled with the fact that he was executing the decree which he himself had bought in direct contravention of the rules framed by this Court under the Legal Practitioners Act the offence grows in seriousness. The respondent is guilty of grave professional misconduct, and we are unable to accept the recommendation of the District Judge that he should be suspended merely for a period of one month and twenty-two days, the period during which he was actually prevented from practising by the administrative orders of this Court. We consider that the offence is one which should be punished by suspension from practice for a much longer period than this and we direct that the respondent be suspended from practice from now until the end of the next summer vacation of the District Munsif's Court of Rajam.

We also direct that the respondent should pay to the petitioner the sum of Rs. 180, representing the amount of Rs. 169.4.8 which he recovered from the petitioner in excess of the true amount and interest thereon. The respondent's sanad will not in any event be issued to him until he has paid this amount.

C.R.K./B.D. *Order accordingly.*

---

* **A. I. R. 1938 Madras 278**

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Secretary of State — Petitioner.

v.

Rm. P. Rm. M. Subramanian Chettiar — Respondent.

Civil Misc. Petn. No. 3246 of 1934, Decided on 15th October 1937.

* (a) **Court-fees Act (1870), S. 12—Appeal in respect of part of subject matter of suit—Deficit court-fee can be levied only in respect of that part.**

Section 12 is not happily worded. [P 279 C 2]

Where a part of the subject matter of the suit only is comprised in the appeal before the Appellate Court, deficit court-fee only in respect of that part of the suit can be levied and not in respect of the entire subject matter of the suit: *15 Mad 181, Approved.* [P 279 C 1, 2]

(b) **Court-fees Act (1870), S. 7 (v) — Suit against cosharer for partition and for separate possession—Plaintiff excluded from possession — Court-fee payable is ad valorem under S. 7 (v).**

Where the plaintiff is in possession, actual or constructive, and merely seeks to change the form of his enjoyment by obtaining a divided in the place of an undivided share—in such a case there is a conflict of judicial opinion as to the appropriate provision applicable. But where the plaintiff has been excluded from possession, there can be no doubt whatsoever that the court-fee payable is ad valorem under S. 7 (v). [P 279 C 2]

K. S. Champakesa Aiyengar for K. S. Krishnaswami Aiyengar (Government-Advocate) — *for the Crown.*

N. Srinivasa Aiyengar—*for Respondent.*

Venkatasubba Rao J.—In the appeal that we have just disposed of, a question of court-fee has been raised on behalf of the Government under S. 12 (ii), Court-fees Act. The suit is in effect one for partition and possession, brought by the plaintiff against his cosharers. He claimed in the plaint two separate shares, each of one-eighth, on the ground that he purchased them from two different co-owners. He fixed the total value of the entire one-fourth share at Rs. 14,000 and paid in respect of the relief of "partition and separate possession" of that share, Rs. 100 as court-fee under Sch. 2, Art. 17.B (Madras Amendment) of the Court-fees Act. It must be mentioned that previous to the suit, he had applied to the Collector for separate registration, which was refused. He therefore prayed for a declaration that he was entitled to get himself registered as a landholder to the extent of the one-fourth share. In respect of this relief he

paid a court-fee of Rs. 100 under Sch. 2, Art. 17-A (Madras Amendment).

Thus, the plaintiff paid on his plaint in respect of these two reliefs Rs. 200 as the court-fee. Here on the memorandum of appeal also, he paid a similar amount. The appeal, as will be evident from what has been stated in the judgment just delivered, deals with the one-eighth share of defendant 7 alone. The question has been raised whether under the terms of S. 12, the plaintiff can be called on to pay the deficit court-fee payable on his plaint (in the lower Court) in respect of the other one-eighth share. The relevant portion of the sections reads thus :

> Whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of revenue.

There are three possible positions : (i) Notwithstanding that the appeal is confined to a part of the suit, it may be contended that the whole suit has come before the Court of Appeal. Hence the Appellate Court has jurisdiction to levy the deficit court-fee in respect of the entire subject matter of the suit. (ii) That part of the suit alone as is comprised in the appeal (it may be contended) is before the Appellate Court. In that case deficit court-fee only in respect of that part of the suit can be levied. (iii) Only a part of the suit being comprised in the appeal, the suit as such is not before the Appellate Court. Therefore the section has no application at all.

On this point there are two reported decisions. In 15 Mad 181,[1] the facts were : the suit related to three parcels of land but the defendants' appeal was in respect of only one of them. The suit was valued at Rs. 480 odd. The Appellate Court held that it ought to have been valued at about Rs. 1100. The deficit court-fee not having been paid, an order was made, "original suit rejected." The learned Judges (Wilkinson and Shephard JJ.) held that the District Judge's order was irregular, on the ground "he had no jurisdiction over the whole subject matter of the suit, the appeal by defendant 4 relating to one item only." The judgment is brief, but the decision is perfectly clear. In other words, of the three possible views mentioned above, it was the second view that prevailed. It is a ruling of a Bench of our Court, which does not appear to have ever been questioned and there is no reason why we should now depart from it.

40 C W N 406[2] is the second of the two cases referred to above. There the suit related to four mortgages and the lower Court accepted Rs. 2775 to be the correct court-fee payable on the plaint. The defendants appealed in regard to a part of the suit claim, namely the amount claimed on the basis of the fourth mortgage bond alone. The Appellate Court held that the proper court-fee payable in the Court below was Rs. 6000 odd. The question arose, could the Appellate Court make an order for the payment of this entire amount? The answer was given in the affirmative. It will be seen that the decision is at variance with what was held in 15 Mad 181.[1] But from the judgment, which in this case also is very brief, it would appear that the argument that was put forward and negatived, was that indicated in position No. (iii) above. It follows therefrom that position No. (ii) did not fall to be considered in that case, that is, the position accepted in the Madras case ; nor was that case referred to or cited.

The section is not happily worded, but we think that the view taken in 15 Mad 181[1] is the most reasonable. The question then remains, what was the court-fee payable on the plaint in respect of defendant 7's one-eighth share? There is a distinct averment in the plaint, that defendant 1 is in possession of the plaintiff's share which means, that the plaintiff is out of possession. The prayer in the suit, which is in accordance with this allegation, is both for partition and separate possession. Where the plaintiff is in possession, actual or constructive, and merely seeks to change the form of his enjoyment by obtaining a divided in the place of an undivided share—in such a case there is a conflict of judicial opinion as to the appropriate provision applicable. But where, as here, the plaintiff has been excluded, upon his allegation, from possession, there can be no doubt whatsoever that the court-fee payable is ad valorem under S. 7 (v).

It is for the Government to show that the court-fee of Rs. 100 (paid in the lower Court in respect of this relief) is insufficient. It was on the assumption, that court-fee was payable on the market value of the one-eighth share (i. e., Rs. 700),

1. Kerala Varma v. Chadayankutti, (1892) 15 Mad 181.

2. Radha Ranee v. Kshetra Mohan, (1935) 63 Cal 720=40 C W N 406.

that the case was argued on behalf of the Government. But the suit property is a mitta, which it is not disputed, is an "estate", and the value of the land, is to be deemed to be, under S. 7 (v) (a) twenty times the annual revenue payable. It has not been shown what the annual revenue is; in other words, there is nothing to show that twenty times the annual revenue amounts to a figure in excess of the sum on which Rs. 100 (the amount actually paid) would be the proper court-fee. So much for the plaint in the Court below. The same remark would apply to the court-fee paid on the memorandum of appeal. Finally, one word as regards the contention in respect of the relief of declaration. The value of defendant 7's share (which alone has come before the Appellate Court) is less than Rs. 10,000 and therefore the court-fee payable on the plaint under Sch. 2, Art. 17-A (i) (Madras Amendment) is Rs. 100 and not Rs. 500 and that sum has been paid. It is unnecessary in this view to consider the other question raised, namely whether the prayer as to declaration was superfluous and therefore no court-fee was payable in respect of that relief: 56 M L J 394.[3] In the result, we must hold that the Government's contention has not been made out.

C.R.K./D.S. *Petition rejected.*

3. Kattiya Pillai v Ramaswamia Pillai, (1929) 16 A I R Mad 396=119 I C 35=56 M L J 394.

A. I. R. 1938 Madras 280

PANDRANG ROW AND ABDUR RAHMAN JJ.

Srimathu Raja Muthu Vijaya Raghunatha Doraisingam — Appellant.

v.

Muthu K. R. M. Muthaya Chettiar and others — Respondents.

Letters Patent Appeal No. 4 of 1936, Decided on 9th November 1937, against judgment of Varadachariar J., D/- 31st October 1935, reported in A I R 1936 Mad 583.

Madras Court of Wards Act (1 of 1902), S. 49 — Person giving notice assigning his interest — Assignee need not give fresh notice before filing suit.

(Per *Pandrang Row J.*) — When after the notice is given as required by S. 49, the person who gives the notice dies or transfers his interest in the subject matter to another, a fresh notice has not to be given under S. 49 by the heir or transferee. A transfer of the subject matter does not affect the object for which such notice is required to be given. [P 281 C 1]

(Per *Abdur Rahman J.*) — Although under Cl. (2) of S. 49 an intending plaintiff is required to serve the Court of Wards with a notice in which his name, place of his abode, the cause of action and the relief which he claims are to be stated, sub-cl. (1) of the section has been so drafted as not to provide that the suit must necessarily be instituted by the very person who had served the Court of Wards with a notice: *25 All 187, Disting.* [P 281 C 1]

S. T. Srinivasagopalachari — *for Appellant.*

R. Kesava Aiyengar — *for Respondents.*

Pandrang Row J. — The facts of this case have been stated by Varadachariar J. in his judgment* and it is needless to repeat them. The only point that has been decided is that the notice given in May 1928 by one Singa Dorai satisfies the conditions embodied in S. 49, Court of Wards Act. The law on the subject has been fully discussed by Varadachariar J. and there is no need to add to his discussion of the case law. The section of the Court of Wards Act which has to be construed is S. 49, which runs as follows:

1. No suit relating to the person or property of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered to or left at the Office of the District Collector specified in the notification under S. 19 or the Collector appointed under S. 46, as the case may be.

2. Such notice shall state the name and place of the abode of the intending plaintiff, the cause of action and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

The notice given in this case completely complies with all the provisions of this section. The person who gave the notice was one Singa Dorai, the senior proprietor of the village, the proprietors of which are the present plaintiffs. He was certainly the intending plaintiff at the time the notice was given. He was the original complainant before the Survey Officer and the respondent before the Appellate Survey Officer. The notice was given because the Appellate Survey Officer's decision was against Singa Dorai. It is not pretended that any one else was the intending plaintiff at the time the notice was sent. The cause of action and the relief claimed which are given in the notice are not different from the cause of action and the relief claimed in the present suit. The plaint contains a statement that the notice was delivered or left at the offices referred in the section and this delivery is not denied. It would thus follow that all the requirements of the section have been really fulfilled. The main objection urged

* Vide A I R 1936 Mad 583.

by the zamindar's advocate in this appeal is that Singa Dorai who gave the notice is not the actual plaintiff in the present suit in which the plaintiffs are those who derived title from him subsequent to the issue of the notice, Singa Dorai having transferred his interest in the village in August 1928 to certain persons who in turn transferred the same to the plaintiffs in September 1928. In other words, the contention of the learned advocate for the appellant is that when after the notice is given as required by S. 49, the person who gives the notice dies or transfers his interest in the subject matter to another a fresh notice has to be given under S. 49. It is difficult to see how this conclusion can be said to follow necessarily from S. 49. It certainly does not follow from the letter of this law; nor can it be said that the object of this law requires such a conclusion to be drawn. A transfer of the subject matter does not affect the object for which such notice is required to be given. I may also say that the reasons given by Varadachariar J. in support of his conclusion appear to be sound, and that the conclusion which he has come to is one in consonance with justice and is not opposed to law. There is no reason therefore why that decision should be interfered with in appeal. The appeal should accordingly be dismissed with costs.

Abdur Rahman J. — I agree. While our learned brother Varadachariar J. rejected the appeal on the ground that the notice given by Singa Dorai to the Court of Wards should be held to be available for the benefit of the persons claiming under him, I would like to rest my decision on a grammatical construction of S. 49, Court of Wards Act itself. A close perusal of this section shows that although under sub.cl. (2) an intending plaintiff is required to serve the Court of Wards with a notice in which his name, place of his abode, the cause of action and the relief which he claims are to be stated, sub.cl. (1) of the section has been so drafted as not to provide that the suit must necessarily be instituted by the very person who had served the Court of Wards with a notice. It merely enacts that no suit relating to the person or property of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered. Had the Legislature intended that the person who had served the Court of Wards with a notice would alone be entitled to sue, it could have said so without any difficulty. It is true that when the suit is to be filed on the basis of the cause of action mentioned in the notice, the person serving the notice would ordinarily be the same as the person instituting the suit; but the person, who intended to file a suit and who actually served the Court of Wards with a notice, may have died before the suit is instituted, and his sons or heirs may have had to institute the suit instead. In that case it cannot be reasonably argued, in my opinion, that the notice served by the intended plaintiff has spent itself on account of his death and cannot be availed of by his sons or heirs. There is nothing in S. 49 of the Act which would make another notice essential as long as the suit is based substantially on the same cause of action which was stated in the notice. S. 49 appears to have been so drafted as to cover cases of this character.

The position of an assignee, on whom the interest of the intending plaintiff may devolve by a voluntary act of the latter would be the same, in my opinion, and no objection can be raised on the ground that he had not served the Court of Wards with another notice after his assignment. It may be that if his title is denied by or on behalf of the Court of Wards, he would be called upon to establish the same before he is held entitled to any relief. But if he chooses to file a suit on the cause of action stated by his assignor in the notice served on the Court of Wards no legitimate objection can be raised against him on that score. A number of cases either following or decided on the lines adopted in 25 All 187[1] were pressed upon us by the learned counsel for the appellant in support of his contention. There is no doubt that the language used in S. 80, Civil P. C. is very similar to that employed in S. 49, Court of Wards Act but there is, first of all, some difference in the manner in which the two sections were drafted, i. e., while the provisions of S. 80 are contained in one paragraph, those contained in S. 49 have been subdivided into two. This might have persuaded the learned Judges in placing a different construction of S. 80, Civil P. C., and holding that the intending plaintiff who has been referred to in the latter part of the section must be necessarily taken to refer to the same person who had served

1. Bachchu Singh v. Secretary of State, (1903) 25 All 187.

the notice. Secondly the word 'intending' before the word 'plaintiff' has now been taken out and this change appears to me to have been effected with the object of removing a doubt in construing S. 80, Civil P. C. to which it was otherwise liable. For these reasons, I consider that there is no merit in this appeal and it should be dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. 1938 Madras 282

VENKATARAMANA RAO J.

C. R. Padmanabha Ayyar — Appellant.

v.

Coimbatore Municipality —

Respondent.

Second Appeal No. 904 of 1933, Decided on 24th September 1937, against decree of Addl. Sub-Judge, Coimbatore, in A. S. No. 11 of 1933.

Madras District Municipalities Act (5 of 1920), Sch. 4, R. 13—Chairman should direct party to pay amount fixed on revision—This is condition precedent to be satisfied before taking proceedings for non-payment.

Rule 13 of Sch. 4 requires that the Chairman shall direct the party to pay the amount fixed on revision within 15 days after receipt of such intimation. This is a condition precedent which the Chairman has to perform before he could take the appropriate proceedings for non-payment of the tax. It is not open to the Municipality to say that once the reduction in valuation is made, the party must ascertain what the exact amount to be paid by him is and should pay the same. The rule distinctly requires that the Chairman should direct him to pay the amount fixed on revision. The obligation of fixing the tax on revision is on the Municipality and no duty is cast on the party to fix for himself the amount he has to pay. Therefore the proceedings by way of distress taken for the non-payment of the tax without complying with this condition precedent are not legal and the levy of tax and the proceedings taken for the realization thereof ought to be set aside.

[P 282 C 2]

T. M. Krishnaswamy Iyer and A. Balasubramania Iyer — *for Appellant.*

N. Gopal Menon — *for Respondent.*

Judgment.—The only substantial question in this second appeal is whether the levy of property tax in respect of the plaintiff's house for 1926-27 by the defendant Municipality is legal. The material facts bearing on this question are not in dispute. A quinquennial revision was undertaken by the Municipality in 1926-27 in pursuance whereof a tax of Rs. 9-6-0 instead of the old tax of Rs. 5-1-7, was levied in respect of the plaintiff's house and a demand therefor made. The plaintiff preferred a revision petition against the said assessment and there was a disposal of the said revision petition in his favour by a reduction of the valuation from Rs. 324 to Rs 250. The result of this revision will be that the tax of Rs. 9-6-0 will have to be modified and before appropriate proceedings either by way of distress or suit can be taken against the plaintiff, the provisions of the rules prescribed by the statute must be complied with. Under R. 13 of Sch. 4, District Municipalities Act,

> immediately after the disposal of the Revision Petition, the Chairman shall inform the petitioner, or his authorised agent, either orally or in writing, of the orders passed thereon, and shall direct him to pay the amount fixed on revision within 15 days from the date on which it becomes due, and shall if necessary cause the assessment books to be corrected.

It is admitted in this case that immediately after the disposal of the revision petition itself, there was a note made that the valuation was reduced to Rs. 250 and the petitioner's signature was taken as evidence of this fact having been communicated to him. But the rule further requires that the Chairman shall direct him to pay the amount fixed on revision within 15 days after the receipt of such intimation. Therefore this is also a condition precedent which the Chairman had to perform before he could take the appropriate proceedings for non-payment of the tax. It is admitted in this case that no such direction was given and in fact for the year 1926-27, the assessment books have not been corrected and there is nothing to indicate what exactly was the amount fixed by the Municipality on revision. It is not open to the Municipality to say that once the reduction in valuation is made, the plaintiff must ascertain what the exact amount to be paid by him is and should pay the same. That is not what the Rule says. The Rule distinctly requires that the Chairman should direct him to pay the amount, fixed on revision. The obligation of fixing the tax on revision is on the Municipality and no duty is cast on the plaintiff to fix for himself the amount he has to pay. Therefore the proceedings by way of distress taken for the non-payment of the tax, for 1926-27 are not legal, and therefore the levy of the tax and the proceedings taken for the realisation thereof ought to be set aside.

I therefore modify the decree of the lower Courts in so far as they have directed the plaintiff to pay the tax for the year 1926-27 and direct a refund of the excess

levied for the said year as prayed for. The rest of the appeal fails and is dismissed. So far as the second appeal is concerned, I direct each party to bear his own costs. Leave to appeal is refused.

C.R.K /K.S. *Decree modified.*

A. I. R. 1938 Madras 283

VENKATARAMANA RAO J.

Padmanabha Iyer — Petitioner.

v.

Visalakshmi Achi — Respondent.

Civil Revn. Petn. No. 1552 of 1936, Decided on 19th April 1937, from order of Dist. Court, West Tanjore at Tanjore, D/- 27th November 1936.

(a) Madras Revenue Recovery Act (2 of 1864), S. 40—Position of purchaser at revenue sale is similar to decree-holder—Purchaser is entitled to remedies available in execution proceedings.

The intention of the Legislature in enacting S. 40 was to place the purchaser at revenue sale for the purpose of recovering possession of the lands purchased, in the position of a decree-holder and therefore he would be entitled to such remedies as would be available to a decree-holder in execution proceedings. This view is in consonance with principle that when a duty of a particular character is cast upon an established Court, it imports that the ordinary incidents of the procedure of that Court are to attach: *A. A. A. O. No. 27 of 1889; 1 M L J 594; 14 M L J 433 and 31 Mad 24, Rel. on.* [P 284 C 1]

(b) Madras Revenue Recovery Act (2 of 1864), S. 40—Benami—Revenue purchase can be benami—Bar of S. 66, Civil P. C. also does not apply to benami purchaser—Process can be issued after necessary enquiry.

It is now settled law that there is nothing in the provisions of the Revenue Recovery Act which would preclude a real purchaser from contending that the purchaser in whose name the certificate is issued under S. 38, Revenue Recovery Act, was only a benamidar. The reason of the rule is that the benami purchase not being illegal must be given effect to in so far as they have not been prohibited by any enactment and even the limited bar placed by S. 66, Civil P. C. would not apply to a case of purchase at a revenue sale. The words "shall cause the proper process to be issued" in S. 40, Revenue Recovery Act, only means that on an application for delivery of possession the Court must issue the appropriate writ, but that can only be directed in accordance with the provisions of the Civil Procedure Code, after making such an enquiry as may be necessary and is contemplated by the sections relating to such delivery of possession: *28 Mad 526 and 29 Mad 473, Ref.* [P 284 C 2; P 285 C 1]

(c) Madras Revenue Recovery Act (2 of 1864), S. 38 (5) — Collector cannot go into question of benami—Once sale is confirmed, purchaser's name must be registered.

Under S. 38 (5), it would not be competent to the Collector to go into the question of benami. Under that section, once the sale is confirmed, the Collector is under an obligation to register the lands in the name of the person declared to be the purchaser and grant the certificate to such purchaser, that is the person who is declared to be the purchaser. [P 285 C 1]

V. T. Rangaswami Iyengar and K. Ramaswamy Iyengar — *for Petitioner.*

T. R. Srinivasa Iyengar — *for Respondent.*

Order. — This is a revision petition against an order made in the course of proceedings taken under S. 40, Revenue Recovery Act, for delivery of possession of the property purchased by the petitioner in a revenue sale. The property known as Mattangal estate was brought to sale for arrears of revenue by reason of the default committed by the pattadars Karuppan Chetti and Avadayam Chetti and purchased by the petitioner Padmanabha Iyer. The said sale was confirmed on 20th June 1935 and a certificate of sale was issued in his favour under S. 38, Revenue Recovery Act. On the strength of the said certificate, he made an application to the District Court of Tanjore for delivery of possession of the said property and an order for delivery was made; but when he sought to take possession, he was obstructed by Visalakshmi Achi, the respondent herein. Thereupon the petitioner filed an application under O. 21, Rr. 95 and 98, Civil P. C., for removal of the obstruction and delivery of possession. The plea of the respondent was that the purchase of the estate was made benami for her and with the aid of her moneys, and that she soon after took possession of the estate in pursuance thereof and has been in possession of the village in her own right as the real purchaser. The learned District Judge directed an enquiry into the matter. It is against this order this civil revision petition has been filed.

The contention of Mr. V. T. Rangaswami Ayyangar on behalf of the petitioner is that the lower Court has no jurisdiction in an application under S. 40, Revenue Recovery Act to go into the question of benami, that it was bound to direct delivery of possession by removing the obstruction and that the only remedy for the respondent is only to file a suit for establishing her right. He laid considerable emphasis on the language of the section, especially the words "shall cause the proper process to be issued." S. 40, Revenue Recovery Act, has been enacted

for the purpose of enabling a purchaser at a revenue sale to get possession of the property without resorting to the necessity of instituting a suit as there is no machinery provided by the Act to enable such purchaser being put in possession. The aid of the Civil Court is therefore provided for by the Legislature and the section therefore enacts that the purchaser at a revenue auction must be treated in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court. This section was interpreted so early as 1889 by a Bench of this Court consisting of Muthusami Ayyar and Parker JJ. in A. A. A. O. No. 27 of 1889, where the learned Judges held that the intention of the enactment was to place the purchaser for the purpose of recovering possession of the land purchased in the position of a decree-holder and that he would be entitled to such remedies as would be available to a decree-holder in execution proceedings. The same learned Judges adhered to the same interpretation in 1 M L J 594[1] and they remarked thus :

If the execution of the process is obstructed, the provisions of the Code of Civil Procedure become applicable. To hold otherwise, would be to defeat the intention of S. 40, Revenue Recovery Act, which gives a certificate the same force, which a decree of Court has under the Code of Civil Procedure.

This view was followed in a case reported in 14 M L J 433[2] where the learned Judges held that where a Court awarded possession under S. 40 to a purchaser at a revenue auction, restitution could be ordered on the sale being set aside. See also 31 Mad 24[3] which seems to take the same view. This view is in consonance with the principle that when a duty of a particular character is cast upon an established Court, it imports that the ordinary incidents of the procedure of that Court are to attach. It was on the application of this principle that when a question arose under S. 78, Madras Hindu Religious Endowments Act, which provides that on the appointment of a trustee by the Hindu Religious Endowments Board, constituted under the Act, the Court may on application by a person so appointed and on the production of the order of appointment direct delivery of possession of the property to the trustee, Curgenven J. held that it would be in the competency of the Court to investigate an objection made to the delivery of such possession and the principle of O. 21, R. 100, could be invoked: vide A I R 1932 Mad 164[4] at p. 166. A similar view was taken by Venkatasubba Rao J. in A I R 1935 Mad 612[5] where the learned Judge observed thus :

The applications mentioned in S. 78 must under the Act be to a District Court and there is therefore no reason to hold that they are not proceedings in a Court of Civil jurisdiction within the meaning of S. 141 mentioned above. If that be so, the provisions of O. 21, Rr. 97, 98 and 99 become applicable and the Court can in virtue of the power conferred by them make the investigation.

It will be noticed that the application in this case was made by the petitioner under O. 21, Rr. 95 and 98, Civil P. C. Therefore the question whether the respondent is resisting possession at the instigation of the defaulter or on her own account has to be gone into. Her case is, she is in possession of the estate on her own account. It is now settled law that there is nothing in the provisions of the Revenue Recovery Act which would preclude a real purchaser from contending that the purchaser in whose name the certificate was issued under S. 38, Revenue Recovery Act, is only a benamidar. The decided cases show that it would be open to a defaulter to recover or to defend his possession in suits brought against or by a certified purchaser : 28 Mad 526[6] and 29 Mad 473[7]. The reason of the rule is that the benami purchase not being illegal must be given effect to in so far as they have not been prohibited by any enactment and even the limited bar placed by S. 66, Civil P. C, would not apply to a case of purchase at a revenue sale. The question of benami would be relevant for ascertaining the nature of possession of the respondent. It seems to me therefore that the order of the lower Court directing enquiry is correct. The words " shall cause the proper process to be issued "

1. Chithambaram v. Natasam, (1891) 1 M L J 594.
2. Gnanasambanda Pandara Sannadhi v. David Nadar, (1904) 14 M L J 433.
3. Sambasiva Mudaliar v. Panchanada Pillai, (1908) 31 Mad 24=17 M L J 441.
4. Guruvammal v. Arumugha Padayachi, (1932) 19 A I R Mad 164=136 I C 769=61 M L J J 894.
5. Seshasayee v. Govinda Pillai, (1935) 22 A I R Mad 612=157 I C 925=59 Mad 86=69 M L J 87.
6. Muthunaiyan v. Sinna Samavanijan, (1905) 28 Mad 526=15 M L J 419.
7. Narayanaswami Padayachi v. Govindaswami Padayachi, (1906) 29 Mad 473=16 M L J 505.

only mean that on an application for delivery of possession the Court must issue the appropriate writ, but that can only be directed in accordance with the provisions of the Civil Procedure Code after making such an enquiry as may be necessary and is contemplated by the sections relating to such delivery of possession.

The next contention of Mr. Rangaswami Ayyangar is that before the Collector the respondent objected to the issue of certificate in the name of the petitioner but in spite thereof the Collector issued the certificate in his name and therefore she is precluded from raising this objection. On reference to the order, I find the Collector declined to go into the said matter. It seems to me that under S. 38 (5), Revenue Recovery Act, it would not be competent to the Collector to go into the question of benami. Under that section, once the sale is confirmed, the Collector is under an obligation to register the lands in the name of the person declared to be the purchaser and grant the certificate to such purchaser, that is the person who is declared to be the purchaser. There is therefore no force in this contention of Mr. Rangaswami Iyengar. In the result, the civil revision petition fails and is dismissed with costs.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1938 Madras 285

PANDRANG ROW J.

Kullappa Reddiar and others — Petitioners.

v.

Al. Vr. St. Veerappa Chettiar and others — Respondents.

Civil Revn. Petns. Nos. 1335, 1524, 1525 and 1165 of 1934, Decided on 5th May 1937, from decrees of Dist. Court, Coimbatore, in C. M. A. Nos. 74, 77, 83 and 78 of 1932.

(a) Provincial Insolvency Act (1920), S. 53 —Applications under — Joint trial with consent of parties—Each alienation must be dealt with separately and evidence relating to each considered separately.

Where four separate applications under S. 53, are tried together with the consent of parties, it does not follow either that evidence otherwise irrelevant becomes relevant because the applications were heard together, or that because some alienations are found to be fraudulent as being not in good faith the other alienations must necessarily on that account partake of the same character. Therefore in spite of the joint trial of all the applications, the case as regards each alienation must be dealt with separately and the evidence relating to each considered separately. [P 286 C 1]

(b) Provincial Insolvency Act (1920), S. 53 — Good faith — Proof of — Absence of good faith on part of transferee must be proved — Such burden is not discharged by vague allegations of fraud — Absence of valuable consideration and circumstances reasonably leading to inference of bad faith on part of alienee must be shown.

So far as S. 53, is concerned, it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent. [P 286 C 1]

The fact that there are certain circumstances appearing in the evidence on the side of the alienees which in the absence of an explanation would offer ground for suspicion is not sufficient for coming to the conclusion that the alienations fall under S. 53. The burden of proving want of good faith on the part of alienees is not discharged by mere vague allegations of fraud but only by establishing circumstances from which it can be reasonably inferred that the alienees acted in bad faith and that there was no valuable consideration for the alienations. [P 286 C 2; P 287 C 1]

M. Duraisami Ayyar — *for Petitioners.*

K. Rajah Ayyer — *for Respondents.*

Order.—These four revision petitions arise out of connected applications made by a creditor, Veerappa Chettiar, in I. P. No. 21 of 1927 on the file of the Subordinate Judge's Court of Coimbatore seeking to annul certain alienations made by the insolvent in October 1926. There were five alienations in all executed in October 1926 and there were five applications for annulling them. The insolvent was adjudicated as such on petitions filed on 10th and 11th January 1927. In one case the alienation was sought to be set aside under S. 54, Provincial Insolvency Act, as well as under S. 53, the other four being only applications under S. 53. The trial Court found that one of the alienations (Ex. 2) was valid and dismissed the application relating thereto, and the other four alienations were set aside. On appeal, the appeals by the unsuccessful alienees were dismissed by the Appellate Court and the appeal by the creditor in the single case in which the alienation was upheld was allowed. Five revision petitions were filed. One of them was not admitted and the other four have now to be decided.

Some argument was addressed to me on the impropriety of the joint trial and determination of all the applications together and reference was made to 60 Cal 1367[1]

1. In re Binjraj Harnandrai, A I R 1934 Cal 232 =149 I C 995=60 Cal 1367.

and 71 M L J 788.[2] It is not necessary to devote much attention to this aspect of the case because, as the learned advocate for the respondents has pointed out, the trial of these applications together was with the consent of the parties, and therefore it is not open to the petitioners in these petitions to take objection to the joint trial. This however does not mean either that the evidence otherwise irrelevant becomes relevant because the applications were heard together, or that because some alienations are found to be fraudulent as being not in good faith the others must necessarily on that account partake of the same character. In other words, in spite of the joint trial of the applications, the case as regards each alienation must be dealt with separately, and the evidence relating to it considered separately. There can be no doubt that the two Courts below have not made a real attempt to differentiate the evidence which relates to each alienation. The trial Court points out certain relationships between the parties to the alienations and the attestors thereto and these relationships were apparently allowed to lead to the conclusion that all the alienations were the result of a scheme or plot to defraud creditors. There has also been a failure to observe the distinction between the fraudulent intention of the insolvent, the transferor, and the knowledge of such intention on the part of the transferee. There can be no doubt that so far as S. 53, Insolvency Act, is concerned, it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent.

The judgments of the Courts below are open to the just criticizm that the decisions therein are really founded on mere suspicion and speculation, and not on legal testimony, for, there can be no doubt that the legal testimony is utterly insufficient in law to support the inference that the alienees acted without good faith or that there was no valuable consideration for the alienations. The deeds of alienations themselves have been exhibited and the vouchers in support thereof also have been exhibited. In one of the cases the vouchers so exhibited were 17 in number namely Exs. 1.a to 1.r, the dates of which range from 1908 to 1924. There is no finding to the effect that all these promissory notes are forgeries or that any one of them is a forgery. Prima facie, the promissory notes which have been exhibited in evidence prove that the debts were real and the burden lies, apart from the general burden in cases coming under S. 53, Insolvency Act, on the person who alleges that the promissory notes are forgeries. That burden has not been discharged and indeed there is nothing but mere suspicion, and that too not of a strong character, to show that the promissory notes are not genuine. The mere relationship of the attestors and the alienees in the alienation deeds and the fact that most of the alienees belong to the same village as the insolvent are not sufficient to show either that the alienees acted in bad faith or that the alienations were without consideration. In fact, once it is found that the promissory notes are genuine, there can really be no escape from the conclusion that the alienees must have also acted in good faith. For instance, the trial Court in dealing with the alienation Ex. 1 merely observes that on account of certain suspicious circumstances and the absence of an explanation of the suspicious circumstance by the production of account books it is proved that the consideration for Ex. 1 is not real.

This is clearly a decision which is based on mere suspicion. The suspicion is entirely due to the fact that the alienees have not given an absolutely satisfactory explanation of the transaction and of the previous transactions between them and the insolvent. The evidence on the side of the petitioning creditor is almost of no value, and if the question had to be decided on the strength of the evidence on the side of the petitioning creditor there can be no doubt that the petitioner had utterly failed to prove his case. The fact that the creditors have adduced certain evidence would not discharge the burden which lies on the petitioning creditor even though such evidence is not wholly acceptable. In this case it is not as if the evidence itself has been characterized as false, but that there are certain circumstances appearing in the evidence on the side of the alienees which in the absence of an explanation would offer ground for suspicion. So far as the non-production of account books is concerned, it is not the case of the petitioning creditor that the accounts were summoned and that the

2. Official Assignee, Madras v. Krishnaswami Naidu, A I R 1937 Mad 192=167 I C 520=71 M L J 788.

alienees declined or omitted to produce accounts. It is possible that the accounts were not produced because the alienees were left under the impression that the burden was really, and not merely theoretically, on the petitioning creditor to prove his case.

In my opinion neither of the Courts below has correctly understood the nature of the burden which is thrown by law on the petitioning creditor in cases of this kind. The burden is not discharged by mere vague allegations of fraud as has been done in this case by one witness going into the witness box and saying that all the alienations are fraudulent. The burden can be discharged only if circumstances are established from which it can be reasonably inferred that the alienee acted in bad faith and that there was no valuable consideration for the alienation. Of such evidence there is none in these cases. The decisions rest on no evidence at all and must therefore be regarded as being insupportable in law. They are accordingly set aside and the applications in these four cases are dismissed with costs in this Court and in the Courts below.

C.R.K./K.B. *Applications dismissed.*

A. I. R. 1938 Madras 287

LEACH C. J. AND VARADACHARIAR J.

S. P. Abhirami Ammal — Appellant.

v.

N. Chellammal and another —

Respondents.

City Civil Court Appeal No. 33 of 1935, Decided on 23rd July 1937, against decree of City Civil Judge, Madras, D/- 11th October 1934.

Res judicata—*A* obtaining decree for partition against her sister *B* and brother—Decree remaining unexecuted owing to agreement—Parties continuing in joint possession—Subsequent suit by *A* under S. 9, Specific Relief Act decreed—Subsequent suit by *B* for partition and possession of her share held not barred by res judicata by previous two suits.

A decree for partition obtained in 1919 by *A* against her sister *B* and brother (the parties being Christians) was not executed as the parties had agreed not to take any advantage of the decree and they continued to be in joint possession of the properties as if the decree was not in existence. The parties having fallen out in 1932, *A* successfully instituted a suit under S. 9, Specific Relief Act, to recover possession of the properties, of which she was dispossessed by *B* through her husband and her son. *B* thereafter filed a suit for partition and possession of her share which was contested by *A* as being barred by res judicata by reason of the decree in the suit of 1919 and the findings in the suit under S. 9, Specific Relief Act:

Held that the parties not having given effect to the decree in the suit of 1919 and having continued in joint possession of the properties as per subsequent agreement the second suit for partition was not barred. The decision in the suit under S. 9, Specific Relief Act, operated as res judicata only to the extent of the finding given therein that *A* was in possession of the properties on the day she alleged in that suit that she was dispossessed and nothing more and did not operate as a bar to the second suit. [P 288 C 1, 2]

C. V. Subramania Iyer — *for Appellant.*

K. Venkataraghavachari —

for Respondents.

Leach C. J. — The parties to this appeal are Indian Christians. The appellant is the eldest sister of the two respondents. Their father died in 1895 and their mother in 1906 and they were left two houses one of which was subsequently let out to tenants. The suit out of which this appeal arises was filed by respondent 1 in the City Civil Court for partition of the estate and she obtained a decree. Her brother, respondent 2, took no part in it and has taken no part in the appeal. The contest has been throughout between respondent 1 and the appellant. The appellant challenges the decision of the trial Court on grounds to which we shall shortly refer. Respondent 1's case was that in 1920 an agreement took place between the parties under which they were to enjoy the rents and profits of these houses in common. This followed a suit by the appellant in the City Civil Court for a partition of the estate. She obtained a decree awarding her a one-third share in the property and directing that it be divided between her and her brother and sister. It is common ground that no steps were ever taken to execute this decree, the reason being, according to respondent 1, the agreement to enjoy the properties equally. Thereafter she and the appellant lived amicably together until 1932 when the appellant complained that she had been forcibly dispossessed of the house which was let out to tenants and instituted criminal and civil proceedings against the husband and son of respondent 1. Up to then, respondent 1 and the appellant had been living amicably together but as the result of these legal proceedings it was no longer possible for them to continue to live together and therefore respondent 1 was

forced to ask for a partition of the estate in order that she might enjoy her own share.

The defence was that respondent 1 and the appellant never lived together and that there had been no joint enjoyment of the property. The appellant claims that after the partition suit she was allowed by respondent 1 to collect the rents and enjoy the income herself. She alleges that she had given cash, jewellery, and other moveable property to respondent 1 and it was in consequence of this that respondent 1 had allowed her to remain in exclusive and adverse enjoyment and possession of the said properties in her own right and collect the rents thereof and appropriate the same to her own use.

It was also pleaded by the appellant that respondent 1's suit was barred by reason of the doctrine of res judicata. This argument was based on the decisions in the partition suit of 1919 and in Suit No. 465 of 1932 of this Court in which the appellant had sought a decree under S. 9, Specific Relief Act, and had succeeded. The learned trial Judge held that respondent 1 and her husband were not in such affluent circumstances that they could afford to let the appellant take the income of the properties for herself and he disbelieved the appellant's version. He also held that there had been no exclusive or adverse possession by the appellant and that the suit was not barred by the doctrine of res judicata. With regard to the suit of 1919, the parties had agreed not to take any advantage of the decree which had been passed therein and had continued to be in joint possession of the properties; in other words, they treated the decree as if it was not in existence. In these circumstances we agree that the decision cannot support the plea of res judicata. With regard to the second suit, that is the suit under S. 9, Specific Relief Act, the learned Judge held that a suit of that nature could not give rise to a plea of res judicata in a suit like the present, and we share his opinion. We will return to this question of res judicata in a moment.

We also consider that the learned Judge has taken the correct view of the evidence. It is impossible to hold in view of the pleadings and the evidence on record that respondent 1 and her brother ever agreed to allow the appellant to enjoy the whole of the income of the family property for the rest of her lifetime. It is true that she is the elder sister and that she is a spinster. But the agreement on which she relies was arrived at, according to her in 1920, when there was a prospect of her living for many years. Respondent 1 was not in affluent circumstances. She had four children of her own, and according to the appellant's own evidence, she was in need from time to time of financial assistance. Therefore it is very unlikely that she would ever agree to give up for many years all interest in her patrimony. With regard to the plea of res judicata it is perfectly true that the parties had agreed not to take any action on the partition decree obtained by the appellant in 1919. It would appear that the reason for that suit being filed was the fact that respondent 2 was interfering in the collection of rents; but in 1920 he received an appointment in Delhi and has lived there ever since. His transfer to Delhi removed the cause of friction and the two sisters settled down to enjoy the property as they had been enjoying it before the partition suit was filed by the appellant. In these circumstances, the suit of 1919 could not operate as res judicata. The suit under S. 9, Specific Relief Act, was brought forward to put the appellant back in possession of property which she said she was in possession of on 1st July 1932. The learned Judge who tried the case came to the conclusion that she had established that she was in possession of the house on that day. The fact that evidence with regard to what had transpired years before 1932 appears on the record and is discussed by the learned Judge does not mean that he decided anything more than that the appellant was dispossessed on the date mentioned. The suit operated as res judicata to that extent and to that extent only.

An attempt has been made to support the contention that there was consideration given by the appellant for her exclusive enjoyment of the family property. It is said that she gave her sister moneys, jewelleries and other property and that as the result of this her sister subsequently agreed to the appellant enjoying the rents exclusively. There is here no consideration for the agreement set up by the appellant and the plea is obviously an afterthought. The appeal therefore fails and must be dismissed with costs.

C.R K./K.B. *Appeal dismissed.*

A. I. R. 1938 Madras 289

VENKATARAMANA RAO J.

Thekke Veettil Makkam Amma and others — Appellants.

v.

Thekke Veetil Kunhi Kalappa Kurup and others — Respondents.

Second Appeal No. 1302 of 1932, Decided on 18th March 1937, against decree of Dist. Court, North Malabar, in A. S. No. 410 of 1930.

(a) Malabar Law—Karnavan — Powers of— Can make maintenance grant in favour of junior member or group of members constituting tavazhi — Such arrangements are binding on succeeding karnavan — When arrangements can be altered — Maintenance grant in favour of persons to be born included in tavazhi as one entity is valid — Such grant is capable of revision or enhancement — Such arrangements cannot be assailed by succeeding karnavan.

It is open to a karnavan of the Malabar tarwad to make grants of land in lieu of maintenance to the junior members of the tarwad and any such maintenance arrangement entered into by the karnavan in favour of a junior member or a group of members constituting a tavazhi is binding on the succeeding karnavan and cannot be set aside except for a good cause. It is open to him having regard to the circumtances then existing to substitute some other suitable arrangement. But until that is done, he cannot interfere with it : *A I R 1917 Mad 78 and A I R 1926 Mad 810, Rel. on.* [P 290 C 2]

It is also open to a karnavan of the Malabar tarwad to provide for the maintenance of the tavazhi including persons to be born hereafter treating it as an entity. Any such provision will not be in excess of the powers of the karnavan as such. Such maintenance arrangements are capable of revision by the karnavan and it is also open to the tavazhi to seek an enhancement according to changed circumstances. Any arrangement entered into will be treated as binding on the succeeding karnavan also until a case is made out for revision or alteration. [P 291 C 2; P 292 C 1]

If in the exercise of a discretion a karnavan makes provision for the maintenance of a tavazhi it cannot be assailed by the succeeding karnavan on the ground that it may not have been necessary at that time : *A I R 1925 Mad 1158, Rel. on.* [P 292 C 1, 2]

(b) Malabar Law —Karnavan—Assignment of right to redeem by way of Melcharth — When can be attacked—Assignment to member in lieu of maintenance with right to redeem is however valid in law.

If an assignment by a karnavan had been in favour of a stranger by way of a Melcharth possibly it may be open to objection that a karnavan by assigning away the right to redeem long before the period of redemption, would not be acting prudently in the interests of tarwad and would be unnecessarily fettering the exercise of the discretion of the succeeding karnavan who at the time of the expiry of the period should take the circumstances then existing as to the desirability of granting a Melcharth; but if by means of a family arrangement, the said property is allotted to a member in lieu of maintenance subject to the burden thereon, there is nothing in law to preclude him from empowering that particular member to discharge that burden and enjoy the land. [P 292 C 2]

O. T. G. Nambiar and C. Goundan — *for Appellants.*

B. Sitarama Rao and A. Achutan Nambiar — *for Respondents.*

Judgment — This second appeal arises out of a suit for redemption of a kanom executed in favour of the assignor of defendants 1 and 2 in or about 1913 by the then karnavan of a tarwad known as Thekkevetti tarwad. Plaintiffs 1 and 2 are the respective heads of their tavazhies which are branches of the same tarwad. Defendants 1 and 2 also belong to the same tarwad. The right of redemption is claimed by plaintiffs 1 and 2 under two karars executed by the karnavan of the tarwad, Ex. C dated 5th August 1916 in favour of plaintiff 1's branch and Ex. B dated 7th November 1916 in favour of plaintiff 2's branch. The said karars purport to be assignments of land in lieu of maintenance of the members forming the said tavazhies. There were several items of land assigned under the said karars and one of the said items assigned to each was half a share in the land which forms the subject-matter of this suit. On the dates of the said karars, the said land was subject to a kanom in favour of one Aluppukeye Ex. A dated 18th August 1913. The kanom was for a period of 12 years and the property was liable to be redeemed thereafter. The assignees under the said karar were given the power to enjoy the land after redemption of the same by paying the amount due to the kanomdar. The karnavan who executed the said karar was one Kunhambu Kurup. He is dead and defendant 8 was the karnavan on the date of the said suit. This action was resisted mainly by defendants 1 and 2. They base their claim under a document Ex 3 dated 29th June 1926, which purports to be a kanom for a sum of Rupees 2091-6-10 in renewal of not only the kanom in favour of Aluppukaye whose assignees defendants 1 and 2 were but also of another kanom dated 3rd November 1924 executed in favour of defendant 2 by defendant 8. The said kanom happened to be executed under the following circumstances.

Some of the members of the tarwad obtained a decree in O. S. No. 416 of 1920 on the file of the Additional District Munsif's Court of Tellicherry for arrears of maintenance and in execution of that decree the suit property was attached. To satisfy the attachment, the karnavan obtained leave of the Court to mortgage the said property; in pursuance of the sanction obtained from the Court, the karnavan borrowed a sum of Rs. 782 and executed Ex. 2. So, the amount for which Ex. 3 was executed was made up of the amounts due under Ex. A and Ex. 2. Therefore the contention of defendants 1 and 2 is that as there has been a fresh kanom executed by the karnavan it is no longer open to the plaintiffs to insist upon redemption of the kanom which is no longer in existence. Another contention was also advanced, viz. that the inclusion of the suit property in the two karars executed in favour of the plaintiff was in excess of the powers of the then karnavan, and defendant 8, his successor, was not bound by such an inclusion, and that he had therefore every right to deal with it. Both the lower Courts gave effect to this contention and also held that Ex. 2 was binding on the plaintiffs, and defendant 8 was competent to grant renewal in favour of defendants 1 and 2 and the suit for redemption is therefore not sustainable.

Mr. Nambiyar's main contention is that it is perfectly competent to Kumbambu Kurup, the then karnavan, who executed the karars in favour of the plaintiffs to make an assignment of the suit land in their favour and to enable them to redeem the land for the purpose of enjoying the land for their maintenance, that Exs. 2 and 3 being in derogation of the rights conferred on them is not binding on the plaintiffs, and in any event, Ex. 3 is not binding on the plaintiffs and that the plaintiffs must be allowed to redeem the property on payment of the amount due under Exs. A and 2. This last contention should in my opinion prevail. No valid ground of attack was made against Ex. 2 and in the memo of grounds of appeal no objection regarding its invalidity was raised. It is not therefore open to Mr. Nambiyar to assail it before me. I therefore proceed on the assumption that Ex. 2 is valid.

But the question remains whether Ex. 3 is valid and binding on the plaintiffs. If the plaintiff's right under Exs. C and B to redeem the kanom of Aluppukaye is valid, it follows that Ex. 3 cannot stand, and this position is not challenged by Mr. Sitarama Rao on behalf of defendants 1 and 2. The question therefore is was Kunhambu Kurup who executed the said karars within his right in including the suit property in the said karars and was he competent to confer on the plaintiffs the power to redeem the kanom of Alappukeyi? The argument of Mr. Sitarama Rao on behalf of defendants 1 and 2 may be stated thus: the assignment of lands was in favour of specific members of the tarwad, that the inclusion of the suit item was not necessary having regard to the amount that was fixed for maintenance for each member, that the suit item was only included and intended to be for the purpose of maintenance for future members of the tavazhi, that it was not competent to a karnavan of a tarwad to make a grant for future born members of the tavazhi, that the grant of the suit item was an independent and separable transaction and it is open to the succeeding karnavan to ignore it, and further the power of redemption conferred on the assignee was in the nature of a melcharth long before the period of redemption arrived and invalid and illegal. It is well settled, and it is not disputed, that it is open to a karnavan of the Malabar tarwad to make grants of land in lieu of maintenance to the junior members of the tarwad and that any such maintenance arrangement entered into by the karnavan in favour of a junior member or a group of members constituting a tavazhi is binding on the succeeding karnavan and cannot be set aside except for a good cause. It is open to him, having regard to the circumstances then existing, to substitute some other suitable arrangement. But until that is done, he cannot interfere with it: 32 M L J 97[1] and 23 M L W 584.[2]

It is not suggested in this case that the maintenance arrangement entered into by Kunhambu was not bona fide or proper at the date of the said karars. What is suggested is that the inclusion of the suit item was unnecessary having regard to the then existing circumstances as being a provision for allotment for future born members.

1. Ramaswami Pattar v. Gopalan, (1917) 4 A I R Mad 78=37 I C 659=32 M L J 97.
2. Sara Umma v. Kunhammad, (1926) 13 A I R Mad 810=94 I C 508=23 M L W 584.

To test the soundness of the argument, it is necessary to examine the document to find out what the substance of the transaction is. The relevant portion of Ex. C runs thus: (It may be noted that the contents of Ex. B are similar)

As you are now prepared to institute suit against me for the maintenance due to you from our common Thekke Veetil Tarwad, to avoid such litigation and for the welfare of the tarwad, and for the protection of the tavazhi, lands and parambas mentioned as items 1 to 12 in the schedule hereunder and one half of land item 13, which have the claim value of Rs. 1000 have, on account of the liability of the tarwad, been hereby given possession of to you, out of the tarwad properties for your maintenance and that of the descendants that may be born to the female members, hereafter in order that you shall hold in possession items 1 to 12 from this day and item 13 after the expiry of the kanom period ..... It has been settled that, after the expiry of the kanom demise, you shall pay Rs. 564-4-9, one-half of the aforesaid kanom amount and utilize one-half of the said waram, viz. 350 edangalies, of paddy in meeting the maintenance expenses of the members of your tavazhi.

It will thus be seen that this arrangement was entered into to avoid litigation and intended for the protection of the tarwad. The property that was assigned was 13 items of land including the suit item. It was elicited in the evidence that 12 items were capable of yielding Rs. 57 and it worked out at Rs. 4.12.0 per head for the 12 members in whose favour Ex. C was assigned and that items 1 to 12 were therefore sufficient for the maintenance allotment of the said branch. It may be seen that so far as the second branch is concerned, it consisted of 19 members. As I understand the document, the provision for maintenance was intended to be made for the tavazhi as a whole, members then existing and members to be born and that item 13 was not intended specifically for future born members. The entire allotment must be taken as one allotment for all the members of the tavazhi. Therefore the argument that item 13 was intended only for the future born members is not borne out by the document itself. It is contended that it is not open to a karnavan to provide for the tavazhi as such, because the tavazhi is capable of being increased by birth of future members and they will not be bound by any allotment as not being parties to the document, and further it may be fettering the exercise of the discretion of a succeeding karnavan by any such allotment, because it will not be possible to know the increase in the members of the tavazhi. There does not seem to be any specific authority in favour of this view which Mr. Sitarama Rao contends for, but at any rate, there are indications in some of the decided cases that it may be competent to make such a provision. In 18 I C 234,[3] dealing with a karar in that case, Sundara Iyer J. observes at page 235 :

There was no contract between the karnavan and plaintiff 1's mother as representing her branch of the tarwad. It cannot therefore be said that the karar was binding on the tavazhi of the plaintiffs as such until properly set aside.

In 21 I C 755,[4] dealing also with a karar in that case, their Lordships observe thus at page 756 :

There is no provision in the body of the document showing any fixed amount in kind or money as payable to the tavazhi. It will be seen that what is paid is in terms stated to be for the maintenance of five persons only, that is plaintiffs 1 to 5; nothing is said about those who may become members of the tarwad by birth who are clearly entitled to maintenance. No obligation is implied on plaintiffs 1 to 5 to maintain them out for their allowance.

In 49 M L J 121,[5] Phillips J. made the following observation at page 122 :

Both the lower Courts have found that the karar was merely an allotment for the maintenance of the members of the tavazhi who were alive at its date. This would be a rather curious position in a Malabar tavazhi of this size, because a large number of the members are adult women and it may be ordinarily expected that children would be born shortly after the date of the karar, and it is unreasonable to conclude that after-born children are intended to be deprived of the benefits of this karar unless it is so stated. It must be remembered that at the time when this karar was entered into, there had been disputes and litigation in the tarwad and the allotments for the maintenance were made in settlement of those disputes, and therefore it is unlikely that intention of those parties was that this settlement should be subject to modification immediately other members were born. Here, we have recitals in the document which show clearly that the allotment was made to the tavazhi as such which would include not only the members then alive but also members born thereafter.

On appeal from his judgment their Lordships, Waller and Madavan Nair JJ., in 23 M L W 584[2] took a different view as regards the construction of the document but did not dissent from the view expressed by Phillips J. that allotment can be made in favour of the tavazhi as such, that is for existing members and

3. Kelu Achan v. Lakshmi Nethyar Ammal, (1913) 18 I C 234.

4. Pattu Neithier Amma v. Thazatha Dharaman Achan, (1913) 21 I C 755.

5. Kunhahomad v. Sara Umma, (1925) 12 A I R Mad 1158=90 I C 849=49 M L J 121.

also for members to be born. No doubt they are all cases in which it was found on a construction of the document that the allotment was made in favour of specific existing members; but at any rate, those cases seem to contemplate the possibility of such an allotment being made and that it will not be in excess of the powers of a karnavan as such. Nothing has been shown to me why a tavazhi should not be treated as an entity and provision be made as such for it. The only objection indicated is that it is not possible to predicate the number of members a tavazhi may consist, and the allotment may be more than necessary or not be adequate for the maintenance of the members for all time to come. If the law is that these maintenance arrangements are capable of revision by the karnavan and it is also open to the tavazhi to seek an enhancement according to changed circumstances, I do not see any force in the said objection. The arrangement will be treated as binding until a case is made out for revision or alteration. However it is unnecessary to rest any decision on this ground, as even treating the assignment as one intended to be in favour of only the existing members, the inclusion of items 13 cannot be considered to be an act done by the karnavan in excess of his powers. What was contemplated by the parties was that the assignees should have the income from all these 13 items and for the first 8 years they should be content with the income from 12 items and thereafter after redeeming the said kanom they should enjoy also the income from item 13.

It is not suggested that the addition of the income derivable from item 13 would in any way make the rate of maintenance excessive; on the other hand, it appears from the evidence of the present karnavan that the proper maintenance for each member would be Rs. 5 or 6 per month. No doubt plaintiff 1 in his deposition stated that at the time the arrangement was entered into, Rs. 4.12.0 was taken as the basis of calculation. It may be so, but there is nothing improper for a karnavan to safeguard the possible decrease in the rate intended to be provided for having regard to the bad seasons by including also item 13. It would seem to me proper and prudent on the part of a karnavan to make such a provision and if in the exercise of his discretion a karnavan does so, it cannot be assailed by the succeeding karnavan that it may not have been necessary at that time. The question in all these cases is as pointed out by Kumaraswami Sastri J. in 33 Mad 436[6] at p. 438, was the transaction at the time it was entered into bona fide proper and prudent? Therefore having regard to all the surrounding circumstances on the date of the karars, the inclusion of item 13 was certainly within the competence of the karnavan and no valid reason has been assigned against its inclusion. Again, it is not open to a succeeding karnavan without upsetting the arrangement as a whole to withdraw a portion of the land allotted. It may be open to him to revise the entire arrangement and substitute some other arrangement but he has not chosen to do so. However, as I have said, there is nothing unreasonable in also allotting item 13 for maintenance. Therefore the view of the lower Court in this behalf is unsound and cannot stand.

It remains to notice the other argument of Mr. Sitarama Rao whether it was competent to the karnavan to empower the plaintiffs to redeem the kanom long before the period arrived. If the assignment had been in favour of a stranger by way of a melcharth, possibly it may be open to objection that a karnavan, by assigning away the right to redeem long before the period of redemption, would not be acting prudently in the interest of tarwad and would be unnecessarily fettering the exercise of the discretion of the succeeding karnavan who at the time of the expiry of the period, should take the circumstances then existing as to the desirability of granting a melcharth; but, if by means of a family arrangement, the said property is allotted to a member in lieu of maintenance subject to the burden thereon, there is nothing in law to preclude him from empowering that particular member to discharge that burden and enjoy the land. Mr. Sitarama Rao frankly confesses that there is no authority in support of the view that it would be in excess of the powers of the karnavan to do so. Therefore if the allotment of item 13 cannot be interfered with and the plaintiffs have got a valid right to redeem the kanom of Aluppukeyi, Ex. 3 cannot stand; but it is open to the plaintiffs to redeem only the Aluppukeyi's kanom; they are

6. Ekkanath Eacharaunni Valia Kaimal v. Manakat, (1910) 33 Mad 436=5 I C 774=20 M L J 344.

also bound to redeem the kanom in favour of defendant 2 created by Ex. 2.

I therefore set aside the decree of the learned District Judge and give leave to the plaintiffs to redeem the suit properties on payment of the amount due under the kanom in favour of Aluppukeyi and also under Ex. 2. In the circumstances, I direct each party to bear his own costs in this second appeal and in the Courts below. The amount which has been agreed that the plaintiff should pay for redeeming the land is Rs. 2039.14.10. Time for redemption is six months from this date.

C.R.K./B.D. *Decree set aside.*

---

* A. I. R. 1938 Madras 293

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

Annamalai Chettiar and others —
Petitioners.

v.

Srinivasaraghava Aiyengar and others
—Respondents.

Civil Revn. Petn. No. 1747 of 1931, Decided on 20th September 1937, from judgment of Sub-Judge, Kumbakonam, in O. S. No. 3 of 1930.

*** Civil P. C. (1908), O. 34, R. 1—Attaching creditor, so long as attachment subsists, is necessary party to suit on mortgage—But if he sells judgment-debtor's property in execution of his decree and purchases it himself he is no longer necessary party.**

No doubt, ordinarily a Court should deal with the rights of the parties as they stood at the institution of the suit, but where the continued existence of those rights is an essential requisite for according the relief asked for and such rights have been lost before the relief could be granted, the Court cannot but take notice of the altered circumstances and decline to give the parties that relief to which by their own act, they have disentitled themselves. Though an attaching creditor as such is not a necessary party to a suit on a mortgage and an order striking his name out in so far as he purports to assert a paramount claim and raises questions of priority is also correct, yet by virtue of the statutory right of redemption conferred under S. 91 (f) of the Transfer of Property Act, he will be proper party to the suit and it is not open to a Court to strike out the name of a party as an unnecessary party if he is otherwise a proper party to the suit. Even apart from S. 91, an attaching creditor may in certain cases be permitted to intervene and be made a proper party to the suit for the purpose of safeguarding his rights, i. e., to see that the interest of his judgment-debtor which might be sold under the mortgage decree to be passed is correctly determined. But if the attaching creditor proceeds to sell the property in execution of his decree, the Court sale releases the property altogether from attachment and with it the right of redemption which the statute confers on him and such rights as he can allege as an attaching creditor also go with it and he is no longer a necessary party. Because what the Court auction-purchaser acquires is only the right, title and interest of the judgment-debtor and not the right of the attaching creditor; thereafter he can only agitate such rights as the judgment-debtor has. The fact that the attaching creditor himself becomes the purchaser is immaterial : *A I R 1930 Mad 801 (F B)*; *A I R 1920 Mad 126 and A I R 1921 Mad 30*, *Ref.* [P 294 C 2; P 295 C 1, 2]

T. R. Venkatarama Sastry and S. V. Venugopalachari — *for Petitioners.*

K. S. Krishnaswamy Iyengar and S. Narasimha Iyengar—*for Respondents.*

Venkataramana Rao J.—This is an application to revise the order of the learned Subordinate Judge of Kumbakonam striking out the names of the petitioners, who had been impleaded as defendants 18 to 20 in O. S. No. 3 of 1930 as unnecessary parties thereto. The argument of the learned counsel for the petitioners before us is that though they may not be necessary parties, they having been made parties to the suit, it is not open to the learned Judge to pass the order he did. The relevant facts to deal with this contention are few and not in dispute. The petitioners obtained a decree for money in O. S. No. 41 of 1915 on the file of the Subordinate Judge of Kumbakonam on 22nd December 1916 against certain defendants personally and against certain defendants as legal representatives of their predecessor-in-title. Subsequent to the date of this decree, the plaintiff in the suit out of which this application arises obtained a mortgage on 16th October 1919 from defendants 1 to 17 in the suit, some of whom were parties to the suit, O. S. No. 41 of 1915, and some of whom were represented therein by their predecessor-in-title. The present suit, O. S. No. 3 of 1930, was instituted to enforce the said mortgage and the present petitioners were impleaded as defendants 18 to 20 on the ground that they attached the mortgaged properties in execution of their decree and the said attachment was subsisting. The petitioners pleaded inter alia that they had a paramount claim by virtue of their decree in O. S. No. 41 of 1915, that they were entitled to priority, and that they were therefore not necessary parties to the suit. One of the issues in the suit relates to this question of priority. Of course they also

raised other defences regarding the truth and validity of the mortgage and the extent of interest that would properly pass under the deed of mortgage. They were not allowed to raise issues which would not be open to the mortgagors.defendants to raise but were allowed to remain on record to safeguard their interests by an order dated 3rd November 1930. But when the suit came on for trial, the trial Judge took the view that having regard to the pleadings in the case they were unnecessary parties to the suit and he therefore directed their names to be struck out and subsequently passed a preliminary decree in favour of the plaintiff on 22nd July 1931. Subsequent to the date of this decree, petitioners proceeded to execute their decree in O. S. No. 41 of 1915, brought the properties to sale in pursuance of the attachment already effected by them and purchasing the properties themselves on 10th October 1931. It is subsequent to this purchase that the petitioners preferred this revision petition and also the appeal (Appeal No. 570 of 1931) complaining against their removal from the record. Subsequent to the filing of the revision petition and the appeal, a final decree was passed in the suit, O. S. No. 3 of 1930 and the mortgaged properties were brought to sale and purchased by the plaintiff. Thus the legal positions which the plaintiff in O. S. No. 3 of 1930 and the petitioners occupy are these: The plaintiff in O. S. No. 3 of 1930 is a purchaser in execution of the mortgage decree obtained by him and the petitioners are auction.purchasers in execution of the money decree obtained by them, subsequent to the preliminary decree on mortgage obtained by the plaintiff in O. S. No. 3 of 1930. The question is whether on this state of facts we ought to interfere with the order of the learned Subordinate Judge.

So far as our High Court is concerned, in cases governed by the Transfer of Property Act before the Amendment it was settled by the decision of the Full Bench reported in 53 Mad 881,[1] that an attaching creditor is not a necessary party to a suit on a mortgage. The view of the learned Subordinate Judge that the petitioners as attaching creditors are not necessary parties is correct. Again, his order striking their names out in so far as they purported to assert a paramount claim and raised questions of priority is also correct. But is his order justified if the petitioners are viewed simply as attaching creditors? They may not be necessary parties in that the plaintiff cannot be compelled to join them on the ground that no effective decree could be passed without their being on the record but by virtue of the statutory right of redemption conferred under S. 91 (*f*), Transfer of Property Act, they will be proper parties to the suit and it is not open to a Court to strike out the name of a party as an unnecessary party if he was otherwise a proper party to the suit. But the question still remains whether in view of the altered circumstances as a result of the Court auction purchase the petitioners can be given the relief they seek in their revision petition. The principle upon which an attaching creditor is given the right of redemption is stated by Wallis C. J. in 44 Mad 232,[2] thus:

> He is merely allowed, while the attachment is in force, to exercise any right of redemption the judgment-debtor may be entitled to for the purpose of bringing the judgment-debtor's interest to sale in execution of his decree more advantageously than if it were sold subject to the mortgage.

Even apart from S. 91, an attaching creditor may in certain cases be permitted to intervene and be made a proper party to the suit for the purpose of safeguarding his rights, i. e., to see that the interest of his judgment.debtor which might be sold under the mortgage decree to be passed is correctly determined. But this again is to enable him to effect a more advantageous sale of the interest of his judgment.debtor. The reason of the rule however disappears when the attachment ceases to be in force and an attaching creditor sheds the character of an attaching creditor either when the attachment is raised or is otherwise put an end to. It is on the basis of this principle our High Court has taken the view in 43 Mad 696[3] and 44 Mad 232,[2] since affirmed by the Full Bench in 53 Mad 881,[1] that if the attaching creditor proceeds to sell the property in execution of his decree the Court sale releases the property altogether from attachment and

1. Subramanian Chettiar v. Sinnammal, (1930) 17 A I R Mad 801=127 I C 624=53 Mad 881=59 M L J 634 (F B).

2. Chamiyappa Tharagan v. Rama Ayyar, (1921) 8 A I R Mad 30=62 I C 121=44 Mad 232=40 M L J 65.

3. Veyindramuthu Pillai v. Maya Nadan, (1920) 7 A I R Mad 126=58 I C 501=43 Mad 696 39 M L J 456.

with it the right of redemption which the statute confers on him and such rights as he can allege as an attaching creditor also go with it. Wallis C. J. explains the position thus in 44 Mad 232[2] at p. 240 :

> Coming now to the attaching creditor's alleged right to redeem any mortgage there may be on the attached property, it follows that this right must also come to an end together with the attachment itself on the sale to the auction purchaser in execution of the decree. Thereafter the attaching creditor has no concern with the property, while on the other hand the auction-purchaser has acquired any equity of redemption, or right to redeem the mortgaged property, that the judgment-debtor may have had in the property, and there is no necessity or justification for holding that the attaching creditor's right to redeem is transferred to the purchaser in the Court sale in execution of his decree.

What the Court auction-purchaser acquires is only the right, title and interest of the judgment-debtor and not the right of the attaching creditor and thereafter he can only agitate such rights as the judgment-debtor has. The fact that the attaching creditor himself becomes the purchaser is immaterial : Vide 43 Mad 696.[3] It is essential therefore that the petitioners should have maintained that character of attaching creditors if they wanted to assert the rights which the law confers upon them in order to enable them to effect an advantageous sale of the judgment-debtor's property. But where an attaching creditor proceeds to sell the property without having the right, title and interest of the judgment-debtor defined, the purchaser can only get such rights as he had at the date of the sale. What the petitioners should have done is they should have come immediately after the passing of the order dated 20th July 1931 and got the order revised and the preliminary decree re-opened before proceeding to sell the property. But they elected to proceed with the execution of their decree and sell such right as the judgment-debtor had at the time of sale. If the present order is set aside, their position will in the suit be not as attaching creditors but as auction-purchasers and they can only agitate such rights as the judgment-debtors had on the date of the preliminary decree in O. S. No. 3 of 1930. No doubt, ordinarily a Court should deal with the rights of the parties as they stood at the institution of the suit, but where the continued existence of those rights is an essential requisite for according the relief asked for and such rights have been lost before the relief could be granted, the Court cannot but take notice of the altered circumstances and decline to give the petitioners that relief to which they by their own act in bringing the property to sale before filing the petition, they have disentitled themselves.

We therefore decline to interfere with the order of the learned Subordinate Judge and dismiss the revision petition but in the circumstances we make no order as to costs. The memo of objections is dismissed but without costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R 1938 Madras 295

VENKATARAMANA RAO J.

Adavikolanu Seshagiri Rao — Appellant.

v.

Sri Rajah Venkataramayya Appa Rao Bahadur Zamindar Garu and others — Respondents.

Second Appeal No. 1169 of 1932, Decided on 29th July 1937, against decree of Court of Sub-Judge, Ellore, in A. S. No. 212 of 1930.

(a) Madras Regulation (28 of 1802), S. 34, Cl. 6 — Legal relationship and nature of rights and obligations between zamindar and tenant whose tenure is attached under Cl. 6 explained.

The attachment of property under Cl. 6 of S. 34, does not amount to a transfer of property nor a right to call for transfer of property. The only right conferred is to manage the property until the amount due or to be due is discharged. No right of disposal over the property is given. But for the statutory power, the landlord would have no right to enter in the land. The possession of the tenant is displaced by virtue of the statute and it is not therefore by virtue of any confidence reposed by the defaulting tenant in the zamindar that possession is taken, but in opposition to and in derogation of his rights as owner to remain in possession, and therefore the relationship thus created by attachment can in no sense be one of trustee and cestui que trust. [P 297 C 1]

(b) Limitation Act (1908), S. 10—Pre-settlement mokhasa in certain zamindari attached in 1831 under Cl. 6 of S. 34, Madras Regulation 28 of 1802 — Zamindari sold for arrears and came in possession of Government— Government resumed mokhasa in 1856, wrote off arrears and regranted it unconditionally to zamindar in 1860 — Zamindar held it since then in his own right — Mokhasadar having knowledge of resumption, acquiescing in and abandoning his right in mokhasa — Suit for possession brought in 1927—It was alleged that zamindar was trustee and no question of limitation arose — No trust held was created — Time held began to run from date of disclaimer and suit was time-barred.

A village in a certain zamindari was a pre-settlement mokhasa subject to a kattubadi and thus being an 'alienated land' Government had right of resumption under Cl 4 of Regulation 25 of 1802. The zamindari was under the management of Court of Wards. In 1831, the mokhasa was attached for arrears of rent under Cl. 6, S. 34 of the Regulation 28 of 1802. Zamindari itself was sold for arrears of peshkush in 1851 and came into possession of the Government and remained with them till 1860. In 1856 Government resumed the mokhasa and incorporated it with the Government land but obligation to pay kattubadi still remained. The Government as owner of the zamindari wrote off the arrears. As they had to pay a large amount of kattubadi to the zamindar they regranted the mokhasa unconditionally to the zamindar with the zamindari in 1860. From that time zamindar was holding the mokhasa in his own right free and discharged of all claims of the mokhasadars. The resumption proceedings were with the knowledge of the mokhasadars who acquiesced in the same and abandoned their rights in the mokhasa and the conduct of the zamindar was also consonant with that view. An attempt was made in 1884 to recover possession of the mokhasa but failed. A suit was brought in 1927 for the possession and it was alleged that the original entry on the land by the zamindar was as trustee and the suit therefore was not time-barred :

Held that relationship created by attachment of mokhasa in 1831 was not one of trustee and cestui que trust. Assuming that there was a fiduciary relation created, it was put to an end by the resumption of the mokhasa by the Government writing off the arrears and regranting it in 1860 to the zamindar who held the mokhasa in his own right. Even assuming that by virtue of statutory obligation to account for the management and to deliver possession of land a constructive trust could be raised, there was open disclaimer of the title of the mokhasadars and the renunciation of the character of possession set the statute of limitation running from the date of disclaimer or renunciation. The suit therefore was time-barred : *34 Mad 257 (P C), Disting.*

[P 297 C 2 ; P 299 C 1]

G. Lakshmanna and G. Chandrasekhara Sastri — *for Appellant.*

P. Somasundaram, Y. Govindarajulu, P. V. Rajamannar, K. Subba Rao and Y. Suryanarayana — *for Respondents.*

Judgment. — This second appeal arises out of a suit for the recovery of possession of 1/36th share in a mokhasa known as Thimmaraogundem situated within the geographical limits of Baharjalli Pargana in Nidadavolu zamindari. Both the lower Courts dismissed the suit as barred by limitation. Defendants 1 and 2 and their predecessors-in-title, the zamindars, got into possession of the said mokhasa nearly a century ago and from 1856, at any rate for nearly 70 years, they have been in open, continuous and undisturbed possession of the same and enjoying the property in their own right. It was alleged that their original entry into the land was as trustees; they were never divested of their possession as such trustees and no question of limitation arises. To appreciate the points in controversy between the parties, it is necessary to set out a few relevant facts.

The village of Thimmaraogundem was admittedly a pre-settlement mokhasa (vide Ex. A) and subject to a kattubadi of Rs 960-0-0 at the date of the Permanent Settlement of the zamindari. It is thus an "alienated land" within the meaning of the Preamble to the Madras Regn. 31 of 1802 and the right of resumption inhered in the Government by virtue of the power reserved under Cl. 4, Madras Permanent Settlement Regn. 25 of 1802. This position cannot seriously be disputed especially after the recent pronouncement of the Privy Council reported in 46 M L W 7.[1] Between 1802 and 1860 the zamindari of Nidadavolu has a chequered history. It was being badly mismanaged by the zamindars for the time being and came into the possession of the Government three times. In 1831, the Government was in management of the zamindari through the Court of Wards. They found that the kattubadi payable by the mokhasadars was in arrears. Under the law then prevailing, it was open to the landlords to realise arrears of rent due to them without resorting to Courts of law by distraint of personal property or by attachment of the farms and tenures of defaulters and realising all rents therefrom. The Court of Wards chose to adopt the latter course with reference to the suit mokhasa. They therefore attached it and this was in pursuance of the power conferred by Cl. 6 of S. 34, Madras Regn. 28 of 1802. It is to this clause one has to look for the definition of the legal relationship between the zamindar and the mokhasadar and the nature of their rights and obligations. The material provisions of Cl. 6 relevant for the purpose of the present discussion runs thus :

> The proprietors or farmers of land to whom such arrear may be owing shall have power to attach the farm or other tenure of such defaulters, and to manage the same by their own agents, until the rent due, and the further rent which may become due after attachment, with interest upon the whole arrear at the rate of one per cent per mensem, may have been liquidated ; but in such cases of attachment, proprietors, or

1. Secretary of State v. Sobhandri Appa Rao, A I R 1937 P C 209=168 I C 890 = 64 I A 227=46 M L W 7 (P C).

> farmers, shall not exact more from the cultivators of the soil, and other descriptions of inferior tenantry, whose rents for the current year may have been payable to the defaulters, than the defaulters would have been entitled to receive from them if the attachment had not taken place ; and in the event of the defaulters making good the arrear due from them, with interest at the rate of one per cent. per mensem, at any time within the current year, the attachment shall be withdrawn, and an account rendered to them of the receipts and disbursements, during the continuance of such attachment.

Therefore this provides a statutory remedy for the discharge of the tenants' obligations to pay rent. There is no transfer of property nor is there a right to call for a transfer of property. The only right conferred is to manage the property until the amount due or to be due is discharged. No right of disposal over the property is given. But for the statutory power, the landlord would have no right to enter on the land. The possession of the tenant is thus displaced by virtue of the statute. It is not therefore by virtue of any confidence reposed by the mokhasadars in the zamindar that possession is taken but in opposition to and in derogation of his rights as owner to remain in possession. The relationship thus created by the attachment can in no sense be one of a trustee and cestui que trust. This then is the legal relationship which subsisted between the zamindar and the mokhasadar flowing from and out of the attachment of the mokhasa with a right on the part of the Government in exercise of their sovereign power to resume it. The zamindari itself was sold for arrears of peshkush in 1843 and regranted to the zamindar in 1845. Again in 1851 the zamindari was sold for arrears of peshkush and came into the possession of the Government and remained with them till 1860. During this time the Government took serious steps to set right the affairs of the zamindari. They found that considerable arrears of kattubadi were payable to the zamindar not only with reference to the suit mokhasa but also with reference to 31 other mokhasas. So far as the suit mokhasa was concerned, as the learned Subordinate Judge points out,

> the village became a beehiraku village and in fact not even Rs. 200 could be realized by the rents of the village whereas the kattubadi was Rs. 987-8-0.

The Government decided on resuming this mokhasa and other mokhasas unless the mokhasadars came to terms in regard to the arrears. The Collector gave notices in 1856 to the mokhasadars of this village as well as the mokhasadars of other villages. From Exs. 13 and 13-A, it is clear that some of the mokhasadars adjusted the matter with the Government and others did not, and in regard to those that failed to adjust, the Government decided to resume them and incorporate them with Government land. One of such mokhasas which the Government chose to resume and incorporate with the Government property was the suit mokhasa. The Collector points out that in spite of notices and proclamations the mokhasadars failed to appear. There were arrears of over Rs. 18,000 due in respect of this mokhasa. Having regard to the then state of the village, as pointed out by the learned Subordinate Judge, the mokhasadars did not care to appear and lay claim to the village. The Government accordingly resumed it and made it part of the Government property, but still the obligation to pay the kattubadi remained. As the Government were then considering themselves as the owners of the zamindari, they wrote off the arrears. But when the sale of the zamindari was set aside, the question was as to what to do with the village. Having regard to the fact that they had to pay this large amount of kattubadi to the zamindar they granted the village unconditionally to the zamindar along with the zamindari in 1860. The result of these resumption proceedings and the grant to the zamindar was to put an end to any relationship or obligations created by the attachment of mokhasa in 1831. The zamindar from 1860 was holding the mokhasa in his own right free and discharged of all claims of the mokhasadars. The accounts of the zamindari maintained by the karnams, who belong to the family of mokhasadars, seem to be almost decisive of the fact that the resumption was acquiesced in and the old relationship came to an end : vide Exs. 12 and 14 particularly the latter which shows that after 1860 there was no debit of kattubadi or any adjustment of the income therefor in the zamindari accounts.

Both the lower Courts, after a consideration of the entire evidence, the probabilities of the case, the surrounding circumstances that prevailed at or about the time of resumption, and the subsequent conduct of the parties, found that the resumption proceedings were with the

knowledge of the mokhasadars and they acquiesced in the same and abandoned their right to the mokhasa. The conduct of the zamindars was also in consonance with this view. In 1884, an attempt was made to recover possession of the mokhasa but it failed. Subsequently, there were two litigations launched (O. S. No. 9 of 1890 on the file of the Sub-Court, Ellore, and O. S. No. 88 of 1895 on the file of the District Munsif's Court of Ellore) for recovery of possession of the zamindari. In both the litigations the zamindar set up exclusive title. In the judgment in the second litigation it was distinctly found that the arrear due to the zamindar was discharged long prior to the suit. After the dismissal of these suits, no further attempt was made until 1927 for a period of 30 years when the present suit was launched. Thus for over a period of 70 years, the zamindars have been in possession and enjoyment of the suit mokhasa in their own right. The conduct of the parties at any rate up to 1884 has been on the footing that the resumption proceedings were valid. Again after open disclaimer by the zamindars of the title of the mokhasadars and setting up their own hostile title, the previous state of affairs was allowed to remain and the zamindars were allowed to continue in undisturbed possession of the same for over 30 years. A clearer case of abandonment of right cannot be found and it is highly inequitable that the mokhasadars should be entitled to disturb "the lengthened enjoyment or the immunity" to which they have been tacit parties. Both the Courts were therefore perfectly justified in finding a case of abandonment of right and change in the character of possession whatever may be the nature of the original possession, whether resumption proceedings were legal or illegal.

In this connexion I may point out that the view taken by the lower Appellate Court, that the resumption by the Government is not legal is wrong. The Government were not resuming the mokhasa qua zamindar but as Government in the exercise of their undoubted power vested in them, that they were conscious of this is clearly proved by Exs. 13, 13-A and 14. The resumption by the Government is thus valid and the mokhasadars had no right to question it and the plaintiff has no cause of action to sustain this suit. Mr. Lakshmanna's first concern was to attempt to displace the concurrent findings of both the Courts that mokhasadars were aware of and acquiesced in the resumption and abandoned their right to the mokhasa. His main argument is that Ex. 6 does not refer to resumption at all, and that the learned Subordinate Judge erred in relying on it for his finding. It will be seen that the learned Subordinate Judge relied on Ex. 6 for the purpose of shewing that the Government from the time they got into possession wanted to have the arrears adjusted with the proprietors of the various mokhasas and the plaintiff's predecessor-in-title was sent for and called upon to adjust the arrears. This is taken as one of the circumstances for probabilizing the accuracy of the statement in Ex. 13-A that the mokhasadars were given notice of resumption and that the regular procedure has been followed and coupled with other circumstances, he therefore inferred as a fact that the mokhasadars were aware of the resumption and acquiesced in the same. The learned Subordinate Judge referred to all the material documents and probabilities and arrived at the findings. Mr. Lakshmanna has not been able to convince me that the findings are wrong, and they have therefore to be accepted in second appeal. Once the findings are accepted, much of the basis for Mr. Lakshmanna's argument disappears. However, I will notice his legal contentions. He contended that by virtue of the attachment the zamindar became an express trustee, that the property was vested in him for the specific purpose of discharging arrears and that no question of limitation would arise by virtue of S. 10, Lim. Act. I have already explained the legal effect of the attachment. The taking possession by the zamindar does not vest in him any control over the property. There was no transfer or conveyance to the zamindar in trust and therefore no vesting within the meaning of S. 10, Lim. Act : 44 Mad 831.[2] The argument thus based on the question of express trust must therefore fail.

Mr. Lakshmanna placed considerable reliance on two cases of the Bombay High Court, namely 8 Bom 585[3] and 39 Bom 572[4] and very properly refrained from tak-

2. Vidya Varuthi v. Baluswami Ayyar, A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
3. Tukaram v. Sujangir Guru, (1884) 8 Bom 585.
4. Secy. of State v. Bapuji Mahadeo, A I R 1915 Bom 282=31 I C 277=39 Bom 572=17 Bom L R 641.

ing the time of the Court by citation of numerous cases as was done in the lower Courts. The case in 8 Bom 585[3] is distinguishable. There was a taking of vatan land by the Government at the request of rival claimants pending the settlement of a dispute. As pointed out by West J. himself, who delivered the judgment in the 8 Bom 585,[3] in a later case 11 Bom 222[5] at p. 233, the Government did not set up a title of their own. Here the Government resumed the property, treated it as the Government property and granted it as such in derogation of the rights of the mokhasadar. In 39 Bom 572,[4] a communication by the Government to a party that they are holding some money of his in their hands was held to amount to a sufficient declaration of trust to constitute the Government an express trustee. Such a declaration is wanting in the present case. If there was no express trust, the bar of limitation must apply and it is not disputed that the statute of limitation does apply to a case of constructive or implied trust. Assuming that by virtue of the statutory obligation to account for the management and to deliver possession of the land a constructive trust can be raised, there has been open disclaimer of the title of the mokhasadars and the renunciation of the character of possession which will set the statute running from the date of the disclaimer of renunciation.

Mr. Lakshmanna placed considerable reliance on the decision in 34 Mad 257[6] for the position that until a person who has taken possession of the properties as trustee has divested himself of that character, no question of adverse possession would arise. But the principle of that decision would not apply to the facts of this case. There has been a complete divestment of any fiduciary character, assuming the zamindar held such. All that is necessary is that such relationship as flowed from the attachment of the mokhasa should be put an end to and the resumption proceedings did put an end to the attachment and both the zamindar and the mokhasadar treated the whole thing as at an end. Further, once it is found, as already pointed out by me, in the litigation of 1898 that the arrears have been wiped out, at any rate from that date the possession of the zamindar must be deemed to be wrongful and the cause of action would instantly accrue and the right to sue has therefore become barred. In my opinion the cause of action accrued to the zamindar even on the date of the resumption. Viewed from any stand-point, the plaintiff's claim appears to be hopelessly barred. The action seems to be purely a speculative one. The decisions of the lower Courts are right and the second appeal therefore fails and is dismissed with the costs of respondent 1. Leave to appeal refused.

C.R.K./S.C. *Appeal dismissed.*

5. Shivram Dinkar v. Secy. of State, (1887) 11 Bom 222.

6. Srinivasamoorthy v. Venkatavarada Aiyengar, (1911) 34 Mad 257=38 I A 129=11 I C 447=21 M L J 669 (P C).

A. I. R. 1938 Madras 299

PANDRANG ROW AND HORWILL, JJ.

Gudivada Rama Rao — Appellant.

v.

Pottiswami and others — Respondents.

Appeal No. 328 of 1931, Decided on 30th July 1937, against decree of Sub-Judge, Bezwada (Principal), D/- 30th November 1928.

Insolvency—Sale deed by Receiver of insolvent's family property—Insolvent father possessing power to sell son's share at time of vesting of property in Receiver—Consideration for sale representing value of whole property—Sale held of entire property including son's share.

The Official Receiver of an insolvent's estate has the power to sell the son's share of the family property when such power was possessed by the insolvent father at the time when the estate vested in him. But there is a difference between the mere existence of the power and the exercise of it. The mere existence of the power is not sufficient to show that in any particular case the Official Receiver had exercised it. [P 300 C 1]

Where the sale deed executed by the Official Receiver of an insolvent father's estate and the evidence of the purchaser showed that what was intended to be sold and purchased was the entire property for a consideration which represented the value of the whole property and not merely the insolvent's own half share after excluding the son's half share, and the Official Receiver had the power on that day to sell the son's share also:

Held that it must be deemed that the power to sell the son's share was exercised by the Official Receiver and that the sale was of the entire property : *A I R 1935 Nag 193, Expl.*

[P 300 C 1, 2]

Pandrang Row J.—This is an appeal from the decree of the Principal Subordinate Judge of Bezwada in O. S. No. 61 of 1927, a suit for recovery of possession of a certain house in Bezwada together with damages for use and occupation, the suit being brought by the plaintiff on behalf

of a certain charitable institution for which this house along with other property was purchased by the then Secretary of the institution from the Official Receiver of Guntur District in whom the estate of the insolvent in I. P. No. 42 of 1922 on the file of the District Court of Guntur had been vested. Defendant 2 in this suit, who is the appellant in this appeal, was a minor son of the insolvent at the time, and it is conceded on his behalf that at the time of the sale by the Official Receiver the latter had the power to sell the son's share as such power was vested in the insolvent father. The real question for decision in the appeal is whether this power to sell the son's share was actually exercised by the Official Receiver or whether what was sold by the Official Receiver was only the insolvent father's own half share in the house. This point was answered in favour of the plaintiff by the Court below and the appellant contends that this finding is wrong.

There is no doubt a difference between the existence of a power and its exercise, and, no doubt, the mere existence of the power will not be sufficient to show that in any particular case it was exercised. In this case however, the document itself executed by the Official Receiver shows that what he intended to sell was the entire property and not merely the insolvent's own half share. There is no reference to the insolvent's half share in the deed nor is there any reference to the son's share or even to the existence of a son. The schedule annexed to the sale deed Ex.A clearly describes the property as having certain boundaries and so on. In the body of the document, it is said that what is sold is the interest or right of the insolvent in the property described in the schedule, and there is the usual clause found in sale deeds executed by Official Receivers to the effect that the purchaser must take the risk of any defect in the title. It is well-known that the Receiver is bound by his duty to sell the entire property of the insolvent for the benefit of the creditors, and where, as in this case, the insolvent's property included not merely his own share but also the power to sell his son's share in respect of his antecedent debts not tainted by illegality or immorality, it would have been contrary to his duty for him to have sold only the father's half share. On the other hand, it is most unlikely that the purchaser, who was making the purchase on behalf of a charity, would have purchased a half share in the properties.

Apart from this question of probability, we have the evidence of the Official Receiver as well as that of the purchaser to show that it was the entire property that was intended to be sold and that was actually sold. Their evidence was accepted by the Court below, and we see no reason to take a different view of their evidence. Both of them are respectable persons and their evidence is perfectly in accord with probabilities. Their evidence is further corroborated by the sale notice issued by the Receiver which makes it clear that the entire property was to be sold. There is nothing in our opinion in the passages in Mayne's Hindu Law and Usage which were quoted before us from S. 321, Edn. 9 which really helps the appellant in this case. A I R 1935 Nag 193[1] also does not really assist the appellant. In that very case it is stated that it is open to the purchaser to give evidence as to what he thought he was purchasing, and that such evidence could be directed to show that the consideration represented the value of the whole property and not merely the father's share. Even from that point of view, it is clear that in the case before us what was sold was the entire property and not merely the father's share.

On the whole therefore we are unable to see any good reason for interfering with the finding of the learned Subordinate Judge on this point. No other point has been argued before us in this appeal which is accordingly dismissed with costs of respondent 1 (plaintiff). The court-fee payable on the memorandum of appeal must be paid by the appellant to the Government.

C.R.K./K.B. *Appeal dismissed.*

1. Fateh Chand v. Hiralal, A I R 1935 Nag 193=158 I C 599.

A. I. R. 1938 Madras 300

MADHAVAN NAIR AND KING JJ.

Thimmanna Bhatta and others — Appellants.

v.

Rama Bhatta and others — Respondents.

Appeal No. 547 of 1931, Decided on 25th August 1937, against decree of Sub-Judge, South Kanara, D/- 5th September 1935.

(a) Hindu Law—Alienation—Widow—Consent by reversioner is presumptive proof of necessity.

Consent of the reversioner to an alienation made by the widow is a presumptive proof of necessity and the presumption may be controverted by other evidence: *A I R 1918 P C 196 Ref.* [P 302 C 2]

(b) Hindu Law—Alienation—Widow—Suit to set aside alienation made long ago—Recitals in document are sufficient proof in its support—No recitals—Still necessity can be presumed.

The recitals in old documents are sufficient proof in support of the deed. Where the validity of an alienation made by a Hindu widow of her husband's property comes in question a long time after the alienation, so that it is impossible to ascertain what were the circumstances in which it was made, presumptions are permissible to fill in the details which have been obliterated by time and it is open to the Court to assume that the alienation was made for necessity so as to be valid even though the deed of alienation does not contain recitals of such necessity: *A I R 1916 P C 110 and A I R 1932 Mad 762, Rel. on.* [P 302 C 2]

B. Sitarama Rao — *for Appellants.*

K. Y. Adiga and K. P. Sarvothama Rao — *for Respondents.*

Madhavan Nair J.—The plaintiffs who are reversioners are the appellants and their suit was to set aside an alienation made by a widow (Ex. 3) in 1875. The facts are these: One Sham Bhatta died in or about the year 1870. He left behind him his minor son Narayana who died in 1874 when he was about eight years old, a widow Lakshmi, his mother Aithamma and his brother's widow Gangamma. Lakshmi died in or about the year 1913. In 1875, she sold the suit property (Ex. 3) to the father of defendant 1 and another. The present suit is to set aside the alienation. To examine the nature of the consideration for the sale, we have to refer back to two previous alienations with respect to this property made by Lakshmi in 1872 and 1874 under Exs. 1 and 2. The property consisted of land yielding 42 Muras of rice a year and also eight kandies of areca-nuts and 1000 cocoanuts. It is in evidence that on the whole, the income from that property at that time may be about Rs. 280. Ex. 1 was a mortgage with respect of some portion of the property in favour of Thimmanna Bhatta for Rs. 400. It was for discharging "my sundry debts incurred for building my house and for my family expenses". Ex. 2 was an Arwar for 50 years. This related to the entire property and this was in favour of Lakshmi's sister's husband and was for Rupees 1500. The consideration for this document is made up of as follows: (1) Rs. 400 for discharging Ex. 1, then (2) Rs. 635 in settlement of accounts in respect of sums borrowed for the medical treatment of her son Naraina who had been suffering from consumption for about two years, (3) Rs. 197 borrowed for future treatment of the same person, (4) Rs. 268 paid by the mortgagee to one Bhatta who had passed a receipt for the same. This must have been money borrowed by Lakshmi, (5) Payment of maintenance to Aithamma, Rs. 20 per year, and Gangamma at the rate of Rs. 28 per year. This document is attested by the plaintiff's father.

Then we come to Ex. 3, the suit document. Neither Ex. 1 nor Ex. 2 having been discharged, provision had to be made for the discharge of the same by this document. So item 1 of consideration was the payment of Rs. 1100 towards the discharge of Ex. 2, the second payment of Rs. 464 was for discharging Ex. 1. Item 3 consisted of Rs. 800. This was the consideration for the mortgage evidenced by Ex. 5 which we find from the document was executed for the benefit of Lakshmi. Item 4 was Rs. 27-9-7 to be paid by the vendees for assessment. Item 5, Rs. 72, was to pay to Govinda Bhatta for money borrowed by Lakshmi. Item 6 was a sum of Rs. 600 odd, received in cash for stamps, etc., for personal debts and for necessities. By item 7, the vendees agreed to pay Aithamma Rs. 67 per annum for her maintenance till her death as she, by that time, got a decree for that sum and a sum of Rs. 28 was agreed to be paid for maintenance to Gangamma till her death. This obligation was discharged by an actual payment of two sums of Rs. 500 to the two widows at the time of the execution of this document. Thus it may be said that the total consideration for Ex. 3 was Rs. 4000 which the learned Judge says, is not inadequate for the property. The plaintiffs' father, the then nearest male reversioner joined Lakshmi in executing this document. It is this document that is now called into question by the appellants.

It is argued generally that the consideration for the document is not binding, that Exs. 1 and 2 were executed by Lakshmi as the owner of the property which she was not and therefore these are not binding on the estate, that Lakshmi has no power to execute the same and that no

satisfactory and sufficient proof of necessity for executing the document has been made out. It is said that when Lakshmi got into possession of the property on the death of her husband, the property remained intact and unencumbered and within five years, it had vanished by these transactions. It is, therefore, stated that the dealings cannot in any way bind the reversioners. On the other hand, it is argued by the respondents that there is sufficient necessity to support the document that the consideration is binding on the estate and the general circumstances would also show that the transaction cannot be questioned at this distance of time. Before we examine the actual binding character of the considerations, we may point out certain general features of the case which will be useful in appreciating the arguments advanced before us. We have already stated that full consideration for the document has been paid. The document is a very ancient one. The suit was filed in 1923. Lakshmi is said to have died in or about 1913. From the evidence, it becomes clear that plaintiff 1 attained his majority in or about the year 1887. He could have instituted a suit for declaration that the alienation was not binding on him some time between 1887 and 1890. That has not been done in this case. If that had been done, the defendants would have been able to produce better and clearer evidence, with regard to the necessity before the lower Court. The father of defendant 1 died in 1919. He was one of the vendees of the properties. Though the plaintiffs failed to institute the suit as mentioned above between 1887 and 1890, plaintiff 1 might well have instituted the suit at least before 1919. If that had been done, the vendee himself could have been asked questions about the nature and the binding character of the transaction and other relevant facts in support of the same.

These circumstances put the present defendants under a serious disadvantage when they are asked to explain the binding character of a document as old as 1875. This further fact also may be mentioned, viz. in Ex. 2, the father of the present plaintiffs was an attestor and the last document, Ex. 3, as stated already, was signed by the plaintiffs' father. He was then the nearest male reversioner. In this connexion, we may refer to the decision of the Privy Council in 42 Mad 523.[1] It says that the consent of the reversioner to an alienation made by the widow is a presumptive proof of necessity. No doubt, this is only a presumption which may be controverted by the plaintiff by other evidence. We may also draw attention to the decision in 44 Cal 186[2] where it has been laid down that recitals in old documents are sufficient proof in support of the deed. In this case, the only evidence in support of necessity consists of the recitals in the document. The document being very old, we have to see whether the recitals therein afford sufficient proof in support of the debt. In 36 M L W 186,[3] it was held by this Court following a series of decisions that where the validity of an alienation made by a Hindu widow of her husband's property came in question a long time after the alienation so that it was impossible to ascertain what were the circumstances in which it was made, presumptions would be permissible to fill in the details which had been obliterated by time and it would be open to the Court to assume that the alienation was made for necessity so as to be valid even though the deed of alienation did not contain recitals of such necessity. Bearing these general features of the case in mind, we will proceed now to examine the evidence that this document affords with regard to necessity.

Exhibit 1 was executed to discharge sundry debts contracted by Lakshmi for construction of a house and also for her household expenses. No doubt, the document is executed by Lakshmi as the owner of the property but taking the document as a whole, it is clear that she is not asserting any right of hers, adverse to her son's rights. Her son was quite an infant at that time and she was looking after the property. Much therefore cannot be said with respect to the statement that it was her property. The question we have to consider is not whether Ex. 1 is enforceable but whether the consideration mentioned in it, the debts were justifiable

1. Rangaswami Gounden v. Nachiappa Gounden, (1918) 5 A I R P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).
2. Banga Chandra Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri, (1916) 3 A I R P C 110 =36 I C 420=43 I A 249=44 Cal 186 (P C).
3. Kumarasami Mudaliar v. Narayanasami, (1932) 19 A I R Mad 762=139 I C 766=36 M L W 186.

debts contracted by Lakshmi and whether those debts would be binding on the estate. If those debts were incurred by Lakshmi on behalf of her son, then, no exception can be taken to the binding character of the document. It has not been argued or even suggested that Lakshmi was leading an extravagant or a bad life. Her son was living with her and she was looking after him. The household expenses referred to in the document may well be taken to be expenses of the house which she kept for her benefit as well as for the benefit of her son. She certainly was entitled to maintenance from the estate as the widow of the last male holder. The construction of the house referred to may be taken to be that of a house constructed for being enjoyed by her son. In these circumstances, we do not think that there are any reasonable grounds to suspect the genuine and the binding nature of the recitals.

We now come to Ex. 2. The first item of consideration was for discharge of Ex. 1. The sum of Rs. 635 was in settlement of accounts in respect of sums borrowed for medical treatment of her son. This is certainly binding on the estate and Rs. 197 was borrowed for the future treatment of her son. This also falls into the same category. The next item is Rs. 263; it is said that the mortgagee was paid the money and he has passed a receipt for it but the receipt is not before the Court. There is no evidence to show that Lakshmi was incurring personal debts for private purposes. This sum may be taken to be mainly borrowed for binding purposes and for the benefit of her son or of herself as a member of the household. The next item relates to the payments of maintenance. The binding nature of these payments of maintenance to Aithamma and Gangamma cannot be questioned, and as we have already pointed out the father of the present plaintiffs was an attestor to this document. Next, we come to Ex. 3. The first two items refer to the discharge of Exs. 1 and 2, which had not been discharged. Item 3 is a consideration for a mortgage evidenced by Ex. 5 executed for the benefit of Lakshmi. The learned Subordinate Judge in para. 42 of his judgment says that:

> He is inclined to believe that this amount was given to her by way of making a provision for her maintenance. It is in evidence that Lakshmi ever after lived with her sister's husband and his sons and died while living with one of the latter.

As no other provision has been made for her, we may well agree with the Judge, that this amount was intended for her maintenance and if so, the validity and the binding character of it cannot be questioned. The sum of Rs. 29 was intended for paying assessment and the amount of Rs. 72 was to pay money borrowed by Lakshmi. Then, as we have already pointed out, two other items relate to maintenance, and these were commuted into a single money payment. The sum of Rs. 600-6-5 was for stamps, etc. Thus after an examination of the various items in detail as shown by the recitals, we are not satisfied that there is anything to show that these items of consideration are not binding on the estate. Though the estate had disappeared within about five years, we are not satisfied that the disappearance of it was brought about by the questionable management of the same by Lakshmi. She had to spend money for medical expenses on account of her son and she had also to conduct two litigations which we have not referred to till now. These suits were brought against her for maintenance. One was by Aithamma, the suit by which she obtained a decree for Rs. 67. The other suit by Gangamma did not proceed to its end but was compromised before the decree. This lady had also to meet the funeral expenses of her husband. The argument that she, being a young widow who was only about 27 years old at that time, probably was not able to manage the estate efficiently and that the estate was not therefore productive of full income is not also without force.

Taking all the above circumstances into consideration, we cannot say that the conclusion arrived at by the learned Subordinate Judge that Ex. 3 is a binding transaction is not justified by the evidence. We would, therefore, accept his finding that Ex. 3 is binding. The result is that the plaintiffs' suit is dismissed with costs throughout. As the suit is dismissed on this point, the other questions arising in the case need not be considered.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1938 Madras 304

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

Malayalam Plantations Ltd. —
Appellants.

v.

Nagasuri Veeraraghaviah —
Respondent.

Appeal No. 243 of 1932, Decided on 21st September 1937, against decree of Sub-Judge, Nilgiris, Ootacamund, in O. S. No. 43 of 1931.

Contract — Penalty — Owner of land selling mining rights over it — Covenant in sale deed providing that in case of default by vendor to pay assessment on land vendee by paying it should be absolute owner of property — Covenant held amounted to penalty and should be relieved against.

An owner of land sold mining rights over it. A covenant in the sale deed provided that the vendor should pay the assessment on the land and in case he committed default in any year the vendee or his heirs would on payment to Government of such land assessment be entitled to hold and possess with full and absolute rights the property in respect of which such payment had been made. The vendor committed default in payment of land assessment and the vendee on payment of the same brought a suit for declaration that he was an absolute owner of the property :

Held that the covenant was more or less a clause *in terorrem* and in the nature of a penalty which was out of proportion to the possible injury which the vendee might have suffered by reason of the non-payment of assessment. The covenant therefore should be relieved against. [P 305 C 1]

King and Partridge — *for Appellants.*

Vasudevan and Bhagavat —
for Respondent.

Venkataramana Rao J. — This is an appeal from the decree of the learned Subordinate Judge of the Nilgiris, Ootacamund giving a decree in favour of the plaintiff in terms of Para. 22 (a) of the plaint. The property belonged to one Percy Guard.

On 1st March 1901 he granted the mining rights in the suit property to one Walter Morres. Subsequently he sold all the mining rights to the plaintiff by a deed dated 1st June 1914. By a release deed of even date Walter Morres surrendered all his mining rights in favour of the plaintiff. The document executed by Percy Guard in favour of the plaintiff is Ex. A in the case. Percy Guard died somewhere about 1916 and letters of administration to his estate were granted to Walter Morres in 1917. As administrator he sold the property to the East India Tea and Produce Co. Ltd. which has since gone into liquidation and the rights of the East India Tea and Produce Co. Ltd. are now vested in the present defendants they having purchased the same in 1923.

One of the terms of Ex. A is that the owner of the property for the time being should pay the assessment on the land and that in case he commits default in any year the vendee, his heirs, executors, administrators and assigns will on payment to Government of such land assessment be entitled to hold and possess with full and absolute rights the property in respect of which such payment has been made. On 10th March 1918 there was default committed in the payment of land assessment. On 11th March 1918 the plaintiff wrote to the Tahsildar to find out if the assessment had been paid and on receiving information from him that it had not been paid himself sent the amount on 13th March 1918. A week thereafter (21st March 1918) the defendants also sent the amount of assessment but the revenue authorities declined to receive the said amount on the ground that it had already been received from the plaintiff. Subsequent to this payment, an order was made transferring the patta in the name of the plaintiff but later on representation made on behalf of the administrator the order were cancelled. Again under Ex. A the vendor for himself, his heirs, executors, administrators and assigns covenanted that he would do all such acts as may be required of him which are necessary for the purpose of getting the mining license in order to enable the plaintiff to carry on mining operations. This the defendants failed to do. Misunderstandings arose in consequence thereof. The ground of the misunderstanding seems to be that the Government insisted on the defendants making an initial deposit of Rs. 500 and executing an indemnity against all losses that may result in consequence of the mining operations that will be carried on by the plaintiff. The defendants seem to have called upon the plaintiff to make the said deposit and to execute the indemnity bond but the plaintiff declined. As a result of these misunderstandings, the plaintiff filed this suit for a declaration that by reason of the default committed by the defendants in the payment of land assessment under the terms of Ex. A he has become the absolute owner of the suit property on payment by him of the land assessment on 13th March 1918 as aforesaid or in the alternative to direct the

defendants to do all the necessary acts which are incumbent upon them to do to get the mining license and that he should not be called upon to pay the initial deposit or execute the indemnity bond.

The learned Subordinate Judge gave a declaration in favour of the plaintiff as prayed for on the ground that he had become the absolute owner by virtue of the covenant in Ex. A. It is against the said decision that the present appeal has been preferred by the defendants. It seems to us that the covenant in and by which the plaintiff should become the absolute owner of 200 acres of land by reason of any default in the payment of land assessment committed by the vendor or his executors, administrators and assigns appears to be more or less a clause *in terrorem* and in the nature of a penalty which is out of proportion to the possible injury which the plaintiff might suffer by reason of the non-payment. At the same time it must also be noted that the defendants were under the terms of the sale deed Ex. A bound to perform all that was required of them to get the mining license in favour of the plaintiff and that they were not justified in calling upon the plaintiff to pay the initial deposit and to execute the indemnity bond because the Government made a demand upon them. The plaintiff is really anxious that he should be allowed to carry on the mining operations and that the defendants themselves should give him all facilities in order to enable him to do so and he has before us stated that he would be content if those rights are secured in his favour by a decree in the alternative as prayed for in para. 22 (b) of the plaint. It seems to us that the offer is a very reasonable one and it has been agreed to by Mr. O. T. G. Nambiar on behalf of the defendants-appellants.

We therefore set aside the decree of the lower Court and pass a decree in terms of prayer (b) of para. 22 of the plaint directing the defendants to make the necessary application to the revenue authorities and to do all acts required of them to secure to the plaintiff a proper mining lease to carry on mining operations on the suit lands. We also wish to make it clear that the plaintiff will not be called upon by the defendants to pay the initial deposit or execute any indemnity bond, a condition of the defendants securing the lease for the plaintiff. We direct the appellants to pay half the costs of the appeal to the respondent. The order as to costs made by the Court below will stand. The decree will also direct the appellants-defendants to pay the respondent plaintiff Rs. 292 being the assessment paid by the plaintiff in respect of the suit property.

C.R.K /D.S. *Decree set aside.*

A. I. R. 1938 Madras 305

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Kambham Kaveri Rangiah Chetty and others — Appellants.

v.

Khaji Syed Hassumiah and others — Respondents.

Appeal No. 242 of 1932, Decided on 13th September 1937, against decree of Dist. Court, Cuddapah, in O. S. No. 24 of 1929.

High way—Right of community to use public street for procession with music — Order excepting music during hours of public congregational worship of Muslims is proper, if exception is confined to particular neighbourhood of mosque.

Any community can use a public street for processions attended with music provided that they do not thereby cause a disturbance to any other community when assembled for prayer or worship. [P 306 C 1]

Where therefore in a suit by the Hindus of a village for a declaration of their right to go in procession through public streets attended with music the Court passes an order entitling them to such right except during the hours of public congregational worship in the mosque, the order is proper except that it should limit that exception to the neighbourhood of the mosque prescribing a certain radius with the mosque as the centre inside which there should be no music during such hours of public congregational worship, as to play music when such worship is going on would practically amount to an offence under S. 296, Penal Code, and would certainly be a serious invasion of the Mahomedans' right to engage in public congregational prayer without disturbance: *2 Mad 140; A I R 1925 P C 36 and A I R 1931 All 341, Rel. on.* [P 306 C 2]

B. Somayya and S. Subramania Sastry — *for Appellants.*

B. Pocker and K. T. M. Ahmed Ibrahim — *for Respondents.*

Pandrang Row J. — This appeal arises out of a dispute between the Mahomedans and Hindus of Muddanur in the Cuddapah District, the Hindus being the plaintiffs who sued for a declaration of

their right to carry in procession their idols with the usual accompaniments through the public streets of the village attended with music and also their right to go in procession on occasions of marriage, etc., with music. The suit was one of the usual type that comes to Courts now and then when the two rival communities claim protection from each other and cannot bring themselves to respect each other's feelings. The law is fairly well settled as regards the rights of the different communities in this matter and the rights which the law will recognize and declare have been clearly laid down from 2 Mad 140[1] onwards. It is enough to refer to the decision of the Judicial Committee in 47 All 151[2] and the discussion of the general principles contained in a later Allahabad case, 53 All 484.[3] Generally speaking, the law laid down by this High Court was accepted by the Privy Council as correct.

There is really no dispute about the facts in this case and the rights of the parties are equally not in dispute, for the law is well settled. Any community can use a public street for processions attended with music provided that they do not thereby cause a disturbance to any other community when assembled for prayer or worship. In this connexion, reference may be made to S. 296 and 298, I. P. C. The decree by the Court below, i.e., the District Judge of Cuddapah, is to the following effect :

(1) that the plaintiffs are entitled to carry in procession the idols of their gods and sudibandies and panyaram, carts, etc., through all the public streets of Muddanur attended with music of all kinds on all lawful and customary occasions of feasts or festivals, whether synchronizing with the Muburrum or not, and are entitled also to go in procession on occasions of marriage and other events in the public streets attended with music of all kinds, except during the hours of public congregational worship in the mosque according to the Islamic religion, and subject to any lawful orders or directions by the Magistrates or the police for preventing breaches of the public peace or obstructions of the thoroughfares or for other matters mentioned in S. 144, Criminal P. C. and under other statutory provisions for regulation of traffic ;

(2) that the defendants and other Mahomedans of Muddanur are hereby restrained by means of a permanent injunction from objecting and obstructing or otherwise interfering with the exercise of the abovesaid rights by the plaintiffs and other Hindus of Muddanur.

The appellants who are the Hindu plaintiffs object to the inclusion of the words in the decree, viz. " except during the hours of public congregational worship in the mosque according to the Islamic religion ". They further contend that the exception should be confined only to music in front of the mosque and not anywhere else in any public street. There is a memorandum of cross objections filed by the Mahomedan respondents and their complaint is that congregational worship goes on throughout all hours of the day and night, and that music should be stopped in the front of the mosque at all times and not merely during particular hours. Apparently both parties would prefer the times of the congregational worship to be prescribed in the decree if music is to be prohibited only during the hours of public congregational worship, but there is no evidence in the record of the case which would permit the determination of these hours nor can the parties agree before us as to what the hours are or should be. It is therefore not possible for us to be more particular than the Court below has been in fixing the intervals during which music should not be permitted in the neighbourhood of the mosque.

So far as the objection of the appellants is concerned to the exception introduced in the decree, we are of opinion that the objection taken is not sound, for, it is clear that to play music when public congregational worship is going on in the mosque would practically amount to an offence under S. 296, I. P. C. and would certainly be a serious infraction of the Mahomedans' right to engage in public congregational prayer without disturbance. We therefore think that the learned District Judge was right in introducing the exception, though he should have limited that exception to the neighbourhood of the mosque prescribing a certain radius with the mosque as the centre inside which there should be no music during the hours of public congregational worship in the mosque. As the decree stands, the exception reads as if while public congregational worship is going on in the mosque, no procession with music could go along any public street anywhere. This was obviously not meant by the

1. Muthiahlu Chetty v. Bapu Sahib, (1878) 2 Mad 140.
2. Manzur Hasan v. Muhammad Zaman, (1925) 12 A I R P C 36=86 I C 236=52 I A 61=47 All 151 (P C).
3. Muhammad Jalil Khan v. Ram Nath Katua, (1931) 18 A I R All 341=131 I C 40=53 All 484=1931 A L J 354.

learned District Judge, and even if he did mean it, there is no justification for prohibiting music everywhere in the village. The complaint of the Mahomedan respondents has no doubt a certain amount of practical common sense behind it in view of the fact that it would not be easy in a village like Muddanur to know exactly when public congregational worship is going on and there might be some difficulty in the way of the police protecting the rights of the one community from attacks by the other community. Nevertheless, though there is something to be said in support of the suggestion of the respondents, viz. to prohibit music in front of the mosque at all times, as a practical solution of the ever-recurring disputes that occur between the two communities, it is not possible to give a judicial *imprimatur* to such a solution as that would be inconsistent with the law as laid down for very many years. It is therefore impossible in view of the existing state of the law to prohibit music at all times in front of the mosque. Such a suggestion was considered in more than one case and was negatived, and we are unable to give effect to it as the law stands at present. It therefore follows that the only change that has to be made in the decree of the Court below is to make it clear that the exception contained in the decree is limited only to a certain area round the mosque. We consider, in the circumstances, that if the exception is made to operate, "within the area constituted by a circle drawn round the mosque building proper of a radius of 50 yards (the centre of the mosque being treated for this purpose as the mosque)", it would, in all probability, prevent any real disturbance of public congregational worship in the mosque. The words enclosed in the inverted commas in the preceding sentence will therefore be inserted in the decree after the words " the Islamic religion. "

Subject to the above modification in the decree, both the appeal and the memorandum of cross objections are dismissed; in the circumstances of the case, the parties will bear their own costs.

V.B.B./R.K. *Order modified.*

---

* A. I. R. 1938 Madras 307

BURN AND LAKSHMANA RAO JJ.

Pandivi Satyanandam and others — Appellants.

v.

Paramkusam Nammayya and another — Respondents.

Appeals Nos. 304 of 1934 and 9, 81, 82, 92, 291 and 409 and Civil Revn. Petns. Nos. 328 and 331 of 1935, Decided on 6th October 1937, against order of Dist. Court East Godawari at Rajahmundry, D/- 17th March 1934.

* (a) Stamp Act (1899), Ss. 2 (15), 35, 36 and 37—Decree in suit for partition of joint family directing payment of specific sums to individual members — Payment to be made from joint family fund or out of proceeds of sale of joint property—Decree amounts to final order effecting partition and falls within S. 2 (15) — It cannot be executed by Civil Court unless engrossed on proper non-judicial stamp paper—Fact that decree does not finally divide whole of joint family property is immaterial—Mere fact that decree has been acted upon for over two years does not preclude objection to its executability on ground of want of proper stamp — Decree and proceeding thereunder cannot become validated with retrospective effect on production of proper stamp — Case is governed by S. 35—Ss. 36 and 37 do not apply.

Where a decree in a suit for partition of joint family property directs payment of specific sums to individual members of the joint family, and the payments are to be made out of the joint family funds or out of the proceeds of the sale of the joint family property, the effect of the provisions is that the properties which were joint properties are divided among the members of the joint family and the decree amounts to a final order of a Civil Court for effecting a partition and falls strictly within the terms of S. 2 (15) Stamp Act, and cannot be acted upon i.e. executed by any Civil Court unless it is engrossed on a proper non-judicial stamp paper. The fact that the decree does not finally divide the whole of the joint family property is immaterial, for, a decree may be partly preliminary and partly final. So also, the mere fact that the decree has been acted upon and executed for over two years does not preclude a subsequent objection to its executability on the ground that it has not been properly stamped. The case is governed by S. 35 and not by S. 36, which deals only with the admission of instrument in evidence. [P 311 C 1, 2]

The decree and the proceedings taken thereunder cannot become validated with retrospective effect on the production of the proper non-judicial stamp. S. 37, Stamp Act, does not apply to the case. A final decree for partition has no existence as a decree until it is engrossed on proper non-judicial stamp paper : *32 Cal 483, Rel. on.* [P 312 C 1]

(b) Civil P. C. (1908), O. 47, R. 1 — Court executing decree not deciding point raised by

judgment-debtor that decree is not executable for want of engrossment on non-judicial stamp — Omission amounts to "other sufficient cause or reason"—Order of executing Court is open to review.

When a Court executing a decree omits to decide a point raised on behalf of the judgment-debtor that the decree .is not executable for want of engrossement on a non-judicial stamp, the omission amounts to "other sufficient cause or reason" within the meaning of O. 47, R. 1, even if it does not constitute a "mistake or error apparent on the face of the record". The order of the executing Court is open to review, and an order granting a review is not wrong in law. [P 312 C 1]

*** (c) Civil P. C. (1908), O. 47, R. 1—Application for review made—Subsequent filing of appeal does not render it incompetent — Application granted during pendency of appeal—Appeal cannot be heard and must be dismissed.**

When an application for review has been made the subsequent filing of an appeal will not render the application for review incompetent. But if the application for review is granted during the pendency of the appeal, the appeal cannot be heard and must be dismissed, the order appealed from having been superseded by the order passed after review : *32 Mad 416 (F B) and 28 All 240, Rel. on.* [P 312 C 2]

(d) Execution—Validity — Decree in partition suit, in substance, a final order effecting partition - Decree not engrossed on proper non-judicial stamp is not valid — Sale in execution of such decree is nullity and passes no title to auction-purchaser.

Where a decree in a partition suit which is in substance a final order effecting partition is not engrossed on a proper non-judicial stamp, there is no valid decree in existence and the Court has no jurisdiction to sell any property in the execution proceedings. If such a sale takes place, the whole of the sale proceedings are a mere nullity and the sale passes no title to the auction-purchaser. [P 312 C 2]

(e) Civil P. C. (1908), O. 43, R. 1 and S. 115 —Order rejecting auction-purchaser's application for confirmation of sale.

An order rejecting an auction-purchaser's application for confirmation of sale in his favour is not an appealable order nor can it be revised. [P 312 C 2]

(f) Civil P. C. (1908), S. 47 — Decree in partition suit not engrossed on proper non-judicial stamp — Decree-holder applying to executing Court for having decree engrossed on proper stamp—Order of executing Court is not one under S. 47.

Where a decree in a suit for partition is not engrossed on a proper non-judicial stamp paper and the decree-holder applies to the executing Court to have the decree engrossed on a proper non-judicial stamp, an order passed by the Court on the application is not one under S. 47, Civil P. C., and no appeal lies from it. [P 313 C 1]

V. Suryanarayana and K. Kameswara Rao — *for Appellants.*

G. Lakshmanna, G. Chandrasekhara Sastri, B Somayya and M. S. Ramachandra Rao— *for Respondents.*

Burn J.—These appeals and C. R. P. No. 331 of 1935 arise out of orders passed by the learned District Judge of East Godavari and the Principal Subordinate Judge, Ellore, in the course of proceedings taken in execution of the decree in O S. No. 18 of 1928 on the file of the Sub-Court Ellore. The suit was for partition of joint family property, but besides the members of the joint family, many persons were impleaded as defendants on the allegation that they were in possession of joint family properties, moveable and immovable. On 16th September 1930, the Subordinate Judge passed a "preliminary decree", and this was transferred for execution to the District Court of East Godavari. In that Court, three applications for execution were put in by the plaintiff and defendant 5, against defendants 40-43. The first was E. P. No. 151 of 1931 by the plaintiff, presented on 6th October 1931, in which he prayed for arrest of defendants 40-43, and for attachment and sale of their moveable and immovable properties to realize the balance due to the plaintiff under the decree of 16th September 1930 It is clear, though the papers are not before us, that in pursuance of this petition certain moveable and immovable properties were brought to sale, for, on 16th November 1931, defendant 5, (a brother of the plaintiff and defendant 1) presented E. P. No. 167 of 1931 against the same judgment-debtors, praying for attachment and sale of immovable properties, for his rateable share in the proceeds of the sale of the moveable properties attached by the plaintiff in E. P. No. 151, and for the appointment of a Commissioner to collect the entire income from the properties of the judgment-debtors. The third execution petition was E. P. No. 76 of 1934, by defendant 5 against the same judgment-debtors praying for the attachment of a sum of about Rs. 12,000, said to be in deposit in O. S. No. 62 of 1926 on the file of the Sub-Court, Rajahmundry.

The principal question for decision in these appeals is whether the decree of 16th September 1930 was executable, or whether it was a mere decree on paper, which could not be executed because it had not been engrossed on a non-judicial stamp paper. This question was not raised by defendants 40-43 till 14th March 1934, more than two years after the filing of E. Ps. 151 and 167 of 1931. It was then

raised in E. A. No. 77 of 1934, an application under S. 47, Civil P. C., in which defendants 40.43 prayed for the dismissal of E. P. No. 151 of 1931 on the ground that there was not in existence a valid and legal decree engrossed on a proper non-judicial stamp paper. The learned District Judge, Mr. P. T. Jagannadhachariar, dismissed this application on 17th March 1934 in a short order:

This application was apparently put in under a misapprehension. What was transmitted to this Court for execution was the preliminary decree dated September 1930 and not the final decree. Execution has been going on from 1931. Petition dismissed.

A. A. O. No. 304 of 1934 is filed by defendants 40, 42 and 43 from this order. Having dismissed E. A. No. 77 of 1934, the District Judge ordered execution to proceed, and certain properties of defendants 40.43 were sold at Court-auction on 17th March 1934. On 6th April 1934, defendants 40 43 presented two petitions to the District Judge, E. A. Nos. 107 and E. A. No. 108 of 1934. In the first, they prayed for restoration to the file of E. A. No. 77 of 1934, and for review of the order passed thereon. In the second they applied under O. 21, R. 90, Civil P. C., for the setting aside of the sale. By the time these came on for hearing, Mr. P. T. Jagannadhachariar had been succeeded in the office of District Judge by Mr. P. Rajagopalan, I. C. S., who took a very different view. He allowed E. A. No. 107 of 1934 reviewed his predecessor's order and on 6th September 1934 passed an order accepting the contentions of the judgment-debtors. He held that the decree of 16th September 1930 was a final order for partition within the meaning of S. 2 (15) of the Stamp Act. It followed that it could not be acted upon, i. e. executed by by any Civil Court (S. 35 of the Stamp Act). A. A. O. No. 9 of 1935 is filed by the plaintiff from this order. There are thus two appeals by opposing parties from two contradictory orders passed by two District Judges on the same petition.

Without delay the plaintiff went to the Court which had passed the decree, and on 17th September 1934, he applied in E. A. No. 279 of 1934 to the Subordinate Judge, Ellore, for orders on the question whether any and if so what non-judicial stamp was to be paid for by the plaintiff, and for orders to receive from the plaintiff whatever stamp was necessary, and to have the decree engrossed thereon. The Principal Subordinate Judge allowed the plaintiff's request, and directed his office to determine the value of the stamp in a week, allowing the parties in whose favour a decree had been given 15 days time to produce the required non-judicial stamps. A. A. O. No. 81 of 1935 is preferred by defendants 40.43 from this order. The Subordinate Judge's order was obeyed without delay but the learned District Judge of East Godavari held that the engrossing of the decree on the proper stamp paper after 17th September 1934, could not validate any proceedings taken in execution theretofore. Acting on this view, he dismissed E. P. No. 151 of 1931 on 15th November 1934, and A. A. O. No. 291 of 1935 is the plaintiff's appeal from that order of dismissal. For the same reasons the learned District Judge on 30th November 1934 dismissed the two execution petitions of defendant 5, E. P. No 167 of 1931 and E. P. No. 76 of 1934. A. A. O. No. 94 of 1935 and A. A. O. No. 409 of 1935 are defendant 5's appeals from those orders. The last petition with which we have to do is E. A. No. 293 of 1934 presented on 19th November 1934, by a purchaser at the auction held on 17th March 1934 of some of the properties of the judgment-debtors. He brought to the notice of the Court that the decree had by that time been engrossed on a non-judicial stamp. He requested the District Judge to hold that the decree had thereby been validated with retrospective effect, and accordingly to confirm the sale in his favour. The District Judge disposed of this petition and I. A. No. 108 of 1934, (the judgment-debtor's application under O. 21, R. 90), in one order on 27th November 1934. He directed that both should be "struck off the file" on the ground that E. P. No. 151 of 1931 had been dismissed. This dismissal, the learned District Judge held, rendered E. A. No. 108 of 1934, superfluous, and made it impossible to comply with E. A. No. 293 of 1934. From the order striking off E. A. No. 293 of 1934, the auction-purchaser has preferred A. A. O. No. 82 of 1935; he has also, in C. R. P. No. 331 of 1935, prayed that the order of the District Judge may be revised under S. 115, Civil P. C.

Several interesting questions arise for decision, of which the most important, as already observed, is what is the nature of

the decree passed in O. S. No. 18 of 1928 on 16th September 1930. Mr. Jagannadhachariar, without apparently giving the matter much consideration, remarked that it was the preliminary decree and not the final decree. How a mere preliminary decree in a suit for partition could be executable, he did not explain; he seems to have been satisfied that it could, because execution had been going on for over two years. Mr. Rajagopalan, on the other hand, held that the decree, though it styles itself as a preliminary decree, was a final order for effecting a partition within the meaning of S. 2 (15), Stamp Act. Mr. Suryanarayana, who appears in these appeals for the plaintiff, and Mr. Kameswara Rao, who appears for defendant 5, also for the auction-purchaser, contend that in so far as it is a decree for partition, it is only a preliminary decree. They would say that it is only a final decree in so far as it decides the liabilities of the debtors of the joint family to the joint family. According to this view, the executing Court was not asked to act upon the decree in its character of a decree for partition, but merely in its character of a decree for payment of money to the family. Mr. Somayya, who appears for defendants 40.43, supports the decision of Mr. Rajagopalan. It is necessary at this point to examine the decree, and in particular those portions of it which the plaintiff and defendant 5 have attempted to execute. The decree begins with an order that certain immovable properties be divided into four equal shares, and that the plaintiff, defendant 1, defendant 10, and defendant 11, do each get possession of one such share. It goes on to give directions regarding the manner in which the partition of those properties shall be made and the various members of the family to whom certain items shall be allotted. It then declares that certain questions between the members of the family and some defendants who were occupying lands belonging to the family, and certain questions between the members of the family inter se, shall be reserved for decision in separate suits. Next, the decree directs certain payments to be made to the plaintiff by other members of the family, defendants 1-5. Then we come to the terms with which these appeals are concerned, viz. the clauses directing defendants 40.43 to pay certain sums to the plaintiff, defendant 1 and defendant 5, after deducting certain sums due to them from the plaintiff and defendant 1. It will be convenient to set out these clauses of the decree in full. They are as follows:

(13) That the plaintiff and defendant 1 do each get from defendants 40-43 half of Rs. 1,30,493, being the sum shown as balance in the three names katha, and interest thereon from 14th February 1926, and that the plaintiff and defendant 1 do each get from defendants 40.43 half of Rs. 31,895-11-7, being the balance under No. 2 Venkayya katha and interest thereon from 6th October 1925.

(14) That plaintiff, defendant 1 and defendant 5 do each get from defendants 40.43 one-third of Rs. 43,145-4-9, being the sum shown as balance in Sesha Rao's katha and interest thereon from 31st March 1925.

(15) That defendants 40.43 do deliver to each of plaintiff and defendant 1 half of the timber shown as balance under No. 2 Venkayya katha or their value, Rs. 6730, and interest thereon from 25th February 1925.

(19) That defendants 40.43 do recover from plaintiff Rs. 87,910-7-10, being the amount of debt payable by him under No. 1 Venkayya katha, and interest thereon from 14th March 1926.

(20) That defendants 40.43 do recover from defendant 1 personally and from the family properties of defendants 2 to 4, the sum of Rs. 98,777-2-10, being the balance of debts still payable under No. 1 Venkayya katha, after deduction of the sum payable by plaintiff as per para. 19 supra, and interest on the said sum of Rupees 98,777-2-10 from 14th March 1926.

(21) (This clause provides for interest on the sums due to the plaintiff, defendants 1, 5, and 40.43.)

(22) That defendants 40.43, do deposit into Court or pay plaintiff and defendant 1 and defendant 5 the sums due to each of them under the three names katha, No. 2 Venkayya katha and Sesha Rao's katha, after deducting what is due to them from plaintiff and defendant 1 respectively with reference to No. 1 Venkayya katha.

The remaining clauses are concerned with the appointment of a Commissioner to determine the amounts due to the several parties under clauses 9(a) to 9(d), 10(a) to 10(d), 12(a) to 12(c) and 16 to 18,

with directions to the Commissioner, the remuneration of the Receivers and the Commissioner, and the court-fees payable to Government. It is clear that the clauses of the decree extracted above are on the face of them executable provisions. It is also clear that they are not directions for payments to be made by strangers to the joint family as a whole. They are directions for the payment of the specific sums to individual members of the joint family. And there is no gainsaying the statement of defendants 40-43 that these payments are to be made out of moneys that were before the suit joint family property, or out of the proceeds of the sale of joint family property. The effect of these provisions in the decree therefore is that properties which were joint properties are divided amongst the members of the family who were the co-owners. There is nothing more that the Court which tried the suit can do to divide these joint properties. The learned District Judge (Mr. Rajagopalan) was undoubtedly justified in relying on the decision of Bakewell J. in 35 Mad 26,[1] where the distinction between a preliminary and a final order for partition is explained. The learned advocates for the plaintiff, defendant 5 and the auction-purchaser have not been able to adduce any arguments or authorities to show that the learned District Judge was wrong. We agree with his conclusion that the decree in this case is a final order of a Civil Court for effecting a partition, and that it falls strictly within the terms of S. 2 (15), Stamp Act. That the decree does not finally divide the whole of the joint family property is quite immaterial. As the learned District Judge has observed, the Explanation to the definition of "decree" in S. 2 (2), Civil P. C., shows that a decree may be partly preliminary and partly final. It is not necessary to cite authority for this, or to refer to cases in which this distinction has been acted upon.

The next question discussed by Mr. Suryanarayana for the plaintiff has reference to S. 36, Stamp Act. He contends and Mr. Kameswara Rao supports him on behalf of defendant 5 and the auction-purchaser, that it is now too late for defendants 40-43 to object to the execution of the decree. Even if it be held, as we do hold, that the decree of 16th September 1930 was an instrument of partition and as such not executable unless engrossed on a non-judicial stamp of the proper value, the decree was in fact acted upon and executed for over two years, and S. 36, Stamp Act, it is contended, precludes any subsequent objection to its execution on the ground that it has not been properly stamped. This contention, we are satisfied, is baseless. S. 36 deals only with the admission of instruments in evidence. There is no question here of admitting the decree of 16th September 1930 in evidence; the question is one of executing the decree. The provision applicable is S. 35, Stamp Act, which provides that:

> No instrument chargeable with duty shall be . . . . acted upon . . . . by any public officer, unless such instrument is duly stamped.

For our present purpose, the important words in the section are "acted upon." The only way in which a decree of this kind can be acted upon is by execution. The District Court of East Godavari did not admit the decree in evidence; it was never asked to admit it in evidence. What the plaintiff and defendant 5 wanted was that it should be put in execution, i. e. of acted upon, and that was what the District Court did until Mr. Rajagopalan pointed out that it could not be done.

Another contention put forward on behalf of the plaintiff, defendant 5 and the auction-purchaser is that when the Principal Subordinate Judge of Ellore on 5th October 1934 directed the proper non-judicial stamp to be produced, and had the decree engrossed thereon, the decree became validated with retrospective effect from the date on which it had been passed. Consequently, it is urged, all the proceedings taken in execution of the decree also became validated. This contention also is devoid of substance. S. 37, Stamp Act, is invoked, but it obviously has no application; this is not a case in which an instrument has been written on a stamp of sufficient amount but of improper description. There is no provision of law which could validate this decree with retrospective effect. As Mr. Somayya points out, S. 42 (2), Stamp Act, merely provides that when the duty leviable upon an unstamped or insufficiently stamped instrument has been paid, and the instrument has been endorsed, the instrument shall thereupon be admissible in evidence.

1. Thiruvengadathan Aiya v. Mangayya, (1912) 35 Mad 26=12 I C 775.

and may be acted upon. In terms this provision is not retrospective. It is well settled that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper; till that is done the suit is pending: *vide* 32 Cal 483.[2]

A subsidiary point taken in A. A. O. No. 9 of 1935 is that the District Judge, Mr. Rajagopalan, had no jurisdiction to review his predecessor's order dated 17th March 1934 on E. A. No 77 of 1934; or, if he had jurisdiction, his order granting review was contrary to law. The first contention is apparently based on R 2, O. 47, Civil P. C. but it cannot be upheld; the application of review was made to Mr. Jagannadhachariar and notice of it was given by him. There has been no appeal from Mr. Rajagopalan's order granting a review. That does not by itself preclude Mr. Suryanarayana from showing that it is wrong in his appeal from the final order passed after the review was granted: vide R. 7, O. 47. But Mr. Suryanarayana has not attempted in argument to show exactly why he contends that Mr. Rajagopalan had no jurisdiction, nor why his order was illegal From the unofficial typewritten copies produced by Mr Suryanarayana at the time of hearing, it would seem that Mr. Rajagopalan granted the review because his predecessor had not decided the only point of importance put forward by the petitioners in E. A. No. 77 of 1934. The point raised was that the decree was not executable for want of engrossment on a non-judicial stamp Mr. Jagannadhachariar did not say a word about this in his order of 17th March 1934. This omission would clearly amount to "other sufficient reason" under R. 1, O. 47, even if it did not constitute a "mistake or error apparent on the face of the record." It is therefore impossible for us to hold either that Mr. Rajagopalan had no jurisdiction, or that his order granting a review was wrong in law.

Mr. Somayya, for the 40.43 judgment-debtors, contended that it was a matter of little or no importance, whether Mr. Rajagopalan had or had not jurisdiction to review his predecessor's order in view of the fact that his clients had preferred an appeal (A. A. O. No. 304 of 1934) from the order which was reviewed. The application for review of Mr. Jagannadhachariar's order of 17th March 1934 was filed on 6th April 1934; the appeal from the same order was presented in this Court on 16th July 1934. Now it is well settled that when an application for review has been made, the subsequent filing of an appeal will not render the application for review incompetent: *see* 32 Mad 416.[3] But, if the application for review is granted during the pendency of the appeal, the appeal cannot be heard and must be dismissed. The reason is obvious; the order appealed from has been superseded by the order passed after review: 28 All 240.[4] It remains to dispose of the contentions of the auction-purchaser (appellant in A. A. O. No. 82 of 1935). Mr. Kameswara Rao argues that the auction-purchaser, having bought at the sale held by the Court, with no reason to suppose that there was anything lacking in the Court's power to sell, and having paid value, must be protected. He relies on the Privy Council cases reported in 14 Cal 18[5] and 25 Bom 337.[6] Those cases have no application to this. In both, it is clear that the executing Court had jurisdiction to sell. Here the whole point is that there was no decree in existence at the time of sale, and that consequently the whole of the sale proceedings was a mere nullity. There is therefore on the merits nothing in A. A. O. No. 82 of 1935 and C. R. P. No. 331 of 1935. Technically also the appeal and the C. R. P. are incompetent. There is no provision in the Code of Civil Procedure for an application by the auction-purchaser for confirmation of the sale; confirmation follows automatically under R. 92 (1) and the setting aside of the sale follows automatically, under R. 92 (2) of O. 21. An order rejecting an auction-purchaser's application for confirmation of the sale is not an appealable matter, nor can it be revised. It is very unfortunate for the purchaser that he should have been misled by the action of the Court into paying down his money, and leaving it lying idle for such a long period, but it is quite impossible to confirm the sale in his favour.

A. A. O. No. 18 of 1935 is clearly incompetent. The application, E. A. No 279 of

2. Jotindra Mohan Tagore v. Bejoy Chand, (1905) 32 Cal 483.

3. Chenna Reddi v. Peddaobi Reddi, (1909) 32 Mad 416=2 I C 802=19 M L J 388 (F B).
4. Kanhaiya Lal v. Baldeo Prasad, (1905) 28 All 240=1905 A W N 265.
5. Rewa Mahton v. Ram Kishen Singh, (1887) 14 Cal 18=13 I A 106=4 Sar 746 (P C).
6. Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=7 Sar 739 (P C).

1934, to the Subordinate Judge of Ellore, was a mere reminder to the Court to do a duty incumbent on the Court, viz. to see that the decree was engrossed on a proper non-judicial stamp. This has nothing to do with the execution, discharge or satisfaction of the decree, and the Subordinate Judge's order is not one under S. 47, Civil P. C. The learned Subordinate Judge has made a somewhat obscure reference to the doctrine of "*nunc pro tunc*" which we do not altogether understand. If he meant to imply that the decree after engrossment on the proper stamp could or would become validated with effect from the date, 16th September 1930, he was clearly wrong. We have already indicated that the decree only came into existence as a decree on the date on which it was engrossed. The learned District Judge (Mr. Rajagopalan) was wrong in holding that E. P. No. 151 of 1931 "must be deemed to have been dismissed on 6th September 1934." The E. P. was not before the learned District Judge on 6th September 1934 when he disposed of E. A. No. 77 of 1934. Actually, the learned District Judge dismissed E. P. No. 151 of 1931 on 15th November 1934 as appears from the concluding sentence of his judgment, and from the decretal order passed in pursuance of it. This order is correct, if based upon the view that the decree which was to be executed was the decree engrossed on a non-judicial stamp, no copy whereof had been produced before, or transmitted to the District Judge, East Godavari. It would be incorrect if based on the ground that E. P. No. 151 of 1931 must be deemed to have been dismissed on 6th September 1934, but we must decline to interfere with it, since it is quite possible to read the learned District Judge's judgment as basing it on the proper ground, viz. that a certified copy of the decree had not been produced (vide O. 21, R. 11 (3), Civil P. C.).

We proceed to pass orders on the matters before us in the light of these conclusions. A. A. O. No. 304 of 1934 is dismissed with the costs of respondent 1 (plaintiff.) A. A. O. No. 9 of 1935 is dismissed; we make no order as to costs, because the respondents were unduly dilatory in raising the contention that the decree could not be executed. A. A. O. No. 81 of 1935 is dismissed with costs. C. R. P. 328 of 1935 also is dismissed. A. A. O. No. 291, 94 and 409 of 1935 are dismissed; as in A. A. O. No. 9 of 1935 we make no order as to costs. A. A. O. No. 82 of 1935 and C. R. P. No. 331 of 1935 are dismissed. The parties will pay their own costs in these.

C.R.K./R.M. *Orders accordingly.*

A. I. R 1938 Madras 313

VENKATASUBBA RAO
AND ABDUR RAHMAN JJ.

Rarichan — Appellant.

v.

M. R. Anantanarayana Aiyar — Respondent.

Letters Patent Appeal No. 27 of 1936, Decided on 2nd December 1937, against order of Burn J., D/. 18th February 1936.

Civil P. C. (1908), O. 41. R. 10—Appellant minor and pauper but mere creature in hands of persons able to find security — Order for security for costs can be made.

Where the appellant is minor and also pauper but is a mere creature in the hands of persons well able to find security, an order directing the appellant to furnish security for costs can be made. [P313 C 2]

S. Venkatachala Sastri — *for Appellant.*

C. S. Swaminatha Aiyar — *for Respondent.*

Order. — In exceptional circumstances, it has been laid down, an infant plaintiff can be called on to furnish security for costs: 18 M L J 155.[1] In the case of a pauper appellant again, it has been uniformly held in this province (though a different view prevails in the other Courts) that if special grounds are shown, he can be required to find security: 3 Mad 66[2], 43 Mad 902,[3] 56 Mad 323[4] and 1931 M W N 1157.[5] Thus the fact that the appellant here is both a minor and a pauper, does not by itself entitle him to resist the application. In this case the effect of Burn J.'s order is that the minor pauper is a mere creature in the hands of persons well able to find security. This being so, the learned Judge's order is confirmed and the Letters Patent appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

---

1. Mani Bai v. Lodd Govind Doss, (1908) 18 M L J 155.
2. Seshayyangar v. Jenulavadin, (1881) 3 Mad 66.
3. Saldhana v. Hart, (1920) 7 A I R Mad 318=58 I C 794=43 Mad 902.
4. Narayana Rao v. Veerayya, (1933) 20 A I R Mad 619=144 I C 940=56 Mad 323=64 M L J 433.
5. Subbayya Thevar v. Balasubramania Pandia Thalavar, 1931 M W N 1157.

A. I. R. 1938 Madras 314

VARADACHARIAR AND KING JJ.

K. Subba Reddi — Appellant.

v.

M. Chengalraya Reddi — Respondent.

Appeal No. 276 of 1932, Decided on 6th October 1937, against decree of Dist. Court, Chittoor, in O. S. No. 3 of 1929.

Hindu Law—Religious endowment — Gift to temple — Properties conveyed to person described by donor as trustee—No other persons in management as general trustees—Object of gift connected with ordinary worship in temple — Such trustee is not special trustee.

It is only in a case where there are other persons in management who can be regarded as general trustees and there are other funds out of which the general upkeep of the trust can be carried on that there will be any sense in distinguishing any endowment as a special trust or kattalai intended for a particular purpose.

[P 315 C 1]

Where in a gift of certain properties to a temple the person to whom the properties are conveyed is described by the donor as a trustee and there are no other persons in management as general trustees and the object of the gift is connected with ordinary worship in the temple, such person cannot be regarded as a special trustee and whether he is a trustee de facto or de jure, having taken the property under such a gift deed, he cannot claim to have held the properties in any character except that of the trustee of the temple.

[P 315 C 1]

S. A. Seshadri Ayyangar — *for Appellant.*

N. C. Vijayaraghavachariar — *for Respondent.*

Varadachariar J.—This appeal arises out of a suit under S. 73, Madras Hindu Religious Endowments Act, for the framing of a scheme in respect of the administration of two village temples and for incidental reliefs relating thereto. The plaint also prayed for the removal of the defendant from trusteeship, and for vesting certain properties in the plaintiff as trustee. Certain sums of money were also claimed as due from the defendant to the institution. The learned Judge dismissed the defendant from the trusteeship and allowed a small portion of the money claimed, but dismissed the suit so far as it claimed relief in respect of the lands forming item 1 in Sch. B to the plaint on the ground that those lands had been constituted a special trust and that the Court acting under S. 73, Endowments Act, had no jurisdiction to award any relief in respect thereof. In this appeal by the plaintiff nearly all the reliefs disallowed by the lower Court were claimed in the memo of appeal but during the arguments before us nearly all the money claims have been given up, it being stated that in the present condition of the defendant, nothing could be got out of him as a result of any money decree that may be passed against him. Only one portion of the money claim was pressed, namely that relating to a sum of Rs. 250 which it was stated constituted part of the trust funds realized by the defendant as per the razinamah decree in O. S. No. 85 of 1921 in his family and was traceable as part of the consideration for Ex. L, a mortgage taken by the defendant in 1926. We agree with the learned Judge that it is not possible on the terms of Ex. P, the razinamah decree, to say what items of property were allotted to the suit temples as distinguished from the chatram charity at Tiruttani. It is not denied that Ex. I is restricted to the immovable properties and makes no reference to the moneys which it is said were also constituted endowments to the temple in Ex. P. Further, even assuming Ex. Q to be genuine, it is impossible to say that the money said to have been received by the defendant under Ex. Q could have formed the advance to Rama Reddi which is referred to in Ex. L, because that advance is said to have been made on 10th May 1921 whereas Ex. Q is dated 12th May 1924. We are therefore unable to hold that the suit temples can claim any portion of the moneys forming the consideration for Ex. L, as part of the trust funds of the temple.

As regards the immovable properties forming item 1 of the B schedule to the plaint, we regret we are unable to agree with the view taken by the lower Court. The language of Ex. I, the deed of endowment, is clear enough even as it is; and if it is read in the light of Ex. P, there is no room for doubt as to what was intended. Ex. P contemplates these lands being set apart for the temple. Ex. I as originally worded also ran as a gift of these properties to the temple. A line was however interpolated before the completion of the document describing the defendant as trustee of the temples. We do not see that these interpolated words in any manner alter the scope or effect of the document. It appears from the evidence that the temples in the village were just then in the process of renovation and it is not suggested that

there were any other trustees who may be described as 'general' trustees of the temple if one would take Ex. I to constitute the defendant special trustee, as the learned Judge in the Court below held him to be. The learned Judge says that the defendant could not have been appointed a trustee of the temple by the donors under Ex. I because they could not have had any such power under the law. That seems to us beside the point; whether the said appointment by the donors would be valid in law or not, it is obvious that it is in the capacity of a trustee of the suit temples that the donor conveyed the property to the defendant. Whether he was a trustee de facto or de jure, having taken the property under such a gift deed he cannot claim to have held the properties in any character except that of the trustee of the temples. Further, there is no basis for any argument on this gift deed, having regard to the terms of Ex. I, that any special purpose was contemplated. The purposes specified in the document are purposes connected with the ordinary worship in the temple, namely maintenance of the gurukkal, putting up lights and the performance of festivals. It is only in a case where there are other persons in management who can be regarded as general trustees and there are other funds out of which the general upkeep of the trust can be carried on that there will be any sense in distinguishing any endowment as a special trust or kattalai intended for a particular purpose. There is no room for any such differentiation in the present case. We must accordingly hold that the lands specified as item I to Sch. B, in the plaint constitute an endowment to the temple and we make a declaration accordingly. For the time being, the properties will be vested in the plaintiff as the only existing trustee, the defendant having been removed. In view however of the observations of the learned District Judge as to the way the plaintiff himself has been carrying on the management of the temple, it will be for the authorities concerned and for persons interested in the temple to take proper steps to ensure that the institution is duly managed.

The learned District Judge found that if defendant is to be held accountable for mesne profits in respect of the lands above referred to, a sum of Rs. 400 will be the proper estimate for the years prior to suit. He has not given any declaration even in respect of that amount because of his view that these properties could not be held to be an 'endowment' to the temple. In the view that we have above expressed, there will be a declaration that the defendant is accountable to the temple in respect of the above sum of Rs. 400, and for any other amounts which the Court may on enquiry fix to be properly payable as profits from these lands for the period subsequent to the institution of the suit and before the defendant ceased to be a trustee under the decree of the lower Court. We agree with the lower Court that having regard to the character of the institution it is scarcely worth while to frame a scheme; but if it is not possible to rectify the management in any other manner, it will be time enough to consider whether a scheme may not be necessary. To the extent above indicated, the decree of the lower Court will be varied and the case sent back to the lower Court for further inquiries and directions. As the appeal has succeeded only in part, there will be no order as to costs of this appeal.

C.R.K./D.S. *Decree varied.*

A. I. R. 1938 Madras 315

LAKSHMANA RAO J.

In re Ponnuswami Servai—Petitioner.

Criminal Revn. Case No. 344 and Petn. No. 317 of 1937, Decided on 28th October 1937, from judgment of City First Class Magistrate, Madura, in C. A. No. 12 of 1937.

Penal Code (1860), S. 409—Offence under, cannot be tried by Second Class Magistrate — Alteration of conviction to one under S. 409/109 is illegal.

The offence under S. 409 is not triable by the Magistrate of the Second Class and the alteration of conviction to one under S. 409 read with S. 109 is illegal. [P 315 C 2]

K. V. Sesha Aiyangar — *for Petitioner.*
Public Prosecutor — *for the Crown.*

Order. — The offence under S. 409, I. P. C. is not triable by the Magistrate of the Second Class and the alteration of the conviction to one under S. 409 read with S. 109, I. P. C., is illegal. The conviction of the petitioner is therefore set aside and he is acquitted.

C.R.K./D.S. *Conviction set aside.*

---

* A. I. R. 1938 Madras 316

VARADACHARIAR AND
PANDRANG ROW JJ.

Pamidimukkala Sitharamayya and others —Appellants.

v.

Ivaturi Ramayya and another — Respondents.

Appeal No. 87 of 1937, Decided on 29th October 1937, against decree of Sub-Judge, Masulipatam, in O. S. No. 11 of 1930.

(a) Civil P. C. (1908), O. 7, R. 11 (c)—Provision in O. 7, R. 11 (c) does not apply to appeals.

The provisions in O. 7, R. 11 (c) do not apply to appeals. The Appellate Court is entitled to reject an appeal in which the full court-fees have not been paid without calling upon the appellant to pay the deficient court-fee. So far as memoranda of appeals are concerned, express provision is made in O. 41, R. 3 for their rejection on grounds stated in that rule : *A I R 1915 Mad 426* ; *A I R 1934 Cal 659* ; *A I R 1920 Lah 92* ; *A I R 1917 Pat 26 and A I R 1929 All 75, Rel. on.* [P 316 C 2 ; P 317 C 1]

*** (b) Civil P. C. (1908), O. 41, R. 1, S. 149—Appeal presented on unstamped or insufficiently stamped paper—No order granting time passed under S. 149—Presentation of appeal is not valid presentation.**

A mere filing of a paper without the proper court-fee does not amount to a proper presentation of appeal for all purposes. In absence of an order granting time under S. 149, presentation of an unstamped or insufficiently stamped memorandum of appeal does not amount to a valid presentation. [P 317 C 1]

P. Satyanarayana Rao and V. Parthasarathy — *for Appellants.*

Ch. Raghava Rao and S. Rajaraman — *for Respondents.*

Varadachariar J.—This case though numbered as an appeal comes up before us for disposal on the question whether the appeal is to be treated as having been presented in time or should be dismissed as not having been presented in time. The memorandum of appeal was filed in this Court on 21st March 1935 which was within the time allowed by law, but it was presented on a court-fee of Rs. 5 while in the valuation memo attached to the memorandum it was stated that Rupees 224.15.0 was the court-fee payable. The papers were returned on more than one occasion to the party for various purposes and on 15th July 1935 the appellant's counsel revised the memo of valuation with the result that Rs. 111.5.0 was shown as the court-fee payable. Even this amount was not paid for a long time and the appellants ultimately filed an application under S. 149, Civil P. C. (C. M. P. No. 327 of 1936) for extension of time to pay deficient court-fee. This application was rejected by one of us on the ground that the reasons assigned in support of the application for extension of time were palpably false and the appellants had no other reason for non-payment of the court-fee in time than their inability to find the money. The case was then directed to be posted for argument on the question whether in view of the fact that the deficient court-fee was paid long after the expiry of the period of limitation the appeal should not be dismissed as not presented in time. Notice was given to the respondent to be present at the argument of this question, so that the decision on the point may be final between the parties.

It has now been contended before us that in spite of the dismissal of the application under S. 149, Civil P. C. the memorandum of appeal cannot be held not to have been presented in time because on the analogy of the provisions of O. 7, R. 11 (in the case of plaints) the appellants ought to have been called upon within a fixed period to pay the deficient court-fee and until that has been done it is not open to the Court to reject the appeal. This argument seems to us to ignore the real point for consideration. We may however mention in passing that the applicability of the provision in O. 7, R. 11 (c), Civil P. C. to appeals is by no means so clear as the learned counsel for the appellants assumes. On the other hand, the weight of authority is decidedly against its applicability. Except the Bombay High Court, nearly all the other High Courts have held that the provision in O. 7, R. 11, Cl. (c), does not apply to appeals. In this Court that view was expressed as early as in 27 M L J 677[1] and quite recently the Calcutta High Court has expressed the same view in 61 Cal 663.[2] See also 1 Lah 234,[3] 3 Pat L J 74[4] and 50 All 980.[5] There are obvi-

1. Narayana Rao v. Seshamma, (1915) 2 A I R Mad 426=26 I C 33=27 M L J 677.
2. Khatumennessa Bibi v. Durjodhan Roy, (1934) 21 A I R Cal 659=153 I C 201=61 Cal 663=38 C W N 650.
3. Lekh Ram v. Ramji Das, (1920) 7 A I R Lah 92=57 I C 215=1 Lah 234=144 P L R 1920.
4. Ram Sahay Ram Pandey v. Lakshmi Narain Singh, (1917) 4 A I R Pat 26=42 I C 675=3 Pat L J 74.
5. Brijbhukhan v. Tota Ram, (1929) 16 A I R All 75=118 I C 228=50 All 980=26 A L J 1193.

ous reasons for drawing a distinction in this respect between plaints and memoranda of appeal. In the case of a plaint, there is no power in the Court to excuse delay on grounds which are available under S. 5, Lim. Act, in the case of appeals. Other cases of possible hardship are sufficiently provided for by the discretion vested in the Court under S. 149 of the Code. So far as memoranda of appeal are concerned, express provision is made in O. 41, R. 3 for their rejection on grounds specified in that Rule. But as we have indicated already, the question now is not one relating to the rejection of the memorandum of appeal but a point of limitation.

In view of the provisions of S. 4, Court-fees Act, it cannot be said that a mere filing of a paper without the proper court-fee amounts to a proper presentation of the appeal for all purposes. The observations in 40 Mad 687[6] must be read in the light of the facts of the case where the Court was dealing with a pauper petition and the court-fee had been paid within the time fixed after the dismissal of the pauper petition. The language of S. 149, Civil P. C. itself seems to imply that in the absence of an order granting time under that section, presentation of the unstamped or insufficiently stamped memorandum of appeal will not amount to a valid presentation. The concluding words of S. 149 provide that where proper court-fee is paid in terms of an order under S. 149, the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. The application under S. 149 having been dismissed in this case, it is impossible to maintain that the appeal has been presented in time. We see no reason to excuse the delay because the considerations urged in the order on C. M. P. No. 327 of 1936 are equally applicable to this aspect of the matter. The result is that this appeal must be dismissed as not presented in time. The respondent will be entitled to costs as on an application to excuse delay.

C.R.K./R.M. *Appeal dismissed.*

6. Nella Vadivu Ammal v. Subramania Pillai, (1918) 5 A I R Mad 1039=38 I C 617=40 Mad 687=31 M L J 269.

*** A. I. R. 1938 Madras 317**

BEASLEY C. J.

Kondava Nayakar — Petitioner.

v.

Chinna Ramaswami Naickar and another — Respondents.

Civil Revn. Petn. No. 1921 of 1934, Decided on 10th March 1937, from decree of Sub-Judge, Tuticorin, D/- 29th October 1934.

*** Civil P. C. (1908), S. 65—Execution Sale—Lessee of judgment-debtor paying rent to judgment-debtor before confirmation of sale—Suit by auction purchaser against judgment-debtor and lessee to recover such rent—Lessee held was protected.**

The execution sale was not made absolute until after the payment of the rent had been made by the lessee to the judgment-debtor who was, until the sale was confirmed, his landlord. The auction-purchaser after confirmation brought a suit against the judgment-debtor and lessee to recover the rent so paid :

Held that the payment of the rent by the lessee to the judgment-debtor was quite proper and he was entitled to do so, in spite of the fact that there was the fiction of relation back of the vesting. The lessee was protected until such time as the sale was confirmed in regard to any payment he had made to the judgment-debtor and therefore no decree could be passed against him: *A I R 1933 P C 101, Ref.* [P 318 C 2]

A. Swaminatha Iyer and S. Thyagarajan —*for Petitioner.*

R. Viswanatha Iyer — *for Respondent.*

Order. — The plaintiff in this suit although ordered to be served with notice on the former occasion of this petition has not appeared and therefore I have heard an ex party argument. If there was any argument to be advanced on his side, it is his own fault that such an argument has not been presented. It is sufficient for me to say that the contention of the petitioner here seems to me to be quite sound and in the absence of any argument to the contrary I shall uphold that contention.

Shortly the facts are that the petitioner is defendant 1 and he took a lease of the suit property for five years in 1928 from defendant 2 who was the owner of it. In 1931 the lease was cancelled and it appears that the petitioner then surrendered possession. The plaintiff got a decree against defendant 2 and in execution of that decree brought six acres of the property to sale. The sale was not confirmed at once because there was an application to set it aside presented by defendant 2

which was dismissed by the first Court and the dismissal of that application was affirmed on appeal on 31st January 1933 and the sale was then confirmed. The suit which is one for arrears of rent was filed on 28th February 1933 immediately after the Appellate Court had confirmed the sale. It seems to be conceded that defendant 1 after the sale to the plaintiff in execution of his decree paid the rent to defendant 2 as formerly but it is quite clear from Ex. 2 which is in answer to a notice sent to him by the plaintiff that defendant 1 was willing in view of the fact that there was a dispute between defendant 2 and the plaintiff as regards the sale of the property to take a receipt from both defendant 2 and the plaintiff or to take their directions with regard to the payment of future rent and that he had deposited a sum of Rs. 250 in the Tinnevelly District Permanent Fund. This I take to be a deposit of the rent pending the claim to it made by the former owner of the property defendant 2 or the plaintiff being substantiated. At any rate, it is a notice which is of importance because the plaintiff is asked to say to whom the rent is to be paid. It is found as a fact, I think, from the judgment that defendant 1 did pay rent to defendant 2. The suit was filed against both and a decree has gone against both although it seems to me that in the plaint relief was only asked for in the alternative if the rent should have been paid to defendant 2 then against defendant 2 only.

A proper reading of the plaint is I think that should the rent not have been paid over to defendant 2, by defendant 1, then there should be a decree against defendant 1 in respect of that unpaid rent. What seems to have been overlooked in this case is that although by reason of S. 65, Civil P. C. a property bought in execution of a decree vests in the purchaser from the date of the sale and when the sale has been made absolute the vesting is deemed to be from the date of the sale and not from the date when it became absolute, the sale in this case was not made absolute until after the payment of the rent had been made by defendant 1 to defendant 2 who was, until the sale was confirmed, his landlord. The confirmation of the sale was both after that time and the time when defendant 1 gave up possession to defendant 2. It appears to me that following the decision of the Privy Council in 64 M L J 544[1] although it was a decision under the Income-tax Act and although there is this fiction of relation back of the vesting defendant 1 quite properly paid to defendant 2 this rent and was entitled to do so until the sale had been confirmed. That of course is not to deprive the purchaser of the rent from the date of his purchase when his sale had been confirmed but it seems to me does protect the lessee until such time as the sale is confirmed in regard to any payment he has made to his former lessor. That being so, it seems to me that no decree ought to have been passed against defendant 1 and it should have been passed against defendant 2 alone. For the above reasons, the petition will be allowed with costs of the petitioner here and in the lower Court as against the plaintiff respondent 1 and the decree as against the petitioner set aside.

C.R.K/.V.B.B. *Petition allowed.*

1. Raghunandan Prasad Singh v. Commissioner of Income-tax, Bihar and Orissa, (1933) 20 A I R P C 101=142 I C 446=60 I A 133=12 Pat 305=64 M L J 544 (P C).

A. I. R. 1938 Madras 318

PANDRANG ROW AND
ABDUR RAHMAN JJ.

Katta Venkataratnam and others — Appellants.

v.

Secretary of State — Respondent.

Letters Patent Appeal No. 114 of 1935. Decided on 3rd November 1937, against judgment of Varadachariar J. D/. 28th February 1935, reported in *A I R 1935 Mad 764.*

Grant — Free grant of valuable land by Revenue Officer is devoid of authority — Collector, in his revisional jurisdiction can cancel such grant and his order cannot be questioned by Civil Courts.

Under Madras Revenue Board's Standing Order No. 15 free grant of valuable land by a Revenue Officer is devoid of any authority and the Collector, in his revisional jurisdiction can cancel such grant as it is without authority and adverse to the interests of Government. Collector's order being within his powers, it is not open to Civil Courts to consider whether Collector's order is right or wrong on the merits. [P 319 C 2]

V. Suryanarayana — *for Appellants.*

N. Srinivasa Ayyangar — *for Respondent.*

Pandrang Row J.—This Letters Patent appeal from the judgment of Varada-

chariar J. can be disposed of briefly. The case relates to a grant of three acres of valuable land by the Revenue Divisional Officer to the daffadar of his office in June 1922. That grant was set aside by the Collector in June 1925, under his revisional powers just within three years after the original grant. The original suit was instituted by the sons of the grantee to declare the Collector's order null and void and the original grant by the Revenue Divisional Officer valid. It must be mentioned in this connexion that subsequent to the grant, the land had been improved at some expense by the grantee, and the Collector granted one acre out of the three acres to the sons of the grantee as compensation for the improvement. The learned District Munsif who heard this suit, dismissed it as he was of opinion that the original grant by the Revenue Divisional Officer was null and void and that the Collector's order cancelling it was within the scope of his authority. The Subordinate Judge in appeal was of opinion that the grant was not in excess of the powers of the Revenue Divisional Officer and that there was no mistake of fact which entitled the Collector to exercise his revisional powers. The second appeal was instituted by the Secretary of State for India and that second appeal was allowed by Varadachariar J. who at the same time granted leave to appeal. Really the two substantial questions which arise in this case are those raised in paras. 6 and 10 of the written statement filed by the Collector which run as follows :

6. There is a clear prohibition against the free grant of valuable lands under B. S. O. No. 15 and the grant of the suit land by the Revenue Divisional Officer, Bhimavaram, is illegal and ultra vires.

10. Civil Courts have no jurisdiction to question the acts of Revenue Officers acting within the scope of their authority.

If these contentions are right, then it follows that the suit must fail and the judgment of our learned brother was right. As regards the first point, B. S. O. No. 15 which defines the limits of delegation of authority in the matter of grants of Crown land to various officers, clearly declares that valuable waste lands or valuable poramboke lands which are assigned after they are converted into assessed lands, should ordinarily be sold in public auction, the other alternative methods of disposal being sales in certain cases to applicants at a fixed price instead of by public auction, and assignment even under the dharkast rules, that is to say, free grant to members of the depressed classes subject to certain conditions. It is clear therefore that valuable lands, like the lands concerned in the present suit, could not have been granted to the daffadar in question, who was not a member of the depressed classes, and the original grant must therefore be considered to have been absolutely devoid of authority. It is not a case of the Revenue Divisional Officer acting in excess of his authority, but it is a case of his acting without authority altogether. This seems to us quite clear and does not require much argument to support it. A reference to the actual wording of the Board's Standing Order in question is sufficient.

As regards the other point, the revisional jurisdiction of the Collector as it stood when he exercised it in the present case, that is to say in 1925, enabled him to cancel the grant made by Revenue Divisional Officer if that grant was in excess of the limits of the latter's authority and if the interests of the Government or of the public were affected thereby. In the present case it is obvious that the grant was in excess of the authority conferred on the Revenue Divisional Officer and it was also adverse to the interests of the Government as a free grant of valuable land must necessarily affect the interest of the Government adversely. It must therefore be held that the Collector acted within the scope of the authority conferred upon him by B. S. O. No. 15 when he cancelled the grant in June 1925. When once the conditions necessary for the exercise of the revisional authority are satisfied, it is not open to a Civil Court to consider whether the order passed by the Collector in the exercise of such authority was right or wrong on the merits. In other words, Civil Courts cannot exercise revisional jurisdiction in respect of any order of the Collector which is within his revisional jurisdiction. These reasons are, in our opinion, quite sufficient to show that the second appeal was rightly allowed and the suit rightly dismissed. In the circumstances of the case however there will be no order as to costs in this appeal.

C.R.K./D.S. *Appeal dismissed.*

* A. I. R. 1938 Madras 320

ABDUR RAHMAN J.

Mahalakshmi Amma — Appellant.

v.

Krishna Holla — Respondent.

Second Appeal No. 1000 of 1933, Decided on 5th November 1937, against decree of Sub-Judge, South Kanara, in A. S. No. 22 of 1933.

* **Evidence Act (1872), S. 92, Proviso 1— S. 92 does not debar party to contract from adducing evidence for purpose of contradicting recitals of facts mentioned in document.**

There is a great deal of difference between the terms of a contract and recitals of facts which are mentioned in a document. S. 92 debars a person who is a party to a contract from adducing any evidence which may "contradict, vary, add to or subtract from its terms" but there is no justification for holding that the recitals of facts mentioned in the document cannot be contradicted by evidence. [P 320 C 2]

The document which formed the basis of the suit, provided that as the defendant's wife was sickly and that as the plaintiff had been serving him and looking after his children and had no other means of livelihood, the defendant would continue to give a certain quantity of paddy to the plaintiff during her lifetime The defendant raised a plea that the plaintiff was to receive the paddy during her lifetime only if she served his wife and children and not otherwise and that he was willing to pay for the period for which she had so served:

Held that the defendant's plea amounted merely to a plea of failure of consideration and therefore oral evidence of the failure of consideration could be adduced under Proviso (1) to S. 92. [P 320 C 2]

K. Y. Adiga — *for Appellant.*

K. Sanjeevi Kamath — *for Respondent.*

Judgment.—The only point that has been urged in this appeal is that the defendant was debarred from raising the plea under S. 92, Evidence Act. The document Ex. A which is the basis of the suit, only states that as the defendant's wife was sickly and that the plaintiff had been serving him and looking after his children and had no other means of livelihood, the defendant would continue to give certain quantity of paddy to the plaintiff during her lifetime. It was also mentioned in the document that the defendant was a relation of the plaintiff's. It was contended before me that the defendant should not have been permitted to adduce any evidence against the contents of this document. I might say at the outset that there is a great deal of difference between the terms of a contract and the recitals of facts which are mentioned in a document. S. 92, Evidence Act, debars a person, who is a party to a contract from adducing any evidence which may "contradict, vary, add to or subtract from its terms" but there is no justification for holding that the recitals of facts mentioned in the document cannot be contradicted by evidence.

Taking the particular document in question, I find for instance a statement of a fact that the plaintiff was a relation of the defendant. The plaintiff herself in the witness box denied it. Can it be urged with any justification that the defendant would not be able to traverse this recital contained in Ex. A? There can only be one answer to the question. A great deal of stress was laid then by the counsel for the appellant on the contention that the plea raised and evidence led on behalf of the defendant to the effect that the defendant was only to receive paddy during her lifetime only if she served his wife and children could not be raised or substantiated by evidence as this was not covered by either proviso (3) or any other proviso to S. 92, Evidence Act. I do not agree with the contention. The defendant's plea amounted really, in my opinion, to a plea of failure of consideration. The defendant's case was that the plaintiff was entitled to recover the paddy for as long as services were rendered by her. He was therefore willing to pay for the period for which the plaintiff served his wife and children after the document was executed by him.

It may be stated at once that the document on the basis of which the suit was filed does not mention any consideration at all. But even if it did, evidence of the absence or failure of consideration could always be adduced under Proviso (1) to S. 92, Evidence Act. The plaintiff's assertion that future services might have been a motive but did not form a consideration for the document is also untenable. I would therefore repel the contention raised on behalf of the appellant that the evidence led on his behalf could not be adduced. The result is that the appeal fails and is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 321

BURN J.

Kumara Alagu Samayya Naicker — Petitioner.

v.

Madras Hindu Religious Endowments Board and others — Respondents.

Civil Revn. Petn. No. 406 of 1935, Decided on 22nd October 1937, to revise order of District Court, Trichinopoly, in O. P. No. 34 of 1934.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (5) — Court deciding under S. 9 (5) must advert to both the provisions contained in S. 9 (5) — Failure to do so would be ground for revision under S. 115, Civil P. C.

Under Section 9 (5), Madras Hindu Religious Endowments Act, there are two grounds upon which a temple may be found to be excepted temple; the first category is temples in which right of succession to the office of trustee is hereditary and the second category consists of temples the succession to the trusteeship whereof has been specially provided for and therefore the Court when deciding under this sub-section must advert to both the provisions and his omission to do so will be a good ground for revision under S. 115, Civil P. C. [P 321 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927), Ss. 9 (5) and 84 — Provisions of succession to trusteeship made by founder need not continue to be in force at time of petition under S. 84.

The provision for the succession to the trusteeship of an institution which is made by the founder of it is something which is done once for all at or about the time of the foundation. The words in sub-s. (5) of S. 9 do not imply that the provision made by the founder must continue to be in force at the time of the petition under S. 84 of the Act. [P 321 C 2; P 322 C 1]

K. G. Srinivasa Iyer — *for Petitioner.*

A. V. Narayanaswami Iyer, R. K. Rajamannar and K. Parasurama Iyer — *for Respondents.*

Order. — This is a petition to revise the order of the learned District Judge of Trichinopoly in O. P. No. 34 of 1934. That was an application by the present appellant under S. 84 (2), Madras Hindu Religious Endowments Act 2 of 1927, praying the learned Judge to set aside the order of the Religious Endowments Board dated 6th December 1933 declaring the temple of Sri Kalyana Narasimhaswami at Ramagiri, Karur Taluk, to be a non-excepted temple. The learned District Judge held that the temple was a non-excepted temple and accordingly dismissed the petition. The learned counsel for the petitioner has drawn my attention to the definition of "excepted temple" in S. 9 (5) of the Act. That is as follows :

> 'Excepted temple' means and includes a temple, the right of succession to the office of trustee or the officers of all the trustees (where there are more trustees than one) whereof has been hereditary or the succession to the trusteeship whereof has been specially provided for by the founder.

It is obvious from this definition that there can be two grounds upon which a temple may be found to be an excepted temple. The first category is temples in which the right of succession to the office of trustee is hereditary. The second category consists of temples the succession to the trusteeship whereof has been specially provided for by the founder. The learned District Judge in his order has considered only the first category and not the second. He has found on the admission of the appellant himself that succession to the office of trustee in the temple has not been in practice hereditary for at least 70 years. The learned District Judge has held that therefore the temple cannot be considered to be an excepted temple. The learned counsel for the petitioner contends that on the evidence produced before the learned District Judge, he would be able to show that the succession to the trusteeship of the temple was specially provided for by the founder. The learned District Judge has not adverted to this part of the definition and his omission to do so will justify interference in revision under S. 115, Civil P. C.

The learned counsel for the Religious Endowments Board is not able to argue that the learned District Judge did deal with the second part of the definition of "excepted temple". It has been held by Varadachariar J. in 59 Mad 245,[1] that the expression "has been hereditary" in sub-s. (5) of S. 9 must be construed as meaning "has been and continues to be hereditary". The learned counsel for respondent 2, the trustee appointed by the Religious Endowments Board, contends that the same interpretation must be put upon the words "the succession to the trusteeship whereof has been specially provided for by the founder". This contention I think cannot be accepted. The provision for the succession to the trusteeship of an institution like this which is made by the founder of it is something

1. Krishnamurthi v. Madras Hindu Religious Endowments Board, (1935) 22 AIR Mad 921 =158 I C 733=69 M L J 384=59 Mad 245.

which is done once for all at or about the time of the foundation. It would be a misuse of language to say that these words in sub-s. (5) imply that the provision made by the founder must continue to be in force at the time of the petition under S. 84. The learned counsel for respondent 2 contends that there was no evidence before the learned District Judge upon which he could have found that the succession to the trusteeship of this temple had been specially provided for by the founder. That is a question into which I am not prepared to go for the simple reason that it has not been considered by the learned District Judge.

For these reasons, the order of the learned District Judge is set aside and the petition is ordered to be restored to file and disposed of according to law upon the evidence already recorded by and produced before the learned District Judge. The costs of this petition will abide the result and will be provided for in the decree of the District Court.

C.R.K./R.M. *Order set aside.*

A. I. R. 1938 Madras 322

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Revula Ponnari Rao — Appellant.

v.

Revula Lakshmi Narasamma and others — Respondents.

Appeal No. 425 of 1931, Decided on 27th September 1937, against decree of Sub.Judge, Kurnool in O. S. No. 29 of 1929.

(a) Civil P. C. (1908), O. 41, R. 33—Appellate Court can vary decree even to benefit of party who has not appealed.

The Appellate Court has power under R. 33 of Order 41 to vary the decree of the lower Courts although the variation may benefit a party who has not appealed, but the Court will exercise a wise judicial discretion in using such power : *A I R 1930 Mad 801, Rel. on.* [P 322 C 2 ; P 323 C 1]

(b) Minor—Alienation by guardian to pay binding debts of minor—Actual pressure on estate is not necessary.

In order that an alienation by a guardian of the minors property to pay off debts binding on the minor may be valid and binding on the minor, it is not necessary that there should be actual pressure on the estate : *23 M L J 638, Rel. on.*

[P 323 C 1]

P. C. Parthasarathy Ayyangar — *for Appellant.*

C. Sambasiva Rao and P. Chandra Reddy — *for Respondents.*

Venkatasubba Rao J.—The plaintiff attacks in this suit certain alienations made after his father's death by his stepmother and grandmother who acted as his guardians during his minority. This appeal has been filed by the plaintiff and except as regard defendant 11, it was disposed of by us some two days ago. We are now concerned with the sale in favour of himself and another, for Rs. 700, evidenced by Ex. 2 dated 26th February 1917. The suit was brought in 1929, almost when the period of limitation prescribed for such actions was coming to an end.

The plaintiff challenged the sale on the ground that his father was leading an immoral and vicious life and the debts to discharge which the alienation was made, were incurred for purposes not binding upon him. The learned Judge finds clearly that these allegations are utterly untrue, that the sale was effected for discharging binding debts, that they were in fact paid off, that Rs. 700 was a fair price and that the plaintiff's guardians, who were capable women, acted in his interests and for his benefit. On these grounds the sale ought to have been upheld and the judgment leaves the impression that the Judge meant to uphold it. But somewhat abruptly he remarks towards the close of his discussion, that no pressure on the estate has been shown and it follows therefore that the sale is not binding on the plaintiff. Having said so, he sets aside the sale, but on the condition that the plaintiff before recovering the property must pay Rs. 700 to the vendees.

The plaintiff questions the validity of this direction and on his behalf it is contended that the sale ought to have been set aside in toto. The lower Court's judgment is undoubtedly wrong, but the plaintiff has no reason to complain against it. It has conferred on him an advantage which he does not possess under the law. There is no other course open to us than to dismiss the appeal and we accordingly do so. The respondent (defendant 11) unfortunately is not represented here and the appeal has been heard in his absence. But we have come to the conclusion that in the interests of justice we ought to take action under O. 41, R. 33, Civil P. C., which has been enacted to empower the Appellate Court to do complete justice between the parties. There are several cases of which it is sufficient to mention

53 Mad 881,[1] which have held that the Appellate Court has power under this rule to vary the decree of the lower Court, although the variation may benefit a party who has not appealed. To take a simple illustration, if a person sues for Rs. 1000, and after getting a decree for Rs. 400, files an appeal urging that he ought to have been allowed a larger sum, this section enables the Appellate Court to interfere in favour of the defendant who has not appealed and dismiss the suit in toto. It goes without saying that the Court will exercise a wise judicial discretion in using the power under this section.

We are quite satisfied that the circumstances of this case are such as to call for our interference under the wide terms of this very salutary provision. The alienees in this case are men of very humble status, one being a Boya and the other a Golla, and it is not surprising, when in all probability all their earnings have been invested in this property, that the respondent has not been able to find the money for preferring an appeal. This is a harassing suit of the usual type, brought to unsettle a title acquired by honest purchasers and we think we ought in the interests of justice to use our powers under the provision mentioned above. We are unable to accede to the strenuous contention to the contrary of Mr. P. C. Parthasarathy Ayyangar, the appellant's learned counsel. We need hardly mention that the lower Court's view of the law is thoroughly wrong. To mention only one authority, it has been laid down in 23 M L J 638[2] that it would be unreasonable to hold that a guardian cannot affect a sale in the absence of pressure from the creditor to whom the debt is due. It therefore follows that not only is the appeal rejected, but the suit as against defendant 11 is dismissed.

C.R.K./K.S. *Appeal rejected.*

1. Subramanian Chettiar v. Sinnammal, (1930) 17 A I R Mad 801=127 I C 624=53 Mad 881 =59 M L J 684 (F B).
2. Vembu Iyer v. Srinivasa Ayyangar, (1912) 23 M L J 638=17 I C 609.

* A. I. R. 1938 Madras 323

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Kotta Annapurnamma — Appellant.

v.

Makku Venkamma — Respondent.

Letters Patent Appeal No. 83 of 1936, Decided on 26th November 1937, against judgment of Venkataramana Rao J., D/. 5th August 1936.

*** Limitation Act (1908), Art. 182 (5) — Application for execution by nephew of deceased decree-holder praying that decree should be executed for benefit of himself and widow of decree-holder jointly as representatives of decree-holder — Counter-statement by widow that nephew's application should be dismissed and requesting that decree should be executed for her benefit alone — Application for execution dismissed — Subsequent application by widow for execution within three years of dismissal of previous application held in time.**

The provisions of Art. 182 should receive a fair and not too technical a construction. Its language ought not to be strained in favour of the judgment-debtor who has not paid his debt and the words should be liberally interpreted in favour of the decree-holder. [P 324 C 2]

An application for execution was made by the nephew of a deceased decree-holder who prayed that he and the widow of the decree-holder should be brought on the record and the decree should be executed for their joint benefit. The widow, in a counter-statement requested that this application should be dismissed and added that she should be brought on record as the sole representative and the decree should be executed for her own benefit. The application was dismissed. The widow subsequently brought an application for execution within three years of the dismissal of the previous application :

Held that the application was in time, being within three years of the order passed on previous application which fulfilled the requirements of Art. 182 (5) : *28 Mad 396 and A I R 1917 Mad 2, Disting.* [P 324 C 1, 2]

G. Lakshmanna and G. Chandrasekhara Sastry — *for Appellant.*

P. Somasundaram — *for Respondent.*

Venkatasubba Rao J. — The question in this Letters Patent appeal, is whether the view of the learned Judge that the execution petition in question is barred by limitation is right. The lower Court had decided that the petition was in time and that decision was reversed by the learned Judge. The starting point under Art. 182 (5), Limitation Act is :

The date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of the execution of the decree.

One Subbaraju obtained the final decree in the mortgage suit in question on 9th September 1926 and the present petition was filed by his widow Annapurnamma on 23rd December 1931, for execution of that decree. It is contended that this execution petition is in time, by reason of a previous petition for execution filed on 15th October 1928, which was dismissed by an order dated 15th April 1929. The short point for decision is, whether the previous execution petition fulfils the requirements of Art. 182 (5), for, if it does, the present petition having been filed as it has been, within three years of the order referred to above made upon it, would be saved from the bar of limitation. The previous petition was filed not by Annapurnamma, the widow of the decree-holder, but by his nephew one Karumuri Subba Rao. This man, alleging that the decree amount belonged jointly to his uncle and himself, filed the petition, praying that both he and Annapurnamma should be brought on the record as the decree-holder's representatives, and, that the decree should be executed for their joint benefit. Annapurnamma by way of answer filed a counter affidavit, denying that the applicant possessed any sort of interest in the decree. It is upon a proper construction of this counter-affidavit that the decision in this appeal must turn.

True, as urged by Mr. Somasundaram for the respondent, the widow prayed in the last paragraph of this affidavit, that Subbarao's petition should be dismissed. If the matter had stopped there, there would be nothing to urge in favour of the appellant. But the widow was not content with asking that the petition should be dismissed; she did something more, that is to say, she requested that she should be brought on the record as the sole representative and that the decree should be executed for her sole benefit. Here we may quote her actual words :

> As all the properties of the late Subbaraju as well as the decree in this suit passed to this counter-petitioner, it is necessary that this counter-petitioner should be added as the second plaintiff and that this decree should be executed.

In effect, what she requested was that upon the nephew's petition praying that both he and Annapurnamma should be added as the deceased's representatives, an order should be made substituting her alone as the sole representative. In other words, she adopted the nephew's petition in part and repudiated it in part, and the proper interpretation of what happened is in our opinion this : The widow must be taken to have said to the Court :

> Here is the nephew's application which is in writing as required by the Code and is otherwise in conformity with the law. Take that application as mine and instead of bringing on record, as the nephew requests, both of us, substitute me alone as the legal representative. In that sense I am willing to treat the application as my own.

We see no reason why this construction of what happened at the time should not be adopted, and if that is done, the present petition would be in time. Some question was raised in the Courts below as well as before the learned Judge of this Court, as to whether there was or was not a step-in-aid of execution. In the view we have taken, no such question can arise. The point is not, whether there was a step-in-aid of execution, but whether the previous execution petition could or could not be deemed in law as that of Annapurnamma. Our answer is decisively in the affirmative. The provisions of Art. 182, it has been held, should receive a fair and not too technical a construction (Mitra on Limitation, Edn. 6 p. 2048). Its language ought not to be strained in favour of the judgment-debtor who has not paid his debt and the words should be liberally interpreted in favour of the decree-holder (Ibid p. 2075).

The cases cited by Mr. Somasundaram are easily distinguishable. In 28 Mad 396,[1] the application was made by the mother, although the person rightly entitled was the major son and as the judgment takes care to point out :

> There is nothing to show that he constituted her as his agent for the purpose of making the application.

In 4 M L W 291[2] again, the widow made the application setting up a title as against the adopted son, who, it is not suggested, either ratified or adopted her act. In the result the appeal is allowed and the decision of the Subordinate Judge is restored. Each party will bear his or her costs throughout.

C.R.K./D.S. *Appeal allowed.*

1. Saramma v. Seshayya, (1905) 28 Mad 396.
2. Swaminatha Asari v. Gopalakrishna Aiyengar, (1917) 4 A I R Mad 2=37 I C 750=4 M L W 291.

A. I. R. 1938 Madras 325

HORWILL J.

S. A. Subramanyam Chettiar and another — Appellants.

v.

K. G. Ethirajulu Chettiar and another — Respondents.

Appeal No. 443 of 1936, Decided on 16th September 1937, against order of Sub.Judge, Madura, D/- 23rd September 1936.

(a) Mortgage—Appointment of Receiver—Receiver can eject mortgagor.

As a Receiver can be appointed on behalf of a simple mortgagee, it is a necessary concomitant of his office that he should be able to lease the property and that if he is obstructed by the mortgagor he can seek the aid of the Court to remove him: *A I R 1933 Mad 570 (F B), Foll.*; *A I R 1936 All 495 (F B), Dissent.* [P 326 C 1]

(b) Res Judicata—Mortgagee applying for removal of mortgagor — Court rejecting application — Another application by mortgagee at another stage for removal of mortgagor held not barred by constructive res judicata.

Where in a previous application by the mortgagee, the Court did not see fit to eject the mortgagor from possession, the mortgagee cannot be held to be estopped by the principle of constructive res judicata from again applying to the Court and asking it to eject the mortgagor. The Court might not have seen fit at a particular stage of the suit to pass an order evicting the mortgagor; but it is perfectly open to the Court if it sees fit at some later stage, to do so. In making its first order, the Court considered what was the most convenient course to adopt at that time; and in doing so, it certainly did not decide any question against the mortgagee either expressly or by implication which would amount to a decision on some point which would prevent the point being raised in a subsequent stage of the suit. [P 326 C 1]

K. V. Srinivasa Iyer — *for Appellants.*

K. P. Mahadeva Iyer and I. K. Deva Rao — *for Respondents.*

Judgment.—The appellants mortgaged the property in question to the respondents. The respondents obtained a decree; but because of the various applications that the appellants made in this Court and other tactics that they adopted, the sale has not taken place even now. The respondents thereupon put in an application for the appointment of a Receiver and a Receiver was appointed. Certain allowances were given to the appellants for their expenses; and they were allowed to remain in possession of that part of one of the houses in which they lived. Subsequently, the present order was passed ordering them to vacate that part of the house also, because the Receiver was unable to realize any rent for the benefit of the mortgagees. Hence this appeal.

The learned counsel for the appellants places reliance on A I R 1936 All 495,[1] a Full Bench case of that Court. Their Lordships in that case came to the conclusion that although the first part of O. 40, R. 1, was wide enough to enable a Receiver to be appointed in all cases, yet Clause 2 of that Rule meant in practice that a Receiver could not be appointed on behalf of a simple mortgagee, the reason being that the mortgagee was not entitled to immediate possession and that the Receiver could not be appointed as there was no use in appointing a Receiver if he could not enter into possession. This decision meant that a Receiver should not be appointed on the application of a simple mortgagee. It is conceded that the finding that a Receiver should never be appointed on behalf of a simple mortgagee is not the law current in this presidency; but it is contended that this Court, although holding in Full Bench case, 56 Mad 915,[2] following older cases that a Receiver could be appointed in such suits, this Court has nowhere given a finding that Cl. 2 of O. 40, R. 1, did not apply to the possession and dispossession of the mortgagor. It is seen however from a reading of Allahabad case[1] that the principal reason why the Allahabad High Court came to the conclusion that a Receiver ought not to be appointed in suits on a simple mortgage, is that Cause 2 of O. 40, Rule 1, did not permit of a Receiver dispossessing the mortgagor. Their Lordships of the Allahabad High Court expressed dissent from the judgment of the Full Bench of this High Court in 56 Mad 915,[2] where the opinion was held that the appointment of a Receiver was not dispossession at all as the Receiver held possession on behalf of the mortgagor and merely preserved the profits from the property for the benefit of the mortgagee in case the mortgaged property was not found sufficient. I cannot therefore, in the face of 56 Mad 915,[2] accept the reasoning in the Allahabad case which formed the basis of a decision com-

1. Anandi Lal v. Ram Sarup, (1936) 23 A I R All 495=163 I C 481=58 All 949=1936 A L J 605 (F B).

2. Paramasivan Pillai v. Ramasami Chettiar, (1933) 20 A I R Mad 570=145 I C 449=56 Mad 915=65 M L J 222 (F B).

pletely at variance with that in 56 Mad 915.[2] If, as is the law in this presidency, a Receiver can be appointed, it is a necessary concomitant of his office that he should be able to lease the property and that if he is obstructed by the mortgagor he can seek the aid of the Court to remove him. If the arguments of the learned counsel for the appellants were correct, a Receiver in a mortgage suit would be able to do nothing at all if the mortgagor chose to resist him; for, the mortgagor could remain on his property and because he was in possession he could not be dispossessed. Even if he did not occupy the whole of the property himself but leased it to some other person, that other person's possession would be possession of the mortgagor; and the Receiver and the Court would be equally powerless to collect rent from that other person if he desired to pay the rent to the mortgagor himself. Clause (d) of O. 40, R. 1, confers upon the Receiver power to manage the property and to collect the rents and profits thereof and he cannot do this against the obstruction of the mortgagor unless he is allowed to enter into possession himself.

The next contention raised on behalf of the appellants is that as in a previous application by the mortgagee the Court did not see fit to eject the mortgagor from possession, the mortgagee was estopped by the principle of constructive res judicata from again applying to the Court and asking it to eject the mortgagor. I cannot accept this contention. The Court may not have seen fit at a particular stage of the suit to pass an order evicting the mortgagor; but it was perfectly open to the Court if it saw fit at some later stage, to do so. In making its first order, the Court considered what was the most convenient course to adopt at that time; and in doing so it certainly did not decide any question against the mortgagee either expressly or by implication which would amount to a decision on some point which would prevent that point being raised in a subsequent stage of the suit.

The last contention is that the Court has not found that the mortgagor by his conduct has merited such an order. It is clear however from a perusal of the order appealed against and from the various proceedings that have taken place at the instance of the mortgagor, that the mortgagor has succeeded for a long period of years in preventing the mortgagee from realizing the fruit of his decree. I am certainly of opinion that the lower Court was quite justified in passing the order it did. In the result the appeal is dismissed with costs of the contesting respondent.

C.R.K /B D. *Appeal dismissed.*

A. I. R. 1938 Madras 326

WADSWORTH J.

Alamelu Ammal — Plaintiff.

v.

C. Parthasarathi Naidu — Defendant.

Testamentary Original Suits Nos. 11 and 16 of 1936, Decided on 3rd November 1937.

Will—Execution - Proof of — Copy of will containing copy of signature of testator produced — Words "signed before us" at foot but no attestation by witnesses—Neither attestation nor existence of original will at time of testator's death proved — Valid execution held not proved.

A copy of a will admitted to be in the hand writing of a particular person purported to contain a copy of the signature of the testator, and at the foot of it there were the words, "signed before us," but no names of attesting witnesses were found beneath that phrase. There was no evidence whatever that any attestations were made nor was there evidence that the original will was in existence at the time of the testator's death:

Held* that from the fact that the testator signed this will an intention to complete it but not actual completion of the will might be inferred and that valid execution was not proved: *(1890) 15 P D 170*; *(1888) 13 P D 2 and (1917) L R P 93, Disting.*; *164 E R 632 and (1870) 22 LT 489, Rel. on. [P 329 C 1]

V. Radhakrishnayya — *for Plaintiff.*

C. Srinivasachari — *for Defendant.*

Order.—T. O. S. No. 16 of 1936 is an application to revoke the letters of administration granted as in an intestacy in O. P. No. 129 of 1914 (now T. O. S. No. 11 of 1936) and to grant probate to the petitioner Alamelu Ammal of a will a copy of which is tendered in evidence. The alleged testator is one Krishnamoorthi, husband of the petitioner Alamelu Ammal. He died on 26th April 1914 leaving, by the petitioner, three sons and a daughter, the eldest son being the present respondent, Parthasarathi. There was another family by one Ethiraja Ammal, who was either a wife or a concubine. The will which Alamelu Ammal propounds divides the estate between the

petitioner, her daughter and the children of the alleged concubine. Shortly after the death of Krishnamoorthi, his son, the present respondent Parthasarathi, applied for letters of administration as in an intestacy. Notices were served on his mother, and his brothers and sister and in due course letters of administration were issued without any objection in September 1915. In 1923 there was a partition of the properties, as a result of which Parthasarathi got the house which under the will now propounded would go to his mother, the present petitioner. In 1935 there was a further partition of properties subsequently acquired as a result of litigation.

The will now propounded, which is dated 25th November 1912 was first asserted in a lawyer's notice sent by the present petitioner on 25th August 1936. Her allegation is that she had only recently found that copy on which her petition is based. This copy is admittedly in the hand-writing of the respondent Parthasarathi. It begins with the phrase

> Know all concerned that this is my will signed by me in the presence of the two gentlemen who have attested it.

It purports to contain a copy of the signature of the testator, and at the foot of it there are the words, "signed before us," but no names of attesting witnesses are found beneath that phrase. The copy therefore contains an indication that the original was signed and that there was an intention that it should be attested by two witnesses, but no indication that these two attesting witnesses ever did attest it, nor is there any indication as to their identity. The petitioner has no other evidence of the due execution of the will except any inference which might be drawn from the various statements of the respondent. In the first place we have the fact that in the original application for letters of administration he asserted that there was no will, and the persons to whom notices were sent did not contradict this assertion. In the reply to the notice of August 1936, the respondent again asserted, "My father left no will nor have I ever come into possession of any will of my father or suppressed the same." It must be remarked that at this time the petitioner had not revealed the fact that she had in her possession a copy of it in the handwriting of the respondent. Then we have a statement in an affidavit sworn by the respondent on 19th October 1936, in which he says:

> I further deny that to the best of my knowledge my father ever left any will on or about 25th November 1912. I am not aware till now of the existence of any such will. I deny that I ever took possession of any such will or suppressed the same.

In his reply to the affidavit in support of the present petition, the respondent admits that the copy of the will is in his handwriting but denies that the will was attested by any witnesses or that he was ever in possession of the original will. He says that he came across the original during his father's illness in 1913, questioned his father about it, and was told that it had been written to satisfy the importunities of the mother of the concubine. He adds that on the intervention of a relative his father was satisfied that there was no necessity for this will and destroyed the original in the presence of this relative, the respondent himself, the petitioner and the mother of the concubine. Except for petitioner and the respondent, these alleged witnesses of the destruction of the will are dead.

Now it is quite clear that the burden of proving valid execution of the will rests on the petitioner. When this burden has been discharged, it will be incumbent upon the respondent to prove that the will was revoked. The petitioner has no positive evidence at all, except the circumstances summarized above, that any such will as is asserted was ever actually executed in such a manner as would make it a good will in law. It is suggested that since the will was apparently executed outside Madras city, it would be a good will so far as it relates to properties outside this city even in the absence of attestors, the argument being based on the decision in 59 M L J 596[1]. With reference to this argument, I must remark that there is really no evidence as to the place of execution at all. The copy filed in Court contains no indication, and no evidence has been put before me, as to the place of residence of the testator on the date of the alleged execution of the will. It is pointed out that there is an assertion in the petition that the alleged testator was a resident at Guntur and it is admitted by the respondent that when the copy was taken

1. Namberumal Chetti v. Veeraperumal Pillai, (1930) 17 A I R Mad 956 = 128 I C 689 = 59 M L J 596.

by him the document which he copied was actually at Guntur. This however does not seem to me to be sufficient proof that the will was actually executed at Guntur. So far as it relates to the house in Madras, it is certainly not a valid will without attestation. Moreover, I doubt whether when the will itself clearly contemplates the signatures of two attesting witnesses to make it a complete transaction, it could be held that it had been properly executed in the absence of proof that the contemplated formalities were completed.

It is urged on behalf of the petitioner that the Court can presume on the materials before it that there was a valid execution of the will. Mr. Radhakrishnayya has quoted three English cases in which the Court relying on the maxim "*omnia praesumuntur rite esse acta*" has filled up the gap in the evidence of the completion of all the formalities by inferring that those things had been done which in the ordinary course of events having regard to the known circumstances are likely to have been done. One of these cases is (1890) 15 P D 170.[2] It was a case in which the will was lost; there was no copy; the names of the attestors were known, and both were dead; there was no proof of any proper attestation clause; but there was good evidence as to the execution and contents of the will and the fact that it was signed by one of the known attestors and that it was in existence at the time of the testator's death. On these facts it was presumed to have been validly executed. It will be noticed that in the present case we do not know the names of the attestors, or if there were any attestors at all, nor do we know positively that any such will was in existence at the date of the testator's death, so that the inference to be drawn from the circumstances in the present case must go a great deal further than in the case just cited. The case in (1888) 13 P D 2[3] is not of much assistance to the petitioner. That was a case in which there was no room for the signatures of the attesting witnesses at the foot of the will and they were found at the top of the next page. They admitted their signatures but had no recollection of actually attesting this particular document. Here again the Court inferred that the document was validly executed. The case in (1917) L R P 93[4] was a case of a lost will in which there was clear and good evidence that the will was validly executed and attested, but the witnesses could not remember the names of the attestors. It was held that the evidence was sufficient to establish that the will was duly executed. This was a case in which there was no contest; but clearly the evidence went a great deal further than that placed before me.

For the respondents, two English cases have been cited in which evidence somewhat similar to that now before me was held to be insufficient. One is in (1858) 164 E R 632,[5] where the testator residing in India sent to his solicitor in England a copy of his will without any copy of his own signature or the signatures of the attesting witnesses and asked to be informed if the will needed revision in any respect. No revision was suggested and subsequently the testator sent what purported to be a copy of a codicil referring to the previous will, the codicil copy containing the names of the signatory and the witnesses. Shortly afterwards the testator was killed in the Mutiny and no other evidence was forthcoming as to the valid execution of the will and codicil and it was held that the statement of the testator contained in his letters were not sufficient to prove due execution. A somewhat similar decision is found in 22 L T 489.[6] These cases seem to go on the point that at common law a statement of a deceased person regarding facts within his knowledge would not be evidence unless it relates to one of the circumstances which can be proved by the secondary evidence of extra-judicial statements by the deceased person, similar to those embodied in S. 32, Evidence Act.

Looking into the facts of the present case from a practical point of view, what is it that we have established? We know that there was in existence at some time what purported to be a will dated 25th November 1912. We have the statement of the respondent that he saw this will in the possession of the testator in 1913 and that it was unattested. The copy of that will contains an indication that attestations were contemplated. There is no evi-

2. Harris v. Knight, (1890) 15 P D 170=62 L T 507.
3. Woodhouse v. Balfour, (1888) 13 P D 2 = 57 L J P 22=58 L T 59=36 W R 868=52 J P 7.
4. In re Phibbs, (1917) L R P 93=86 L J P 81 =116 L T 575=33 T L R 214.
5. Re John Peter Ripley, (1858) 164 E R 632= 1 S W & Tr 67.
6. In re Gray, (1870) 22 L T 489.

dence whatever that any attestations were made. There is no evidence that the original will was in existence at the time of the testator's death. We might infer from the fact that he signed this will with an intention to complete it. But can we infer its actual completion ? I do not think we can. Nor do I think we can infer from the somewhat disingenuous statements of the respondent when taxed with the existence of such a will, a knowledge that there was ever in existence a duly completed and validly attested will such as is now asserted. All that we might infer is that he probably knew of the existence of this copy and was not sure whether the petitioner had seen the copy or not. Taking all the materials together, I am of the opinion that the valid execution of this will has not been proved. It is therefore unnecessary to call upon the respondent to prove its revocation. T. O. S. No. 16 of 1936 is dismissed with the costs of the contesting respondent. The letters of administration granted in T. O. S. No. 11 of 1936 will be re-granted.

C.R.K./K.S. *Order accordingly.*

---

* A. I. R. 1938 Madras 329

ABDUR RAHMAN J.

Guzulu Devendra Ayyar — Petitioner.

v.

P. C. Muthu Chettiar and another — Respondents.

Civil Misc. Petn. Nos. 3166 and 3167 of 1937, Decided on 5th November 1937, against decree of Sub-Judge, Madura, in A. S. No. 4 of 1935.

(a) Civil P. C. (1908), O. 14, R. 1—Duty of framing issues though lies on Court, parties should draw Court's attention to omission in framing issues—Person alleging that he is not necessary party but not pressing issue to that effect when issues were being framed—That issue must be held to have been waived by him.

It is true that the duty of framing issues has been cast by the Civil Procedure Code on Courts. But it must not be forgotten that it is essential for the parties also to draw the attention of the Court to an omission in framing issues. Where therefore the issue in regard to a party as being an unnecessary party was not pressed on his behalf deliberately when the issues were being framed it must in the circumstances be held to have been waived by him. [P 329 C 2 ; P 330 C 1]

*** (b) Civil P. C. (1908), O. 41, R. 22—Cross-objections can be filed by respondent against person who, though party to suit, was not impleaded by appellant as party to appeal.**

The provisions contained in O. 41, R. 22, are quite general and entitle a respondent to take any cross-objection to the decree which he could have taken by way of appeal. A respondent's right to file cross-objections and ask for relief cannot be restricted to the parties only who have been impleaded in the appeal at the instance of the appellant. If the respondent could file an appeal against a respondent, who although not a party to the appeal, was yet a party to the suit, there is nothing in the words of O. 41, R. 22, which would prevent him from raising the contention in his cross objections which could be raised by him in an appeal : *A I R 1920 Mad 120, Rel. on ; A I R 1920 Lah 438, Explained ; A I R 1931 Mad 133, Disting.* [P 330 C 2 ; P 331 C 1]

T. S. Vaidhyanatha Aiyer — *for Petitioner.*

T. S. Venkatesa Aiyer and K. Venguswami Iyer — *for Respondents.*

Order. — A suit for possession and injunction was filed by one Guzulu Devendra Iyer against Muthu Chettiar as defendant 1 and Venkateswara Iyer as defendant 2 in July 1931 in the Court of the District Munsif at Melur in which the tenant was also impleaded as defendant 3. Certain mesne profits were also claimed by the plaintiff in the suit. While filing his written statement, defendant 1 raised a number of contentions in which he attacked the locus standi of the plaintiff to maintain the suit on the ground that he was not an occupancy tenant and asserted that the othi (Ex. A-1) was invalid. It was admitted by him that he was the landholder but alleged that defendant 2 was in possession of the lands in suit and that the land was rightfully sold to him in a revenue auction for arrears of rent. It was also pleaded on his behalf that he was an unnecessary party to the suit. A number of issues were then framed by the lower Court, but the objection raised by defendant 1 that he was an unnecessary party did not form the subject matter of an issue at all.

It is true that as contended on behalf of the respondent, the duty of framing issues has been cast by the Civil Procedure Code on Courts. But it must not be forgotten that at least on a technical matter like this, it is essential for the parties also to draw the attention of the Court to such an omission. In view of serious contentions raised on behalf of defendant 1 on the merits of the claim, it appears to me that the issue in regard to defendant 1 as being an unnecessary party was not pressed on his behalf deliberately when the issues were being framed and

must in the circumstances be held to have been waived by him. This inference is further strengthened by the fact that the trial proceeded for about an year and a half and yet nothing was said or done by or on behalf of defendant 1 who would have drawn the attention of the Court to such an omission, although another issue was subsequently added by the trial Court. In fact, the result of the case in which a decree for possession was passed against defendant 1 in addition to defendant 2 shows very clearly that there was no merit in that objection and must be necessarily, although impliedly, taken to have been decided against defendant 1.

An appeal was filed by defendant 2 against the judgment and decree of the trial Court passed on 30th January 1933 to the District Court Judge at Madura to which defendant 1 was naturally impleaded as a respondent. Having been served with a notice of appeal on 14th July 1933, he filed cross-objections on 14th August 1933. The only ground which was raised in these objections was that he should not have been held liable for the costs of the suit. When the matter came up for hearing, all the grounds urged by the appellant (i. e., defendant 2) failed but strangely enough the Subordinate Judge found that defendant 1 was an unnecessary party. He came to this finding on the grounds that defendant 1 had first of all disclaimed possession and the relief asked for by the plaintiff was one in which defendant 2 was alone interested. It was apparently overlooked that the plaintiff had in this case asked for possession against both defendant 1 and defendant 2. The allegations in the plaint alone should have been looked into in order to come to a finding whether defendant 1 was or was not a necessary party. If the plaintiff had failed to establish his allegations, the suit should have been dismissed against him on the merits. This was however not done. The finding arrived at by the Subordinate Judge is all the more surprising when one finds that this ground was not even taken by defendant 1 in his cross-objections.

Aggrieved by the judgment and decree of the lower Appellate Court, defendant 2, filed a second appeal and since defendant 1 was held to be an unnecessary party by the Subordinate Judge, he was not impleaded. The plaintiff has now filed cross-objections in which he prays that a decree for possession and costs should have been passed by the lower Appellate Court not only against defendant 2 but also against defendant 1. A separate petition has also been given on his behalf that in the circumstances of the case, defendant 1 should be impleaded as a party to the appeal. Not being content with his cross-objections and the petition filed to implead defendant 1 as a party to the appeal, he has yet put in another petition in which he has asked his cross-objections to be converted into a second appeal and prayed for the delay in filing the appeal to be excused. This has been done as stated by his counsel while arguing the case by way of caution.

The real point which I have now been called upon to decide is whether the cross-objections filed on behalf of the plaintiff are competent against defendant 1 who has not been made a party to the appeal and if not whether he could be ordered to be impleaded as a party to the appeal under the provisions of O. 1, R. 10 read with S. 107, Civil P. C. If I hold on either of the two points in favour of the plaintiff, it is obvious that no orders need be passed on the third application of his in which he has asked for his cross-objections to be converted into an appeal and for excusing the delay under S. 5, Limitation Act. The provisions contained in O. 41, R. 22 are quite general in my opinion and entitle a respondent to take any cross-objection to the decree which he could have taken by way of appeal. It has been already held in a Full Bench ruling of this Court given in 38 Mad 705[1] and followed in 41 Mad 904[2] and A I R 1923 Lah 39[3] that a respondent could urge cross-objections against a co-respondent in any and every case. If this be so, why should a respondent's right to file cross-objections and ask for relief be restricted to the parties only who have been impleaded in the appeal at the instance of the appellant. If the respondent could file an appeal against a respondent who although not a party to the appeal was yet a party to the suit, there is nothing in the words of O. 41, R. 22 which would prevent him from raising the contention

1. Munisami Mudaly v. Abbu Reddy, (1915) 2 A I R Mad 648=27 I C 323=38 Mad 705=27 M L J 740 (F B).
2. Alagappa Chettiar v. Chookalingam Chetty, (1919) 6 A I R Mad 784=48 I C 203=41 Mad 904=35 M L J 236 (F B).
3. Chhajju v. Qutab Din, (1923) 10 A I R Lah 39=69 I C 330.

in his cross-objections which could be raised by him in an appeal. I am supported in this view by a ruling of a Division Bench of this Court given in 11 M L W 602.[4]

The respondent's counsel cited 54 I C 971[5] in support of his contention that inasmuch as the respondent was not a party to the appeal, no cross-objection could be entertained against him. In that case no notice was issued to a defendant who was affected by the cross-objections and the lower Appellate Court had, in spite of the absence of that defendant chosen to pass a decree against him. This was obviously wrong. Moreover unlike the present case, the defence of the two defendants one of whom was impleaded in appeal and the other who was not were not common. But if that ruling meant to lay down the general proposition that no cross-objections could be entertained against a person who although a party to the suit, was not impleaded by the appellant as a party to the appeal, I would with great respect disagree. I see nothing in the words of O. 41, R. 22 and no principle of law under which such a contention should be allowed to prevail. The other ruling cited on behalf of respondent, A I R 1931 Mad 133[6] has no application to the facts of this case.

At all events the Court has ample powers under the provisions of O. 1, R. 10 (2) read with S. 107, Civil P. C. to implead any person in the appeal as a respondent who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate upon all the questions involved in the appeal effectively.

In view of what has been said, I consider that by putting in cross-objections defendant 1 has been legally impleaded in this appeal. In any case I would order him to be so impleaded under the provisions of O. 1, R. 10 (2) read with S. 107, Civil P. C. It is unnecessary for me now to consider the third application for converting the cross-objections into a second appeal and for excusing the delay. I would prefer to pass no orders on this application. Defendant 1 shall bear the costs of the application.

C.R.K./D.S. *Order accordingly.*

4. Ponnuswami Asari v. Palaniandi Mudali, (1920) 7 A I R Mad 120=56 I C 612=11 M L W 602.

5. Ilahi Baksh v. Jawinda Mal, (1920) 7 A I R Lah 488=54 I C 971=1 Lah 396.

6. Aylin Reddi v. Venkata Reddi, (1931) 18 A I R Mad 188=130 I C 657.

A. I. R. 1938 Madras 331

HORWILL J.

K. Sundaresa Iyer—Appellant.

v.

Sarvajana Sowkiabhi Virdhi Nidhi Ltd., Coimbatore — Respondent.

Second Appeal No. 1144 and Civil Misc. Petn. No. 5105 of 1936, Decided on 10th September 1937, against decree of Sub-Judge, Coimbatore, in A. S. No. 128 of 1936.

(a) Specific Relief Act (1877), S. 42—S entrusted with plaintiff's jewels, pledging them with defendant — S convicted for breach of trust and jewels ordered to be returned to plaintiff—High Court in revision holding that jewels should be returned to defendant—Plaintiff obtaining possession of jewels before High Court's order and returning them to Magistrate after 10 months of such order—Suit by plaintiff for declaration that he was entitled to possession of jewels—Magistrate held jewels not as plaintiff's but defendant's agent—Suit for mere declaration without claiming possession was not sufficient.

The plaintiff was the owner of certain jewels which he entrusted to one *S* for sale who committed breach of trust and pledged them with the defendant Bank. The jewels were ordered by the Sub-Divisional Magistrate, who convicted *S*, to be returned to the plaintiff. The High Court in revision held that jewels should be returned to the defendant Bank and ordered accordingly. Before the order was passed by the High Court, the plaintiff obtained possession of the jewels from the Sub-Magistrate and returned them to him 10 months after the order and instituted a suit for declaration that he was entitled to the possession of the jewels. The jewels continued to be in the possession of the Sub-Magistrate :

Held that the Sub-Magistrate continued to hold the jewels from the time they were handed over to him by the plaintiff, for the purpose of handing them back to the defendant in pursuance of the order of the High Court, only as the agent of the defendant. The plaintiff was not in possession of the jewels. Therefore the suit for declaration without a prayer for possession was not sufficient : *36 Mad 62 and 27 Mad 591, Disting.* ; *A I R 1933 Mad 503, Rel. on.*

[P 333 C 1, 2]

(b) Pleadings — Amendment of plaint in second appeal—Objection to maintainability of suit taken in written statement—Defendant risking point being decided against him in lower Courts — Amendment of plaint in second appeal is unfair.

Where in a suit for declaration, the plaintiff has not chosen to amend his plaint by adding a prayer for possession from the time the legal objection was taken in the written statement of

the defendant and has taken the risk of the point being decided against him in the lower Court, it is not fair to the defendant to allow an amendment of the plaint in the second appeal and to force the defendant to a retrial. [P 333 C 2]

K. Rajah Ayyar and C. S. Krishnamurthi — *for Appellant.*

T. M. Krishnaswamy Ayyar and K. V. Ramachandra Ayyar —

for Respondent.

Judgment. — The plaintiff was the owner of certain jewels, which he entrusted to one Subba Rao for sale, who committed breach of trust and pledged them with the defendant Bank. Subba Rao was convicted and the property was ordered by the Sub-Divisional Magistrate who convicted him to be returned to the plaintiff. The High Court in revision held that as the jewels had been taken from the defendant Bank they should be returned to the Bank and ordered the jewels to be given to the Bank. Before the order was passed, the plaintiff had obtained possession of the jewels; and for 10 months after the order of the High Court was passed possession of the jewels was with the plaintiff. On 11th June 1934 the plaintiff handed over the jewels to the Sub-Divisional Magistrate and on the same day filed the present suit in the District Munsif's Court for a declaration that he was entitled to the possession of the jewels. At the same time he filed a petition that the Court should order the Sub-Divisional Magistrate to retain the jewels or, better still, to send them to the District Munsif's Court. Eventually this was done. The District Munsif dismissed the plaintiff's suit on the merits. In appeal to the Subordinate Judge's Court, the plaintiff succeeded on the merits; but the dismissal of the suit was confirmed on the technical ground that the plaintiff should have asked for possession and not merely for a declaration. Hence this second appeal by the plaintiff to this Court.

The contention of the learned advocate for the appellant is that since at the time when the suit was filed the jewels were actually in the custody of the Sub-Divisional Magistrate, it must be considered that the jewels were in *custodia legis* and not held specifically by the Sub-Divisional Magistrate on behalf of the defendant, and that therefore all that was necessary for the plaintiff to do was to obtain a declaration that the jewels belonged to him. The learned advocate for the appellant relies chiefly on 36 Mad 62.[1] That was a case in which the Magistrate under S. 146, Criminal P. C. attached some property because he was unable to decide to which of two disputants it belonged. It would appear from the original records that the attachment was on 5th December 1903. On 27th March 1905 the High Court passed an order setting aside the attachment and ordering the property in question to be returned to the defendants. The Magistrate did not however raise the attachment until 5th February 1906. Before that was done on 1st November 1905 the plaintiff filed a suit for a declaration of his right to the property. It was held in that case that a declaration was sufficient, because although the High Court had ordered the property to be restored to the defendant, the Magistrate had not in fact done so. A somewhat similar case arose in 27 Mad 591[2] where in certain guardian proceedings, the plaintiff was appointed a receiver of the minor's property. The High Court set aside that order and ordered the property to be returned to the defendant. Before the property was actually returned, the plaintiff filed a suit for a declaration that he was entitled to the possession of the property. For reasoning similar to that given in 36 Mad 62[1] it was held that a declaration was sufficient. A case that is much relied on by the respondent as bearing a greater resemblance to the present case is 38 M L W 194,[3] where a certain sum of money was obtained in execution. While the money was still in the custody of the Court, the daughter-in-law of the decree-holder brought a suit for a declaration that she was entitled to the money. It was held in that case by Pakenham Walsh J. that a suit for a declaration was not sufficient, for the High Court was holding the property for the decree-holder; so that the daughter-in-law, who was a stranger to the execution proceedings, had to ask for possession of the property, because she was not in possession. Nor was the Court in custody of the property except as the agent of the decree holder. In that case 27 Mad 591,[2] was referred to and distin-

1. Malayappa Pillai v. Perumal Pillai, (1913) 36 Mad 62=12 I C 170=21 M L J 1022.
2. Vedanayaga Mudaliar v. Vedammal, (1904) 27 Mad 591.
3. Natesa Iyer v. Mangalathammal, (1933) 20 A I R Mad 503=144 I C 602=38 M L W 194.

guished as being a case in which the Court was holding the property for such person as might eventually be found entitled to it and not specifically on behalf of a certain person, as the executing Court does with respect to property realized in execution. Although 38 M L W 194[3] was decided by a single Judge, the matter was reconsidered in a Letters Patent appeal; and the Judges who heard that appeal expressed their entire approval of what had been said by Pakenham Walsh J. 36 Mad 62[1] was not expressly referred to; but as far as I can see, 36 Mad 62[1] is no stronger a case for the appellant than 27 Mad 591.[2] Although the Magistrate had received an order from the High Court that the property was to be returned to the defendant it had not in fact been returned when the suit was filed. The Court had taken the property in order that it might hold it until the Civil Court had decided the rights of the parties; and it continued to hold that property for the same purpose until it actually handed it back to the defendant.

It cannot be said that from the date of the order of the High Court the property was no longer in *custodia legis* and was held by the Court only as an agent of the defendant. It has been argued that when the appellant handed over the jewels to the Sub-Divisional Magistrate the Sub-Divisional Magistrate either held them as a Court to be handed over to the person who was rightfully entitled to them or held them as an agent of the plaintiff-appellant. He clearly did not hold the jewels as an agent of whomsoever might be found by the Civil Court to have a right to them. In the very first instance he purported to hold the jewels for the plaintiff and, after the receipt of the order of the High Court for the defendant. Moreover the present case differs from one in which the Court had all along held possession of the jewels; for, the appellant actually handed over the jewels to the Sub-Divisional Magistrate, and the purpose for which he handed them over was that they might be returned to the defendant. The Sub-Divisional Magistrate could not have taken the jewels from the appellant and retained them as the agent of the appellant until such time as he actually handed them over physically to defendant. The Sub-Divisional Magistrate has ordered the appellant to give up the jewels; and if he had not done so, the Court would doubtless have taken action against the appellant. When therefore the Court took the jewels from the appellant it certainly did not take them as the agent of the plaintiff, to keep them in its custody on his behalf; but took them from the possession of the appellant and held them as the agent of the defendant until such time as it could hand them over to the defendant. I therefore hold that at the time when the suit was filed, the jewels were not in the possession of the appellant and that the lower Court was therefore right in holding that a suit for a declaration was not sufficient.

A petition has been filed in this second appeal asking this Court to grant permission to the plaintiff to amend his plaint. In considering whether this prayer should be granted or not, it has to be borne in mind that even in the written statement itself an objection was raised as to the maintainability of the suit on the ground that the plaintiff had not asked for possession. The plaintiff, during the course of the trial, did not ask to be allowed to amend this plaint; nor did he ask to be allowed to do so during the appeal. Even in this Court he has asked to be allowed to amend the plaint only in case this Court holds against him on the main point raised, i. e., on the question of the possession of the jewels at the time the suit was laid. The plaintiff was therefore fully aware from the date of the filing of the written statement that the defendant was contending that the suit was not maintainable on the ground that he had not asked for possession. He was not only aware that a legal objection had been taken; but he was prepared to go on with the suit and the appeal and to take the risk of this point being decided against him. He cannot therefore reasonably ask at this stage to be allowed to amend his plaint; and it would be unfair to the defendant to be forced to submit to a retrial because of the plaintiff's obstinacy. His petition, C. M. P. No. 5105 of 1936, is therefore dismissed. The appeal is accordingly dismissed with costs. A memorandum of cross-objection has been filed with regard to the finding in appeal on the merits. This point does not arise in view of the fact that in any case the suit has to be dismissed because there is no prayer for possession. There has been no argument on this memorandum of cross-objections and so it is dismissed without costs. Leave to appeal is granted.

C.R.K./V.B.B. *Appeal dismissed.*

A. I. R. 1938 Madras 334

PANDRANG ROW AND
ABDUR RAHMAN JJ.

Thathachariar and others—Appellants.

v.

Srinivasa Raghava Iyengar and others —Respondents.

Letters Patent Appeal No. 57 of 1936, Decided on 17th November 1937, against judgment of Venkataramana Rao J. in S. A. No. 469 of 1932.

Civil P. C. (1908), S. 9, Explanation — Right to first honours on occasion of festival is not right of civil nature unless it is attached to office — Suit for declaration of such right is incompetent.

Where in a suit for a declaration that the plaintiffs and his family are entitled to the first honours, namely thirtham, thulasi and Sri Satari on the occasion of a festival, the real controversy between the parties, is not really the right to receive the particular articles or honours but to receive them before any one else and in particular the defendants and the question is one of mere dignity and precedence and nothing more, the right to such dignity or precedence cannot be regarded as a right of civil nature whether it is claimed in a temple or else where so long as it is not attached to an office and a suit for declaration of such right does not lie : *A I R 1935 Mad 679, Approved.* [P 335 C 2]

K. Bhashyam Ayyangar and N. R. Govindachari — *for Appellants.*

K. S. Narayana Ayyangar — *for Respondents.*

Pandrang Row J.—This is an appeal from the judgment of Venkataramana Rao J. in S. A. No. 469 of 1932 dated 14th April 1936. The second appeal arose out of a suit for a declaration that the plaintiff and his family were entitled to the first honours, namely thirtham, thulasi, and Sri Satari on the occasion of the Pavittrotsavam festival in the temple of Sri Sarangapani Swami at Kumbakonam. The plaintiff's case was that he and his family had been performing the said festival from time immemorial and that immediately after the prayers or worship are over an offering of food prepared at the plaintiff's expense is offered to the deity and after karpoora arathi the plaintiff has to be given thirtham, thulasi, etc., and Sri Satari has to be placed over his head with parivattam, i. e., a piece of silk cloth. The claim was thus, as stated by Venkataramana Rao J. "rested on long-standing custom and practice" and related entirely to "first honours" in connexion with the festival which the plaintiff claimed to be entitled to conduct in the temple. The only question that arose before Venkataramana Rao J. was whether the decree passed in the suit in respect of these honours was right or whether the Court had no jurisdiction to pronounce such a decree as the subject-matter of the litigation was not of the nature of a civil right and therefore not within the jurisdiction of a Civil Court.

The learned Judge referred to several decisions bearing on the point, namely 32 Mad 291,[1] 1913 M W N 289,[2] 31 M L J 758[3] and 41 M L W 752.[4] He expressed the opinion that if the question were res integra, he should have been inclined to follow the observations of Sadasiva Iyer J. in 1913 M W N 289,[2] apparently referring to that learned Judge's observations on pp. 299 and 300. But he was of opinion that he was bound to follow the Bench decision in 31 M L J 758,[3] in which it was decided that the honours claimed were appurtenant to the right of worship and therefore the right to such honours was a civil right, it being assumed or not contested seriously in that case that the right to perform the festival was a civil right. The learned Judge however referred to 41 M L W 752,[4] also a Bench decision, which expressly dissented from the proposition laid down in 31 M L J 758,[3] as will be seen from the extract given in the judgment appealed from :

> A special kind of worship, to which some dignity is attached, but no emoluments of value are attached, cannot, in our opinion, be the subject of a suit in a Civil Court. To this extent we do not agree with the decision in 31 M L J 758.[3]

In these circumstances, it is not possible to say why the learned Judge thought that he was bound to follow the Bench decision in 31 M L J 758[3] and not the decision in 41 M L W 752[4] which was a later decision and more or less coincided with his own view on the subject. Whatever that may be, we have to decide the question whether the right that is claimed in the present suit to first thirtham, thulasi, and the placing of Sri Satari on the head is a civil right which can be

1. Sri Rungachariar v. Rungaswami Battachar, (1909) 32 Mad 291=3 I C 681.
2. Athan Sadagopachariar Swamigal v. E. Srinivasachariar, 1913 M W N 289=19 I C 257.
3. Thirumalai Alwar Iyengar v. Srinivasachariar, (1917) 4 A I R Mad 903 = 36 I C 568 = 31 M L J 758.
4. Periyanan Servai v. Mahadevam Ambalam, (1935) 22 A I R Mad 679=158 I C 375 = 41 M L W 752.

agitated in Civil Court and decreed by a Civil Court. We are of opinion that the view enunciated in 41 M L W 752[4] is right. It is not disputed that where a religious office is claimed any emoluments attached thereto may be sued for in a Civil Court either with the office or without the office; in other words where a man's right to the office is not disputed but he does not get his emoluments he may sue on the emoluments in a Civil Court; or if his claim to the office is not recognized he may sue for the office as well as for the emoluments. But the right to perform a festival cannot in our opinion be regarded as a right to an office. An attempt was made to apply the analogy of office to the case of a right of worship in 31 M L J 758[3] but that attempt did not succeed, the Bench having declined to accept that contention which was put forward by the Advocate-General before them. There is no doubt at the same time that a right to take part in public worship in a temple, or of a deity outside while being taken in procession is a civil right. The question however remains whether the right to individual and exclusive worship of the deity, i. e. to the exclusion of other worshippers is a civil right. It is however not necessary to decide whether such exclusive right of worship is a civil right for the purpose of this appeal. It is enough to say that the point is not conceded definitely by Mr. K. Bhashyam Ayyangar who appears for the appellant and that it is a question that may have to be fully considered on some future occasion when it is necessary to do so.

In the present appeal it is possible to start with the assumption that the right to such exclusive worship is a civil right. Even on this assumption, it does not follow that the right to the "first honours" that are claimed in the present suit is a civil right. The right of worship is one thing and the right to receive certain honours or trifling gifts such as thulasi and holy water is another. According to Sadasiva Iyer J., the latter are only conferred by grace of the deity, and cannot be claimed as of right. Even otherwise and even assuming that the right to receive thirtham, thulasi and to have the Sri Satari placed on one's head is a necessary concomitant of worship, it does not follow that precedence or the order in which these things are done is a civil right. In the present case it is clear from the reliefs sought in the plaint as well as from the decree that has been passed in the plaintiff's favour that the relief that was sought for and granted was to enable the plaintiff to get what are known as "first honours" to the exclusion of the patrachariars. The plaint seeks first honours to the exclusion of the patrachariars and the decree also declares that the plaintiff and his family are entitled to first honours as stated in the plaint and not the patrachariars of whom defendants 2 to 5 are the representatives. The decree further restrains the receiver, defendant 1, by a permanent injunction from showing any first honours to the patrachariars, and from refusing to show such honours to the plaintiff : in other words the controversy between the parties is not whether the plaintiff and his family are to get thirtham, thulasi etc. at all, but that they should get them before any one else, and in particular before the defendant-patrachariars get them. So far as we can understand, these defendants have no objection to the plaintiff and his family getting the thirtham, thulasi, etc. after they themselves are given the same; and so far as we can see, also, the plaintiff has no objection to the patrachariars getting these things after the plaintiff and his family get them.

This is a clear indication of the fact that the actual and real controversy between the parties is not merely the right to receive the particular articles or honours mentioned in the plaint namely thulasi, thirtham and Sri Satari, but to receive them before any one else, and in particular the patrachariar-defendants. It is therefore a mere question of dignity or precedence and nothing more. The right to a dignity or precedence of this nature cannot in our opinion be regarded as a right of civil nature, whether it is claimed in a temple or elsewhere so long as it is not attached to an office. It follows therefore that this appeal must be allowed and that the decree which adjudicates upon matters which are not rights of a civil nature must be set aside. The appellants are entitled to have their costs from the plaintiff-respondent in all the Courts.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 336

BURN AND MOCKETT JJ.

In re Ramaswami—Prisoner—Accused.

Referred Trial No. 125 and Criminal Appeal No. 499 of 1937, Decided on 16th November 1937, referred by Sess. Court, Anantapur, D/- 9th September 1937.

(a) Criminal Trial—Evidence—Post-mortem certificate taken by itself is not substantive evidence — Isolated statement in it cannot without guidance of doctor be used for drawing inferences.

A post-mortem certificate is not evidence. It can be used by the doctor who has given it to refresh his memory when giving evidence and it can also be used as a record of what he observed at the time of post-mortem examination or perhaps to contradict whatever he might say in the witness box but it cannot by itself be substantive evidence. [P 337 C 1]

Where there is a statement in the post-mortem certificate to the effect that some quantity of undigested kora food was found in the stomach of the deceased, it is unsafe for the Court to act upon an isolated statement of this kind, without the guidance of the opinion of the doctor and to draw an inference that death must have taken place within a very short time of the eating of the last meal by the deceased. [P 337 C 2]

(b) Murder—Evidence—Accused alleged to have murdered child — Sole fact proved against him that he was seen in company of child not far from where corpse was found and sometime before murder—Accused commonly seen with child previously — Accused held was not responsible for murder.

Where the sole fact proved against an accused charged with having murdered a child for the sake of his ornaments, is that he was seen in the company of the child not far away from where the corpse was found sometime before the murder must have taken place and there was nothing unusual in the little boy being in the company of the accused, it being a common occurrence and where it is not possible to say that accused and the child were seen together within a very short time of the murder it is not safe to infer that the accused must have been concerned in the murder. [P 338 C 1]

C. R. Pattabhiraman — *for Accused.*

Public Prosecutor — *for the Crown.*

Burn J.—The appellant has been convicted by the learned Sessions Judge of Anantapur for murdering a little boy on 18th February 1937 and has been sentenced to death. This is one of those sadly too frequent cases in which children are murdered for the sake of jewellery on them. There is no reason to distrust the evidence of the mother of the little boy (P. W. 1) who says that on the night of 18th February her little boy ran out to play after taking his evening meal, wearing a pair of gold bangles and a pair of gold earrings. When the little boy's corpse was found by the side of the donka leading from the village towards Dharmapuram, the jewels had been removed. The boy had been murdered apparently by dropping a large stone upon his head. Two blood-stained stones were found closeby, one weighing about one and half maunds and the other quite a small one. There can be no doubt but that the child was murdered in this brutal fashion for the sake of the jewels which he was wearing.

The evidence against the appellant which the Judge has accepted is wholly of a circumstantial nature. The appellant is said to be a eunuch, who is a native apparently of Malabar ; but the mother of the boy, (P. W. 1), says that he had been in the village of Vengannapalli in Gooty Taluq for the past 12 months. According to the evidence of P. Ws. 1, 2 and 3 the appellant was popular with the children of the village and that it was quite usual for them to play with him and to go hither and thither with him. P. W. 2 who lives about a furlong from the place where the body was found, said that she had seen the appellant and the little boy that night going in the direction of the place where the corpse was found. P. Ws. 3 and 4 said that sometime later they saw the appellant alone returning in the opposite direction. To all intents and purposes this is the whole of the evidence against the appellant. It was alleged by the village munsif, (P. W. 10) and another witness, (P. W. 11) that the appellant whom the village munsif found tied up near the temple, admitted that he had committed the offence and promised to show where he had put the jewels. The village munsif says that after the appellant made this statement, he got the appellant released. He says, the appellant and the other witnesses laid him to a place near the house of Vadde Nagabusi. There the appellant played a trick upon the village munsif. He requested the village munsif to keep the other people at a distance, while he and the village munsif alone went further. The village munsif fell into the trap, went along with the appellant but the appellant after pretending to look here and there ran away and the village munsif was unable to catch him. The village munsif is corroborated, as we have mentioned by P. W. 11. But it is to be noticed that

P. W. 11 is not a resident of Venganna-palli but of the village of Nemathabad, a hamlet of Gooty. No resident of the village speaks to this confession by the appellant and we think that the learned Sessions Judge was right in refusing to act upon this evidence of confession. It is curious that although the village Munsif found the appellant tied up when he got to the temple which was after midnight, there is no evidence to inform us when the appellant was caught or where.

The learned Sessions Judge had relied to a great extent upon a sentence in the post-mortem certificate (Ex. B) to the effect that the Sub-Assistant Surgeon found ten ounces of undigested kora food in the stomach of the little boy. The evidence of the mother (P. W. 1) is that she gave the little boy his evening meal and that he ran out at once to play. The evidence of P. W. 2 would show that the appellant and the deceased were seen together very soon after that and the fact that the food was still undigested—the learned Sessions Judge thinks—is an indication that the murder must have taken place within a very short time afterwards. For this reason, he thinks, that it is incumbent upon the appellant to produce a satisfactory explanation or to submit to the drawing of the inevitable inference that he was concerned in the murder. We cannot think that this reasoning of the learned Sessions Judge is sound. The Sub-Assistant Surgeon, when he gave evidence, was not asked anything about the state of the food in the stomach of the little boy. The learned Sessions Judge was not justified in treating the post-mortem certificate (Ex. B) as evidence and in extracting the sentence about the undigested food and relying upon that as if it were positive evidence in the case. The post mortem certificate is not evidence. It could be properly used by the Sub-Assistant Surgeon, when he was giving evidence, to refresh his memory and it could also be used as a record of what he observed at the time to corroborate, or perhaps to contradict, whatever he might say in the witness box; but it cannot by itself be substantive evidence. It is clear that it would be unsafe to act upon an isolated statement of this kind in a post-mortem certificate. If the Sub-Assistant Surgeon had brought out this fact in his deposition the appellant's advocate in the lower Court might have been able to cross-examine the Sub-Assistant Surgeon and to find out precisely what he meant by "undigested" food and also to find out his opinion as to the time that had elapsed between the taking of the last meal and the death of the little boy. It is common experience that the expression 'undigested food' may mean food which has been partially digested in the stomach but has not passed out of the stomach. We have had many cases in which doctors have given opinions that death must have taken place within a certain time after the taking of the last meal. But we do not think it is safe for a Sessions Judge without the guidance of the opinion of the doctor to take so decidedly a view that death must have taken place within a very short time of the eating of the last meal.

There was one other circumstance, which appeared in Ex. A, a statement made by the mother of the boy to the village munsif. That was that when she got to the temple in her search for the child, she saw the appellant and questioned him. She says he replied "Your son Narayanan is not here." The learned Public Prosecutor has pointed out that if it were true that the appellant had been seen in the company of the little boy very shortly before, this conduct on his part shortly after the murder would be very suspicious. For some reason which we do not know, this part of P. W. 1's statement to the village munsif was not brought out in the Sessions Court. In the Sessions Court she said that she saw the appellant at the temple but not that she spoke to him or that he spoke to her. The appellant has offered an explanation of the evidence of the Village Munsif in so far as it relates to his escape from the Village munsif. He says that it is quite true that he promised to show the place where the jewels were buried but that he only did that because he was tied to a post and was being beaten and he wanted to get an opportunity of escaping. There can be no doubt that this is a possible and in fact a plausible explanation.

There was another person accused along with the appellant, one Vankataramudu son of Vadde Nagabusi already mentioned. It is in the evidence of the police that accused 2 was arrested on information given by the appellant and that accused 2 when arrested had some blood spots on his clothes. But nothing more was discovered against him and the police did not think it worthwhile to include him in the

charge sheet. He was committed for trial at the instance of the Sub. Magistrate, who thought it proper that he should be tried along with the appellant. The appellant in his petition of appeal from jail alleges that it was really accused 2 who committed the crime and that accused 2 has been protected by the village munsif and other people of the village, while he (the appellant) has been sacrificed as he is a poor, helpless stranger. It is not necessary to express any opinion with regard to the guilt of accused 2, but it is quite clear that he could not have been convicted upon the evidence, that was adduced in the case.

With regard to the appellant we think that the evidence does not lead to the necessary inference that he must have been concerned in the murder of the little boy Narayanan. As we have already said, the sole fact proved against him is that he was seen in the company of the child not far away from where the corpse was found, sometime before the murder must have taken place. But there was nothing unusual in the fact that the little boy was with the appellant; that was a common occurrence. And as it is not possible to say that the appellant and the child were seen together within a very short time of the murder, we do not think it safe in this case to infer that the appellant must have been concerned in the murder. There is undoubtedly cause for grave suspicion, but we think the evidence falls short of proof. We therefore allow this appeal and set aside the conviction for murder and the sentence of death and direct that the appellant be set at liberty forthwith.

C.R.K./R.M. *Appeal allowed.*

---

* A. I. R. 1938 Madras 338

HORWILL J.

Kella Peda Appayya and others — Appellants.

v.

Lanka Narasimhalu and others — Respondents.

Second Appeal No. 937 of 1933, Decided on 16th September 1937, against decree of Dist. Court, Vizagapatam, in A. S. No. 275 of 1932.

(a) Civil P. C. (1908), S. 91 — Channel constructed through village site—Public nuisance —Special damages not proved—Suit must be with permission of Advocate-General.

The construction of a channel through village site is nothing more than a common nuisance and unless special damages are established, the only manner in which a common nuisance can be abated is by a suit to be brought under S. 91 with the permission of the Advocate General : *6 I C 419 and 35 All 197, Disting.* [P 338 C 2; P 339 C 1]

*** (b) Civil P. C. (1908), S. 91 — Permission of Advocate-General not taken — Objections not raised at early stage — Suit held maintainable.**

A mere failure to obtain the permission of the Advocate-General would not render a suit not maintainable if no objection is taken by the other side at the earliest stage. [P 339 C 2]

B. Jagannadha Das — *for Appellants.*

V. Govindarajachari — *for Respondents.*

Judgment. — The defendants have been found by the lower Appellate Court to have dug a channel through a part of the village site, and that portion of the channel which passes through the village site also runs in front of the house of the plaintiffs and lies between their house and the well. The plaintiffs have therefore brought this suit on behalf of the village community for a mandatory injunction requiring the defendants to block up that part of the channel which lies within the village site. The only point argued in appeal is whether the suit is maintainable. I do not think there can be any doubt that the plaintiffs can have no cause of action unless they suffered special damage from the construction of this channel; and I do not consider that the construction of this channel is anything more than a common nuisance. It seems to me equally clear that the only manner in which a common nuisance can be abated is for a suit to be brought under S 91, Civil P. C., with the permission of the Advocate General. It has been argued in support of the judgment of the lower Court that the whole community of the village could bring a suit for the abatement of this nuisance; but I do not find any authority for that contention. 1910 M W N 443[1] has been cited as an instance where a village community were allowed to sue where a certain person wrongfully cultivated a part of the village natham; but that case can be distinguished as it appears that the whole village, including the village site, was held by the ryots themselves and not, as ordinarily, by the Government or zamindar, when the Government becomes

1. Revd. P. G. Simon v. Thuraimuthu Kadamban, (1910) 6 I C 419=1910 M W N 443.

the trustee on behalf of the villagers for the protection and care of property ordinarily described as communal property. 35 All 197[2] is another case on which the respondents rely and was an instance where certain Mahomedans were prevented from worshipping in a mosque because it had been alienated to a Hindu; and it was held that a suit was maintainable by individual Mahomedans because each of them had a right to worship in that mosque and if his right was interfered with he had a right to sue. It has been pointed out that there was no public right to worship in that mosque, the right belonging to every one of the numerous members of a particular community. 35 All 197[2] has therefore to distinguished on that ground. The only remedy for a member of the public who is inconvenienced by a nuisance but has suffered no special damage from it is therefore to seek the permission of the Advocate-General under S. 91, Civil P. C.

A point has incidentally been raised in this appeal as an Additional reason why the lower Appellate Court should not have granted the mandatory injunction prayed for and that is the great delay in bringing the suit. As to that, I find that no objection was raised on that ground in the written statement or in the grounds of appeal in the lower Appellate Court; and I am not therefore prepared to listen to it now. In spite of the fact that the plaintiffs were not entitled to bring the suit or to proceed with it without the permission of the Advocate General, I do not think that the decree of the lower Appellate Court should be set aside on that ground in view of the fact that this objection was not expressly taken in the Courts below. The defendants allowed the suit and the first appeal to proceed without clearly raising this technical objection. I do not see why, in view of the fact that S. 91, Civil P. C., does not actually prohibit the filing of a suit unless the Advocate-General consents, the absence of the consent of the Advocate-General should not be the subject of a waiver by the defendants. It is true of course that if S. 91, Civil P. C had said that no suit should be filed with regard to a common nuisance without the consent of the Advocate-General, such an objection as has here been taken could be raised at any stage; as it would be a statutory bar to the filing of the suit. But S. 91 is not so worded. It runs :

> Two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit though no special damage has been caused;

and I think this difference in the wording has the effect that a mere failure to obtain the permission of the Advocate-General would not render a suit not maintainable if no objection is taken by the other side. I do not think, it would be equitable to allow the defendants to raise a plea at this stage after the plaintiffs have gone through the expense and trouble of conducting the suit and defending it in appeal. Both the Courts below treated the suit by the plaintiffs as one representing the community; and as the defendant seemed content that the suit should proceed upon the footing that it was a representative suit, the decree should not be set aside merely on the ground that the permission of the Advocate-General was not obtained. The appeal is therefore dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

2. Ramchandara v. Ali Muhammad, (1913) 35 All 197=18 I C 197=11 A L J 283.

A. I. R. 1938 Madras 339

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Marneni Kondappa Naidu and another — Appellants.

v.

Pamidi Marri Mahalakshamma and another — Respondents.

Letters Patent Appeals Nos. 6 and 22 of 1932, Decided on 30th November 1937, against judgment of Madhavan Nair J., D/. 31st August 1931, reported in A I R 1933 Mad 194.

Madras Estates Land Act (1 of 1908), S. 3 (2) (d) (as amended by Act 18 of 1936) — Words in S. 3 (2) (d) as amended in 1936 should be read as if they were present in Act of 1908.

To the categories that under the 1908 Act, were estates, was added, as it were, another category by the amendment of S. 3 (2) (d) and the words in the amended Section should be read as if they were present throughout in the earlier and unamended Act Hence what is estate under the new definition of the word "estate", must be deemed to have always and throughout been an estate. [P 340 C 2]

B. Somayya — *for Appellants.*

Ch. Raghava Rao — *for Respondents.*

Venkatasubba Rao J.—The question raised is, how these Letters Patent appeals

that were stayed, are now to be disposed of. The suits were brought for the recovery of rent in respect of lands situated in a shrotriam, and it was pleaded inter alia that the village was an estate within the meaning of Act I of 1908 and that the District Munsif's Court where the suits were filed had no jurisdiction. Both the Courts below have found that the shrotriam in question is not an estate as defined by S. 3 (2) (d) of the Act mentioned and have accordingly passed a decree for a certain amount. This decision of the lower Courts was confirmed by Madhavan Nair J. and it is his judgment that is attacked in these Letters Patent appeals. An application was made, while they were pending, under S. 127, Madras Act 8 of 1934, that they should be stayed, presumably upon the ground that the appeals were "proceedings involving a decision whether or not the inamdar has the kudivaram right" in the suit lands: see S. 127 (2). The Letters Patent appeals were accordingly stayed and now that the Amending Act 18 of 1936 has been passed, they are posted before us for disposal.

The appellants (defendants) urge that the plaints should be returned for presentation to the Revenue Court; that, it is contended, is the right order to make in the circumstances that have happened. Mr. Raghava Rao for the plaintiffs disputes this proposition. That the suit village is an inam under the amended definition does not admit of question and indeed Mr. Raghava Rao admits it. But his argument is that the suit was in respect of an amount due for the years 1920-1922, i. e. before the coming into force of the 1936 Act. Then he turns to the definition of "landholder" and urges that the expression means a person owning an estate or part thereof, and goes on to contend that his client did not own an estate when the amount claimed became due, for the shrotriam, he says, became an estate for the first time by reason of the 1936 Act. In support of his argument he relies on Explanation (2), newly added to S. 6 which contains the words :

> In relation to an inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act.

On the strength of those words, he says that the Legislature must be taken to have intended to enact that the extended definition was to come into effect only from the date of the amending Act, in other words, the amended S. 3 (2) (d) cannot be treated as declaratory or having a retrospective effect but that the newly added categories should be treated as estates only from the date of the Act. Having regard to the scope and policy of the Amending Act, we are not prepared to hold that that is the proper construction to put upon the amended Section. To the categories that under the 1908 Act, were estates, was added, as it were, another category, by the amendment of Section 3 (2) (d), and the words should be read as if they were present throughout in the earlier and unamended Act. S. 13 of Act 18 of 1936 provides that all proceedings stayed under S. 127 of the 1934 Act shall be disposed of, as if the Act of 1908 as amended by the 1934 and 1936 Acts, had been in force at the original institution of the said proceedings. True, says Mr. Raghava Rao:

> In virtue of this Section I should be treated as a landholder on the date of my suits. But at the time the cause of action arose, i. e. 1920-1922, I was not a landholder because the village was not an estate on those dates.

This argument, as already shown, is wrong, as in our opinion by reason of the new definition of the word "estate" the village must be deemed to have always and throughout been an estate. Mr. Raghava Rao's contention raises a question of far-reaching importance. If his argument is correct, a suit for rent, say for 1934-1935, would lie in a Civil Court, for according to him that would be the competent Court to try the claim. Such a result, it seems to us, is not the one contemplated by the amendment. The proper order therefore in our opinion is to direct the plaints to be returned for presentation to the proper Court, i. e. the Revenue Court. In the Letters Patent appeals we make no order as to costs.

C.R.K./D.S. *Order accordingly.*

*** A. I. R. 1938 Madras 340**

VENKATARAMANA RAO J.

Kamakshi Ammal and another — Appellants.

v.

Krishnammal — Respondent.

Second Appeal No. 760 of 1933, Decided on 29th October 1937, against decree of Sub-Judge, Dindigul, in A. S. No. 85 of 1931.

*** Hindu Law — Maintenance — Widow — Will by deceased husband granting some property to widow and rest to other donees —Property gifted to widow insufficient for her maintenance — Widow can retain that property and also claim maintenance from other donees.**

The right to maintenance possessed by a Hindu widow cannot be taken away by any disposition made by her husband and a donee under a will is bound to provide for her maintenance. Where the husband under his will has granted some property to his widow and the rest to other donees, if the property gifted to her is insufficient for her maintenance, she can retain that property and can also claim in addition maintenance from other donees. [P 341 C 2]

B. Sitarama Rao and P. S. Narayanaswami Iyer — *for Appellants.*

S. A. Seshadhri Iyengar — *for Respondent.*

Judgment. — Mr. Sitarama Rao has raised two contentions in this second appeal : (1) the plaintiff.respondent is not entitled to claim any maintenance from and out of the estate of her deceased husband, and (2) the rate awarded both for arrears of and future maintenance is excessive. It may be necessary to state a few facts for dealing with the first contention. The plaintiff is the widow of one Ramayya Ayyar who is the adopted son of one N. Venkateswara Ayyar. The said Ramayya Ayyar died on 12th April 1923 leaving him surviving his widow the plaintiff, his adoptive mother, Ramalakshmi Ammal, who is no other than the mother of the plaintiff's natural mother and a last will and testament dated 8th April 1923. In and by the said will he bequeathed all the property which he then owned and possessed to both his mother and his wife the plaintiff. To his mother he gave property worth about Rs. 7000 namely, a certain land and a house; to his wife he gave certain lands worth about Rs. 1600. He directed his mother to discharge the debts left by him which were ascertained after his death to be about a sum of Rs. 1192. This suit was filed by the plaintiff for a declaration that the will was not true or at any rate was not made by the testator in a sound and disposing state of mind and even assuming it to be genuine, her right to maintenance cannot be taken away by the said will. Both the Courts have concurrently found that the will was genuine and was made by the testator in a sound and disposing state of mind, and I see no reason to differ from the said finding. The learned District Munsif, in addition to the property bequeathed by the testator to the plaintiff, allowed her a sum of Rs. 150 as and for future maintenance from the date of plaint. He also awarded arrears at that rate and mesne profits from the lands bequeathed to her which were in the possession of defendants 1 to 3, defendant 1, Ramalakshmi Ammal and defendants 2 and 3, being her daughters, who were on the date of suit in possession of the properties left by the testator under a settlement deed executed by defendant 1.

It is contended on behalf of the defendants.appellants that as the testator made a specific gift of certain lands in favour of the plaintiff and she had elected to retain the said property, it is not open to her to claim any maintenance. I am not inclined to agree with the contention. The right to maintenance possessed by a Hindu widow cannot be taken away by any disposition made by her husband and a donee under a will is bound to provide for her maintenance. This rule of Hindu law cannot be disputed. But what is contended is that the gift of property made by the testator in this case must be deemed to be in lieu of maintenance and so long as the will stands, she cannot have the lands and at the same time claim maintenance. But there is no indication in the will that the gift was made in lieu of maintenance. The only question would be, the husband having made a provision to the widow, was that provision sufficient or should the donees other than the widow be compelled also to contribute to her maintenance. The entire property including that taken by the plaintiff is liable for maintenance and so the property taken by her will have to be taken into consideration in arriving at the rate of maintenance to be fixed for her. There is therefore nothing to preclude the plaintiff from retaining the property and claiming also maintenance. What the lower Courts have found is that the income that she would derive from the property bequeathed to her under the will would not be sufficient to maintain her and therefore she would be entitled to have additional amount provided for her maintenance.

Mr. Sitarama Rao contends that the learned Subordinate Judge in awarding the rate of maintenance has not taken into consideration that the mother, defendant 1 was directed to discharge the debts left by the testator and the kist payable on the lands. Having heard learned counsel on

the question of rate, in view of the fact that the mother was directed to discharge the debts left by the testator and having also regard to the fact that the property given to the plaintiff was given to her with absolute rights, I think the award of a sum of Rs. 150 both for past and future maintenance is a little too high. Having regard to the circumstances of this case, I would modify the decree of the lower Appellate Court thus: In regard to the maintenance payable in future, the defendants do deliver 20 kalams of paddy and pay Rs. 25 in cash every year on or before 1st of April every year. In regard to the past arrears upto date, I would substitute for Rs. 150 a sum of Rs. 120 per annum. The decree for mesne profits as made by the lower Courts will stand. The plaintiff will also be entitled to the land bequeathed to her under her husband's will and she will enjoy the same with absolute rights. I direct each party to bear his or her own costs of this second appeal. The memorandum of objections is dismissed but without costs.

C.R.K./D.S. *Decree modified.*

A. I. R. 1938 Madras 342

FULL BENCH

LEACH C. J. VARADACHARIAR AND MOCKETT JJ.

Kotta Venkatraju Garu — Appellant.

v.

Sri Rajah Sahib Meharban Dostan Sri Rajah Ravu Kumara Mahipathi Surya Rao Bahadur Garu and others — Respondents.

Second Appeal No. 848 of 1932, Decided on 8th December 1937, against decree of Dist. Court, East Godavari at Rajahmundry, in A. S. No. 81 of 1930.

(a) Madras Estates Land Act (1 of 1908), Ss. 24, 30 — S. 24 should be read along with S. 30 - Enhancement of rent - Water taken by tenant without landlord's permission — Rent charged by landlord for water—Suit for such rent is under S. 77.

S. 24 must be read in conjunction with S. 30 and Chap. 11 They contain the only provisions for enhancement of rent. S. 3 (11) in effect says that money payable for water taken without permission shall be deemed to be rent. Therefore it can be recovered as such and if such water is charged for, it does not amount to an enhancement of the rent within the meaning of the statute. The claim being one for rent within the meaning of S. 3 (11), the Civil Court is closed to the landlord and the claim can only be enforced by proceedings instituted under S. 77. The fact that the landlord sought to recover something extra for water taken by his tenants does not mean that he was suing for enhanced rent within the meaning of S. 24: *A I R 1935 Mad 1073 Expl*; *A I R 1919 Mad 236, Rel. on.* [P 345 C 2; P 346 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 24—Enhancement - Parties not contemplating increase of rent—Tenant taking water without landlord's permission—Landlord can charge excess rent for water so used — Such rent does not amount to enhancement.

The fact that the parties did not contemplate an increase in rent in the ordinary way does not preclude the landlord from requiring his tenants to pay for something taken without his permission. Where the tenants took the water behind the back of their landlord, the former must pay for it. The law says that it may be recovered as rent and such excess recovery does not amount to enhancement. [P 346 C 1]

V. Suryanarayana — *for Appellant.*

K. Subramaniam for Advocate-General — *for Respondent No. 1.*

Order of Reference

Venkataramana Rao J.—This second appeal arises out of an action by a landlord to recover rent from a ryot holding a certain land under him. Two points have been argued by Mr. Suryanarayana in this second appeal. One is based on the construction of the patta under which the tenant holds and the second is based on S. 30, Madras Estates Land Act. In regard to the first point, the contention is put thus. The land is held on what is known as Nimebadi tenure and that under Cl. 4 of the patta the landlord is not entitled to claim any extra sum in addition to what is provided therein. The claim is made by way of a charge for water for raising wet crops on dry lands in addition to the dry rate mentioned in the patta for three faslis. What is known as "Nimebadi lands" is defined in Ex. 3 thus :

The expression 'Nimebadi' as used and understood by the Rajah and ryots of the Pithapuram Estate connotes lands granted on favourable rent which is lower than the lawful rate previously payable on them or upon lands of similar description and with similar advantage in the neighbourhood.

Therefore clause 4 in the patta only means that so long as the tenant raises dry crops on the land, the landlord is not entitled to charge any extra rent on any account whatever. But once the tenant raises wet crops on the dry land, clause 4 would not apply.

The second contention raises a question of some importance : Where in a particular year the tenant raises wet crops on dry land with the use of the landlord's

water and if the landlord claims water rate for the use of such water in addition to the dry rate, can this extra claim be construed as an enhancement of rent so as to attract the provisions of S. 30, Estates Land Act? In 42 Mad 702,[1] their Lordships, Phillips and Kumaraswami Sastri JJ., were inclined to hold that it would not amount to an enhancement of rent : vide the observations at pp. 706 and 707. In a recent decision in 59 Mad 5,[2] Venkatasubba Rao J. doubts the correctness of this decision at p. 31 where referring to it he observes thus :

> I fail to see how an extra charge for water, when wet crops are raised on dry land, having regard to the implications of S. 30 does not amount to an enhancement.

On the other hand, Ramesam J. does not seem to dissent from this decision; in fact, he rather approves it. At p. 15 the learned Judge remarks thus :

> It was there held (referring to the decision in 42 Mad 702,[1]) that a charge for taking water belonging to the landlord is 'rent' and it is not enhancement of rent even if not consolidated with the rent proper. I agree with this proposition.

I may in this connexion refer to the observations of the learned Chief Justice in 70 M L J 494[3] at pp. 496 and 497. I think it is desirable that this question should be considered by a Bench and I accordingly refer the case for disposal by a Bench I have not considered the other questions which may arise on the decision of this question and the same will also be dealt with by the Bench.

(The appeal having been directed to be posted before a Full Bench and coming on for hearing yesterday and this day, the Court delivered the following judgment.)

Leach C. J. — This appeal arises out of a suit filed before the Deputy Collector, Cocanada, under S. 77, Madras Estates Land Act, 1908, by the Maharajah of Pithapuram, to recover from the appellant and 5 other tenants an aggregate of sum of Rs. 11.1.4 for water taken by them without his permission from his tank for the purpose of raising wet crops on dry lands in Faslis 1336, 1337 and 1338. Para. 5 of the plaint, which is in Telugu, has been translated as follows :

> The defendants have no right whatever to use the said water for the jirayati dry lands in the aforesaid manner. As the defendants use the said water unjustly, the amount of Rs 9-15 7 as per particulars hereunder towards Tirva and cesses thereon, with interest (was due) and in spite of several demands by the plaintiff's officials, both oral and written, the defendants did not pay as mentioned above.

The difference between this sum of Rs. 9.15 7 and Rs. 11.1.4 represents the claim for interest. The main lines of defence were : (1) the Revenue Court had no jurisdiction to entertain the suit as it was a suit in tort ; (2) even if it could be treated as a suit for rent, it could not be maintained as it amounted to a claim for enhanced rent contrary to the provisions of the Act; and (3) the terms of the patta precluded the plaintiff seeking extra rent. The appellant denied that the water belonged to the plaintiff and alleged that he had used it for only one Fasli 1338, and then not on dry lands The Deputy Collector dismissed the suit holding that the water belonged to the defendants and that the terms of the patta precluded the plaintiff from claiming any enhanced rent. An appeal followed to the District Judge of East Godawari, who held that the tank did belong to the plaintiff and that water had been used for the three Faslis mentioned in the plaint on dry lands belonging to the defendants. With regard to the pleas that the Revenue Court had no jurisdiction and that the suit as framed was bad he held that the Civil Court had jurisdiction and that the plaintiff was entitled to recover. He disallowed the claim that the terms of the patta precluded any enhancement of rent. The findings of fact of the District Judge are conclusive and therefore before us the appeal has been confined to the three main questions. The appellant was defendant 6 and he alone has appealed.

With regard to the contention that the suit is in reality a suit to recover damages for tort, it should be borne in mind that it was instituted under the provisions of S. 77 of the Act which relates only to recovery of arrears of rent. S. 3 (11) defines "rent" as meaning whatever is lawfully payable in money or in kind or in both to a landholder by a ryot for the use or occupation of land for the purpose of agriculture and includes whatever is lawfully payable on account of

---

1. Venkatachalam Chetty v. Aiyamperumal Tevan, (1919) 6 A I R Mad 286= 58 I C 83= 42 Mad 702=37 M L J 248.
2. Sundaram Pillai v. Karuppayee Ammal, (1935) 22 A I R Mad 1078=160 I C 1015=59 Mad 5 =69 M L J 48.
3. Rajah of Vizianagaram v. Narayanasami Naidu, (1936) 23 A I R Mad 492=161 I C 742 =70 M L J 494.

water supplied by the landholder or taken without his permission for cultivation of land where the charge for water has not been consolidated with the charge for the use or occupation of the land. Therefore rent includes what is payable for water taken without permission. The suit being a suit under S. 77 and being for the recovery of the value of water taken without permission, we consider that it must be treated as a suit for rent and not a suit in tort. The word "unjustly" was introduced obviously as meaning without right.

The answer to the question whether the suit is maintainable depends on the meaning to be given to the word "enhanced" in S. 24 of the Act which says "The rent of a ryot shall not be enhanced except as provided by this Act." The appellant says that it is a suit for enhancement of rent and as the rent has not been enhanced in accordance with the provisions of the Act it cannot be maintained. The provisions of the statute which permit of enhancement are confined to S. 30 and to Ch. 11, which relates to the resettlement of rents. S. 30 permits applications to be made by landholders for enhancement of rents in special circumstances. There are four grounds on which a landholder can apply under this section. Under sub.s. (1), the landholder may apply to the Collector to enhance the rent on the ground that during the currency of the existing rent there has been a rise in the average local prices of staple food crops in the taluk or zamindari division. Sub.s. (ii) gives him the right of applying when during the currency of the existing rent the productive powers of the land have been increased by an improvement effected by him or at his expense. Sub-s. (iii) permits him to apply when a work of irrigation or other improvement has been executed at the expense of Government, and he has been lawfully required to pay in respect of the holding an additional revenue or rate to Government in consequence. Sub.s. (iv) allows him to apply when the productive powers of the land have been increased by fluvial action.

The learned advocate for the appellant has argued that the plaintiff could have applied under sub-section (ii) of S. 30 for enhancement of rent, and if he had done so and obtained an order increasing the rent in respect of the three years the suit would have been in order, but as he has not secured an enhancement under this section the suit does not lie. This however is not a case of a landlord attempting to recover a higher rent because of any improvement effected by him or at his expense. S. 3 (4) defines "improvement" as meaning with reference to a ryot's holding any work which materially adds to the value of the holding, which is suitable to the holding, and consistent with its character, and which, if not executed on the holding is either executed directly for its benefit or after execution is made directly beneficial to it. Here the landlord did not construct the tank for the benefit of the defendants or for the improvement of their lands. The water in the tank was intended for other tenants and his claim was that the defendant tenants had taken the water without his permission. In other words they had taken advantage behind his back of a work which was intended for other people. It is therefore not open to the appellant to say that the plaintiff ought to have taken advantage of S. 30 before instituting the suit. There were no circumstances which would permit of an application under S. 30.

Before referring to the authorities on the question of what is enhancement, I might point out that S. 189 of the Act defines the jurisdiction of the Collector. The details of the suit and applications which a Collector shall hear and determine are set out in Parts A and B of the schedule. Item 3 in Part A is a suit by a landholder to recover arrears of rent. The second clause of S. 189 states that 'no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which a suit or application might be brought or made in the Revenue Court. Therefore, this being a suit for rent within the meaning of the Act it could only be instituted before the Collector. The meaning of the word 'enhanced' has been the subject of much discussions in this Court. The discussion started when the Rent Recovery Act, 1865, was in force and has been continued since this Act was replaced by the Madras Estates Land Act. The earliest case to which we have been referred is that in 10 Mad 282,[4] where the question was whether the landlord had a right to charge water-cess when a wet crop was cultivated on dry land or when a second

4. Thayammal v. Muttia, (1887) 10 Mad 282.

wet crop was cultivated on wet land. It was not denied there that water for these purposes had been taken from the proprietor's tank, and it was held that the landlord was entitled to call upon the tenant to pay for the extra water and that this did not constitute an increase in rent.

In that case there was no discussion in the judgment on the meaning of 'enhancement', but the matter was referred to in argument. A similar decision was given in 12 M L J 22[5] by White C. J., and Davies J. in 42 Mad 702.[1] Phillips and Kumaraswami Sastri JJ., held that a charge for taking landlord's water is 'rent' within the meaning of S. 3 (11), Estates Land Act, and does not constitute an enhancement of rent. A Full Bench of this Court consisting of Ramesam, Wallace and Jackson JJ. considered the question in 51 Mad 266.[6] In this case a ryot had used for the purpose of cultivating his land water from a tank belonging to Government, and Government required the landlord to pay for the water taken by the ryot. The landlord then sought to recover from the ryot what he had been compelled to pay to Government, and the question was whether this was a claim for enhancement of rent within the meaning of S. 24. The reference to the Full Bench was made by Srinivasa Ayyangar and Curgenven JJ., and I will quote a passage from the judgment of Srinivasa Ayyangar J. which shows in precise terms what is meant by the expression 'enhancement of rent':

> The expression 'enhancement of rent' in ordinary English parlance may apply to two different things: firstly, to any increase in the amount payable by the tenant to the landlord in relation to the holding, and secondly, to a larger amount being required to be paid by the tenant to the landlord in respect of the very things that a tenant has been previously enjoying and without any further advantages. Logically speaking, it is only the latter that can be regarded as constituting a real enhancement of rent. If in the place of half a dozen rooms in a flat the tenant comes to occupy two more rooms and the rent is proportionately increased, it cannot, properly speaking, be called an enhancement of rent; similarly, if the rent of the tenant should be increased, let us say for electric lights installed in the house by the landlord.

In deciding the reference Ramesam and Wallace JJ. held that the claim was not a claim for enhancement within the meaning of the Section. Jackson J. dissented and in doing so expressed the opinion that the enhancement might vary from year to year. This would however conflict with the scheme and the provisions of the Act. There can only be an enhancement under S. 30 or under Ch. 11. S. 30, as I have pointed out, deals with special circumstances under which a landlord may apply, but when he applies and the application is granted, the order of the Collector fixes the rent which is to be paid by the tenant in the future, and he will be liable to pay it until it is altered either by a fresh application under S. 30 or, as the result of a resettlement of rents under Ch. 11. A case on which the appellant has placed reliance is that of 59 Mad. 5[2], which was decided by Ramesam and Venkatasubba Rao JJ. There Venkatasubba Rao J. said (p. 31):

> I fail to see how an extra charge for water, when wet crops are raised on dry land, having regard to the implications of S. 30, does not amount to an enhancement,

and he discussed this question at considerable length. The appeal, however, did not call for a decision on the question because the evidence showed that the water was Government water, and consequently the tenant could not be required to pay any increased rent. Therefore the remarks of the learned Judge on this question must be regarded as obiter dicta. Ramesam J. accepted the view which found favour in 42 Mad 702,[1] and with great respect for all that was said by Venkatasubba Rao J. we consider this view to be right. The question is whether the word 'enhanced' is to be given its dictionary meaning or whether it is to be given a special meaning so far as S. 24 is concerned. This difficulty could have been avoided by more careful drafting but we have got to consider the Act as it is. In our opinion S. 24 must be read in conjunction with S. 30 and Chap. 11. They contain the only provisions for enhancement of rent. S. 3 (11) in effect says that money payable for water taken without permission shall be deemed to be rent. Therefore it can be recovered as such and the authorities show that if such water is charged for, it does not amount to an enhancement of the rent within the meaning of the statute. The claim being one for rent within the meaning of S. 3 (11) the Civil Court was closed to the plaintiff and the claim could only be enforced by proceedings

5. Venkata Rao v. Vaithilinga Udayan, (1902) 12 M L J 22.

6. Doraisami Gurukkal v. Subramania Gurukkal, (1928) 15 A I R Mad 419 = 108 I C 625 = 51 Mad 266=54 M L J 361 (F B).

instituted under S. 77. We hold that it was properly instituted and that the fact that the plaintiff sought to recover something extra for water taken by his tenants during the three years mentioned in the plaint does not mean that he was suing for enhanced rent within the meaning of S. 24.

The argument that the terms of the patta precluded the plaintiff from instituting the suit must also be rejected. It is true that para. 4 of the patta states:

> It is settled that you should on no account demand a reduction or remission of cist either on account of excess inam or want of rain or for any other reason and that I should on no account enhance the cist at any time on the said kamatham (holding)

but when the patta was drawn up it was never contemplated that the tenants would take water from the landlord's tank without his permission. The fact that the parties did not contemplate an increase in rent in the ordinary way does not preclude the landlord from requiring his tenants to pay for something taken without his permission. The tenants took the water behind the back of their landlord and must pay for it. The law says that it may be recovered as rent and that is what the plaintiff sought to do in the suit out of which this appeal arises. It follows that we consider that the decision of the learned District Judge is correct and that the plaintiff is entitled to hold the decree granted to him. It has however been brought to our notice, that the appellant was in fact a tenant for only one fasli (1338), and he will be only liable personally in respect of that year. The rent for three years will of course be a charge on the land. The decree will be modified to this extent. The appeal having failed, the respondent is entitled to his costs.

Varadachariar J. — I agree. I only wish to add a few words in respect of an observation in 33 M L J 355,[7] which has given rise to some criticism in later cases. The principle was there enunciated that where new circumstances have come into existence which require new adjustment there is no question of enhancement. If I may say so with due respect to the learned Judges, there was no difficulty in applying this principle to the facts of the case then before them, but the generality of the language used in the observation gives room for criticism. As has been pointed out in later decisions, the case contemplated in S. 30 (2) may well be held to fall within the general language employed by the learned Judges. The same difficulty arises with reference to the passage in the referring judgment of Srinivasa Ayyangar J. quoted by my Lord in the judgment just delivered. It therefore appears to me that the term "enhancement" as used in the Madras Estates Land Act should not be understood either in its etymological sense or even in the sense explained in 33 M L J 355,[7] but in the light of the history of the decisions, bearing upon the point in this presidency. As shown in the judgment just delivered, it was well settled under the Rent Recovery Act of 1865 that the landlord was entitled to claim extra payment when a tenant used the landlord's water for raising a wet crop on dry land or a second crop on a single crop wet land. As a matter of procedure, it had also been recognized that a claim of this kind would not amount to an enhancement which required the sanction of the Collector under the old Act. When Act 1 of 1908 was enacted, the Legislature seems to have accepted this view of the law both as to the right of the landlord as well as to the necessity for the Collector's sanction. It is only in respect of advantages which might be said to have brought about a new state of things that proceedings under S. 30 were contemplated and not for temporary advantages which at his option the tenant might have enjoyed by the use of the landlord's water in a manner which he had no right to do. The combined result was achieved by carrying the substance of the proviso to S. 11 of the old Act into S. 30 and by embodying the effect of the previous case law in the definition of 'rent' in S. 3 (11) of the Act. The very way in which the definition is framed clearly implies that prima facie such a payment will not be included in the conception of rent ; but for the purpose of facilitating the recovery of the same by the landlord, and also with a view to encourage such user instead of regarding it as an illegal or prohibited act, the Legislature preferred to embody the effect of the case law by giving an extended definition to the term " rent " in the new Act. It is true that as pointed out by Venkatasubba Rao J.,

7. Appanna v. Venkataramalinganna Bhadur, (1918) 5 A I R Mad 563=42 I C 464=33 M L J 355.

in 59 Mad 5,[2] the extension of the definition will not of itself give a right to the zamindar to impose a charge but the zamindar was assumed to have the right as declared in the older cases and the definition was so framed only to indicate the manner in which the zamindar was entitled to recover it. The distinction between payment for temporary advantages of this kind and payment of an enhanced rent in the real sense contemplated in the Act is clearly brought out, if I may say so, in the judgment in 70 M L J 494[3] at p. 497. In the former case, the basic rent remains the same and the tenant is entitled at his option to take the water or not ; in the latter case, the basic rent itself is raised and the tenant will continue to be liable to pay the higher rate of rent whether he cultivates the land or not and whether he takes the water or not, unless he takes steps in the manner provided for in S. 32 (3) to get the rent reduced.

I wish to add a word about another point raised by Mr. Suryanarayana, namely that the zamindar will be entitled, even under the older decisions, to claim payment when water is taken from his tank only if there is a contract express or implied between the parties providing for such payment. It is no doubt true that in many cases there used to be a clause to this effect in the pattas, providing for the contingency of the tenant taking water from the landlord's tank for raising wet crop on dry land or a second crop on a single crop wet land, but I cannot accede to the contention that the zamindar's right is limited to such cases. The appellant's argument is no doubt supported to some extent by the observations of Srinivasa Ayyangar J., in A I R 1928 Mad 340 ;[8] but it is not easy to reconcile them with the express provision in the Act which contemplates a payment for the use of such water even when it is taken without the landlord's permission. It does not seem to me right to assume that the Legislature contemplates only a contractual right. Cases which may even be regarded as claims for damages on the ground of unlawful use of water are equally within the terms of the Section ; the Legislature preferred that even such claims should be treated as claims for " rent " instead of claims for damages, it being to the interest both of the landlord and of the tenant that such user should not be prohibited as tortious (*cf.* S. 45 of the Act of 1908 as to " rent " being payable even by a trespasser).

Mockett J. — I agree.

C.R.K./B.D. *Appeal dismissed.*

8. Venkatayya v. Kistappa, (1928) 15 A I R Mad 340=111 I C 743.

---

* A. I. R. 1938 Madras 347

FULL BENCH

LEACH C. J. VARADACHARIAR AND MOCKETT JJ.

R. S. Ramachandran and another — Petitioners.

v.

R. G. Balasubramania Aiyar — Respondent.

Civil Revn. Petns. Nos. 1071 and 1072 of 1935, Decided on 15th December 1937, from order of Dist Court, Tinnevelly, D/- 12th February 1935.

*** (a) Guardians and Wards Act (1890), S. 41 (4) — Court thinking that guardian acted properly throughout – It has full discretion to discharge him and order cannot be challenged in revision.**

When the quondam guardian has complied with the directions of the Court under sub-s. (3) and the Court considers that the guardian has acted properly and no reasonable claim can be brought against him, the Court has full discretion in the matter and can discharge him if it thinks fit. Its order cannot be challenged in revision. [P 348 C 2]

(b) Guardians and Wards Act (1890), S. 41 (4) — Guardian discharged – Court cannot hold inquiry into correctness of accounts.

Where a guardian has been discharged and has filed his accounts, the Court cannot hold an inquiry under the Act into the correctness of the accounts. The Act provides no machinery by which an inquiry can be held once a guardian has ceased to function : *A I R 1926 Mad 977 and 5 C W N 207, Approved.* [P 348 C 2]

T. L. Venkatarama Iyer — *for Petitioners.*

K. Rajah Iyer — *for Respondent.*

Leach C. J.—The petitioners are brothers and constituted an undivided Hindu family. The first petitioner became of age in December 1931. The second petitioner was a minor when the proceedings out of which these petitions arise began. In 1925 the respondent was appointed guardian of the property of the petitioners. His appointment ceased on the first petitioner attaining majority in December 1931. On this event happening, the respondent filed a petition in the Court of the District

Judge of Tinnevelly asking that he be discharged from his guardianship. Thereupon the petitioners filed two counter petitions. In one they asked the Court to assign the bond which had been executed as security for the respondent's stewardship and the other was for an order directing his accounts to be audited. The respondent's petition was granted, but the petitioners' applications were both dismissed. This Court is now asked, in the exercise of its powers under S. 115, Civil P. C., to set aside the order of the District Judge discharging the respondent and his order refusing to direct the bond to be assigned to the first petitioner. No application has been filed against the order dismissing the petition asking for an audit. The answer to the question before us depends on the construction to be placed on S. 41 (4) Guardians and Wards Act, 1890. Sub-s. (2) of that Section states that the powers of a guardian of the property of a minor cease (a) by his death, removal or discharge; (b) by the Court of Wards assuming superintendence of the property of the ward ; or (c) by the ward ceasing to be a minor. Sub-section (3) says :

> When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.

Then comes sub-s. (4) which is worded as follows :

> When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.

It will be observed that a guardian of the property of a minor ceases to be the guardian immediately on the ward coming of age. On this event happening, the Court may require the quondam guardian to deliver the property of the ward in his possession or control according to its direction and similarly require him to deliver the accounts which he has kept relating to past or present property of the ward. That is as far as the Court can go, both as regards the property and as regards the accounts. When the quondam guardian has complied with an order passed under sub-s. 3, the Court may in its discretion discharge him from his liability as guardian, save in respect of any fraud which may subsequently be discovered. In this case it was alleged that the respondent had been guilty of maladministration and an affidavit in support of this charge was filed. After considering this affidavit and giving it the weight which he considered it deserved, the learned District Judge came to the conclusion that the applications for the assignment of the bond and for an order directing an audit were frivolous and being of the opinion that the respondent was entitled to an order discharging him from liability granted his petition. It is said that in so doing the District Judge erred in law. It is argued that on a proper construction of sub-s. (4) the District Judge should, in view of the charge of maladministration, have refused the respondent his discharge and should have assigned the bond to the first petitioner. This is reading into sub-section (4) something which is not there. When the quondam guardian has complied with the directions of the Court under sub-s. 3 the Court has full discretion in the matter and can discharge him if it thinks fit. The learned District Judge did think that the respondent was entitled to his discharge and accordingly granted it. In so doing he exercised a jurisdiction vested in him, and it is not open to the petitioners to say that this Court in the exercise of its revisional powers can interfere with the order.

In 50 Mad 80[1] a Divisional Bench of this Court, consisting of Phillips and Madhavan Nair JJ. held that where a guardian has been discharged and has filed his accounts, the Court cannot hold an inquiry under the Act into the correctness of the accounts and determine the amount or the property in respect of which the guardian is accountable. The correctness of this decision has not been challenged; nor do we think it can be challenged. The same view was taken by the Calcutta High Court in 5 C W N 207.[2] This being so, all that the Court which appointed the guardian can do when the minor has come of age is to discharge him or refuse to discharge him. In the latter case the minor will be left to pursue his remedies against the quondam guardian by way of a suit. The Act provides no machinery by which an inquiry can be held under the Act once a guardian has ceased to function.

1. Subbarami Reddi v. Pattabhirama Reddi, (1926) 13 A I R Mad 977=97 I C 578=50 Mad 80=51 M L J 249.
2. Nabu Bepari v. Sheikh Mahomed, (1901) 5 C W N 207.

The proper course for a Court which has appointed a guardian of property to adopt on the minor coming of age is to refuse to grant a discharge if it appears that there is sufficient reason to keep open the question of the guardian's liability, and in this case to assign to the quondam minor the security bond. Similarly, if it considers that the guardian has acted properly throughout and no reasonable claim can be brought against him it should exercise the power which it has of discharging the guardian. In this case the learned District Judge has come to the conclusion that the respondent acted properly and has granted him discharge. Consequently the order is not open to question in revision proceedings. The two petitions before us will be dismissed and the respondent will be granted costs on one petition.

C.R.K./D.S. *Petitions dismissed.*

** A. I. R. 1938 Madras 349

FULL BENCH

LEACH C. J., VARADACHARIAR AND MOCKETT JJ.

Soora Kulasekara Chetty and another — Appellants.

v.

Tholasingam Chetty — Respondent.

Second Appeal No. 776 of 1933, Decided on 13th December 1937, against decree of Dist. Court, Chingleput, in A. S. No. 163 of 1932.

(a) Criminal P. C. (1898), S. 438—Criminal Rules of Practice and Orders of Madras High Court, Rule 263—Rule 263 cannot be read as saying that District Magistrate shall never refer acquittal to High Court.

Rule 263 has been framed for the guidance of District Magistrates in suitable cases and cannot be read as saying that a District Magistrate shall never refer an acquittal to the High Court. If the Rule is construed in the opposite way, it would be ultra vires the powers of the Court.

[P 350 C 2]

****(b) Limitation Act (1908), Art. 23—Person prosecuted either discharged or acquitted — Revision petition against discharge or acquittal dismissed—Suit for malicious prosecution — Time runs not from discharge or acquittal but from dismissal of revision petition: *23 Mad 24, Overruled.***

The words "when the plaintiff is acquitted" cannot be divorced from the words "or the prosecution is otherwise terminated". Where therefore a person who is prosecuted is either discharged or acquitted and the revision petition filed by the complainant against the discharge or acquittal is dismissed, the prosecution proceeding terminates only when the revision petition is dismissed and not on the discharge or acquittal. The limitation for a suit for malicious prosecution therefore begins to run from the dismissal of revision petition and not from the discharge or acquittal: *A I R 1920 Mad 151, Approved*: *23 Mad 24* **Overruled.** [P 352 C 1]

D. Ramaswamy Iyengar for C. S. Venkatachariar — *for Appellants.*

Srinivasa Raghavan and Thiyagarajan — *for Respondent.*

Leach C. J. — The respondent filed a complaint against the appellants before the bench of Magistrates of Saidapet, in which he accused the appellants of assault, insult and criminal intimidation. The charges against the 2nd appellant were dismissed on 23rd September 1930 and he was accordingly discharged. The case proceeded as against the first appellant and resulted in his acquittal on 25th May 1931. The respondent was not satisfied with the decision of the Magistrates and he filed two applications in revision, one against the discharge of the 2nd appellant and the other against the acquittal of the first appellant. These applications were filed in the Court of the District Magistrate of Chingleput and were heard by him. The hearing resulted in the dismissal of the petitions on 13th July 1931. On 12th July 1932 the appellants filed a suit in the Court of the District Munsif of Chingleput for damages for malicious prosecution. The District Munsif dismissed the suit on the ground that it was barred by the law of limitation and this decision was upheld on appeal by the District Judge of Chingleput. Therefore we are called upon to decide whether the suit was barred by Art. 23, Lim. Act. That Article fixes the period of limitation for a suit for malicious prosecution at one year and time begins to run "when the plaintiff is acquitted or the prosecution is otherwise terminated." In dismissing the appeal, the learned District Judge relied on the decision of this Court in 23 Mad 24[1] and on the decision in 47 Bom 28[2] and declined to follow the decision in 52 All 553.[3]

The case in 23 Mad 24[1] was an appeal decided by Subramania Aiyar and Moore

1. Narayya v. Seshayya, (1900) 23 Mad 24.
2. Purshottam Vithaldas v. Ravji Hari, (1922) 9 A I R Bom 209=67 I C 754=47 Bom 28=24 Bom L R 507.
3. Madan Mohan Singh v. Ram Sundar Singh, (1930) 17 A I R All 826=1933 Cr C 449=125 I C 464=52 All 553=1930 A L J 885.

JJ. It arose out of a suit for damages for malicious prosecution, which had been instituted more than a year after the date of the acquittal, but within a year from the dismissal of a revision petition filed by the prosecutor against the acquittal. The learned Judges held that the period of limitation began to run when the appellant was acquitted, treating the order of acquittal as being final. In 47 Bom 28[3] Macleod C. J. and Kanga J. decided that the period of limitation ran from the date of the order of discharge on the ground that the cause of action would not be suspended because further proceedings might be taken either by the Government or by the complainant in order to get the order of discharge set aside. On the other hand in 52 All 553[3] the Allahabad High Court held that an application for revision of an order discharging an accused person could be deemed to be a continuation of the prosecution, or a fresh prosecution in itself, and therefore when the suit was instituted within one year of the dismissal of the application for revision it was in time, notwithstanding that more than 12 months had elapsed from the date of discharge. The learned Judges however remarked that in a case where the prosecution ended in acquittal, the language of Art. 23 left no room for argument with regard to the commencement of limitation, as the Article specifically provides that limitation is to run from the date of acquittal. We consider that in these cases the real significance of an application for revision has not been realized and we are unable to accept the Allahabad High Court's reading of Article 23.

Section 435, Criminal P. C., provides that the High Court or any Sessions Judge or District Magistrate or any Sub Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before an inferior Criminal Court for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of an inferior Court. Under S. 436 the District Magistrate may himself make or direct a Subordinate Magistrate to make further enquiry into a complaint which has been dismissed under S. 203 or sub.s. (3) of S. 204, or into the case of a person accused of an offence who has been discharged. S. 438 provides that the Sessions Judge or District Magistrate may, if he thinks fit, on examining under S 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of his examination. These Sections are very widely drawn. S. 417 states that the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any Court other than a High Court, but this Section does not limit the powers of a District Magistrate in calling for a record from a Subordinate Magistrate, and there is no Section in the Code of Criminal Procedure which does limit this right. Therefore it follows that if a District Magistrate considers that a person has been acquitted who should not have been acquitted, he can report the case to the High Court with a view to that Court exercising its powers of revision.

The learned advocate for the respondent in this connexion has laid great stress on R. 263 of the Criminal Rules of Practice and Orders of this Court. That rule states that when a District Magistrate is of opinion that an order of acquittal is wrong, and that such order should be set aside, he should request Government to prefer an appeal under S. 417, Criminal P. C. and should not report the case for the orders of the High Court under S. 438 of the Code. But this rule does not say that he shall not report such cases to the High Court for its orders. If it did, the rule would be ultra vires the powers of the Court. The rule has been framed for the guidance of District Magistrates in suitable cases, and cannot be read as saying that a District Magistrate shall never refer an acquittal to this Court. That the Court can revise an order of acquittal was recognized by a Full Bench of this Court consisting of Schwabe C. J., Oldfield and Coutts. Trotter JJ. in 45 Mad 913.[4] The learned Chief Justice in the course of his judgment pointed out that where there is an appeal by the Public Prosecutor or the Crown from an acquittal, the Court sets its face against revision; but where a private prosecutor, having no power to appeal comes to the Court in revision it certainly is open to the Court to hear him. The fact that in such a case the High Court seldom interferes does not mean that it will never

4. Sankaralingam Mudaliar v. Narayana Mudaliar, (1922) 9 A I R Mad 502=68 I C 615=23 C L J 583=45 Mad 913=43 M L J 369 (FB).

interfere, and it has interfered in a suitable case, as is shown by the judgment of Wallace J. in 51 Mad 180.[5] The position therefore is this : the prosecutor may file an application before the District Magistrate for revision of an order of discharge or of acquittal passed by a Subordinate Magistrate and on such a petition being filed it will lead in a proper case to the setting aside of the order of discharge or of acquittal as the case may be. If the order of discharge is set aside, a further inquiry will be ordered and in the case where an order of acquittal is set aside a retrial will be directed.

The judgment of the Privy Council in 51 M L J 42[6] has great bearing on the questions now before us. The appellants in that case were accused with two others of murder. The appellants were discharged by the Magistrate who first dealt with the case, but the Sessions Judge called for the record and after notice to the appellants considered whether further enquiry should be ordered into the charge which had been preferred against them. After hearing the arguments the Sessions Judge came to the conclusion that the order of discharge had been properly passed and refused to commit the appellants for trial. The appeal to the Privy Council arose out of a suit which followed for damages for malicious prosecution. The appellants succeeded in the trial Court but on appeal to the Court of the Judicial Commissioner of Oudh the judgment of the trial Court was reversed. The Appellate Court held that in an action for malicious prosecution the plaintiff has to prove (1) that he was prosecuted by the defendant; (2) that he was innocent of the charge upon which he was tried; (3) that the prosecution was instituted against him without any reasonable and probable cause; and (4) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect. Dealing with this statement Viscount Dunedin who delivered the judgment of the Judicial Committee observed :

> Proposition (2), as stated, is quite erroneous. It should be : "That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating". This phraseology may be found in the judgment of Montague Smith J. in (1867) L R 2 C P 684[7] at p. 688. But the practice was in accordance with these words long before that case. Under the old forms of pleading a declaration if the law were really as the Judges in this case defined it, would, in all cases where there had not been an actual acquittal, have been bad if there were not added the statement that the plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecution had terminated without acquittal. There was controversy as to what terminated proceedings as, e g, whether a *nolle prosequi* of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to end when a Magistrate declines to commit. . . Accordingly in Bullen and Leake's Precedents, 8th Edn. at p. 434, the regular form is given for an action for malicious prosecution when the plaintiff has been arrested and brought before a Magistrate. After narrating the arrest and the charge, it continues: "The said Justice having heard the said charge dismissed the same and discharged the plaintiff out of custody, whereupon the said proceedings terminated." In the present case it was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath and Teja ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause.

The Sessions Judge finally refused to commit the appellants for trial as the result of proceedings before him following the discharge by the Magistrate who held the inquiry. The principle which applies here was stated by Williams, Byles and Keating JJ. in (1861) 10 C B (N S) 592[8] at p. 604 in these words :

> It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged.

Now, when did the prosecution proceedings terminate in this case? We consider that the answer must be that they terminated on 13th July 1931 when the District Magistrate dismissed the revision petitions and that this answer is given by the decision in 51 M L J 42.[6] Until those petitions were dismissed the prosecution case was before the Court. And it seems

5. Venkata Rao v. Padmanabha Raju, (1927) 14 A I R Mad 981=105 I C 669=51 Mad 180=28 Cr L J 957=53 M L J 529.
6. Balbhaddar Singh v. Badri Sah, (1926) 13 A I R P C 46=95 I C 329=1 Luck 215=29 C C 163=51 M L J 42 (P C).
7. Basebie v. Mathews, (1867) L R 2 C P 684 = 36 L J M C 93=16 L T 417=15 W R 839.
8. Gilding v. Eyre, (1861) 10 C B (N S) 592 = 31 L J C P 174=5 L T 136=9 W R 946.

to us that it does not lie in the mouth of the respondent prosecutor to say that the proceedings had terminated so far as appellant 2 was concerned on his discharge and so far as appellant 1 was concerned on his acquittal. The proceedings had not terminated, because he took further steps with a view to securing their conviction. The learned advocate for the respondent says that in any event the suit is barred so far as appellant 1 is concerned, as he was acquitted and Art. 23 provides that time shall run from the date of the acquittal. This argument ignores the wording of the Article and the reason for the rule that so long as proceedings are pending the accused shall not be allowed to sue The wording "when the plaintiff is acquitted" cannot be divorced from the words "or the prosecution is otherwise terminated". In our opinion the Article provides that time shall run when the plaintiff is acquitted or when the prosecution comes to an end in some other manner. If the acquittal is followed by other proceedings the prosecution is terminated not by the acquittal but by the order passed in the subsequent proceedings and this construction was placed on the Article by a Bench of this Court consisting, of Bakewell and Phillips JJ. in A I R 1920 Mad 151=57 I C 635[9]. It follows from what we have said that the case in 23 Mad. 24[1] was wrongly decided. The appeal will be allowed and the case remanded to the trial Court for decision on the merits. The appellant will be entitled to his costs in this Court and in the District Court. There will be a direction for the refund of court-fee both here and in the District Court.

C.R.K./D. S. *Case remanded.*

9. Sriramulu v. Subba Rao, (1920) 7 A I R Mad 151=57 I C 635.

*** A. I. R. 1938 Madras 352**

SPECIAL BENCH

LEACH C. J. VARADACHARIAR AND KING JJ.

Commissioner of Income-tax, Madras

v.

S. L. Mathias.

Petition decided on 13th October 1937, for leave to appeal to Privy Council from judgment of Full Bench, D/. 29th April 1937, reported in *A I R 1937 Mad 745 (F B)*.

(a) Civil P. C. (1908), S. 110 — Interpretation of Proviso 2 to S. 4 (2), Income-tax Act, is substantial question of law.

The effect and interpretation of Proviso 2 to S. 4 (2), Income-tax Act, is a substantial question of law within the meaning of S. 110, Civil P. C. [P 352 C 2]

*** (b) Income-tax Act (1922), S. 66-A—In granting leave for appeal to Privy Council High Court cannot impose condition that appellant shall bear respondent's costs.**

In granting leave for appeal to Privy Council, the High Court has no power to impose a condition that the appellant shall bear and pay the costs of the respondent: *A I R 1923 Mad 232, Rel. on.* [P 352 C 2; P 353 C 1]

(c) Civil P. C. (1908), S. 110 — Application for leave to appeal to Privy Council from decision of High Court on effect of Proviso 2 to S. 4 (2), Income-tax Act — Assessee as planter carrying on large business in Mysore State — Actual amount of tax involved in appeal Rs. 3500 — Still leave held should be granted.

An assessee carried on as a planter a large business in the Mysore State. The Income-tax authorities applied to the High Court for leave to appeal to the Privy Council from the decision of High Court on the effect of Proviso 2 to S. 4 (2), Income-tax Act. The actual amount of tax involved in the appeal was Rs. 3500.

Held that though the actual amount of the tax was Rs. 3500 the question would arise each year while the assessee remained in the business. Therefore in the end the amount of tax will be very considerable and hence application should be granted: *A I R 1923 Mad 232, Disting.* [P 353 C 1]

M. Patanjali Sastri—*for Commissioner of Income-tax.*

M. Subbaraya Aiyar — *for Assessee.*

Leach C. J. — The Commissioner of Income-tax applies for a certificate permitting him to appeal to His Majesty-in-Council in respect of a decision of this Court on the effect of Proviso 2 to S. 4 (2), Income-tax Act. There can be no doubt that the question involved is a substantial question of law. As a matter of fact this Court placed a different interpretation on the proviso from that placed upon it by the Calcutta High Court. The application is however opposed by the respondent on the ground that an appeal to His Majesty-in-Council would put him to considerable expense. He contends that if leave is granted, it should be subject to the condition that the income-tax authorities pay his costs. It is quite clear that we have no power to impose any such condition and this was pointed out by this Court in 44 M L J 217.[1] Our powers

1. Rajeswara Sethupathi v. Thiruneelakantam Serval, (1923) 10 A I R Mad 231=72 I C 250 =44 M L J 217.

are confined in this respect to those conferred by S. 66-A, Income-tax Act, and the provisions of the Code of Civil Procedure, which have been made applicable to such appeals. Their Lordships of the Privy Council have, on occasions, stipulated in granting special leave to appeal that the appellant shall bear the costs. But we have no such powers, as I have already indicated. When the appeal is heard in the Privy Council, their Lordships will then decide the question of costs.

The learned advocate for the respondent also says that leave should not be granted because the amount involved is less than Rs. 10,000. The actual amount of the tax in question is Rs. 3500. But the respondent carries on as a planter a large business in the Mysore State and the question will arise each year while he remains in this business. Therefore in the end the amount of tax will be very considerable. The learned advocate has in this connexion referred to the decision in 44 M L J 217,[1] as the Court there refused leave to appeal to His Majesty. That was a case in which the petitioner was wishing to challenge a decision in respect of arrears of rent. There was a large number of respondents, but in each case the amount owed or alleged to be owed was very small. The decision does not apply to the present case because the amount involved, as I have indicated, is really substantial. The application for a certificate will therefore be granted.

C.R K./D.S. *Application granted.*

---

* A. I. R. 1938 Madras 353

FULL BENCH

LEACH C. J., VARADACHARIAR AND KING JJ.

A. N. C. T. Subbiah Thevar and others — Appellants.

v.

N. R. Samiappa Mudaliar and others —Respondents.

Appeal No. 287 of 1932, Decided on 3rd December 1937, against decree of Sub-Judge, Tiruvarur, in O. S. No. 36 of 1930.

*** (a) Trust — Suit against trustee — Loss occasioned to trust — Suit to make it good — Art. 120 and not Art. 36, Limitation Act, applies.**

Article 120 of Sch. 1 applies to a suit filed against a trustee or ex-trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust and not Art. 36: *A I R 1934 Mad 542, Rel. on.; 20 Mad 393 and A I R 1936 Bom 30, Ref.; 33 Mad 308, Dissent.* [P 356 C 2]

(b) Limitation — There must be party capable to sue before applying law of limitation.

There can be no cause of action until there is a party capable of suing and until there is a cause of action, there can be no question of the law of limitation coming into operation : *A I R 1916 P C 202; A I R 1930 P C 270 and A I R 1923 Cal 1, Ref.* [P 356 C 2]

*** (c) Trust — Suit against trustee — Loss occasioned to trust — Suit to make it good —Starting point of limitation — Commencement of time depends on circumstances of each case.**

If a sole trustee of a public trust commits a breach of trust, the loss cannot be made good, without voluntary action on the trustee's part until there is a new trustee. The right to sue in such a case would have to be in abeyance until a new trustee was appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned, because they will have in themselves the right to sue their co-trustees for the loss occasioned by him. Of course, if the co-trustees have also made themselves liable for the breach of trust, the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the cestui qui trust would ordinarily have the right to sue from the date of the breach of trust. It will therefore depend on the circumstances when time will commence to run. [P 356 C 2; P 357 C 1]

V. Rajagopala Aiyar and T. V. Ramiah — *for Appellants.*

K. Rajah Aiyar and R. Sundaralingam— *for Respondents.*

Order of Reference

Varadachariar J. — The only point arising for determination at this stage is the question of limitation on which the lower Court held against the plaintiffs and dismissed the suit in limine. The plaintiffs and defendant 3 were the trustees of a temple on the date of the institution of the suit. Defendant 1 was the managing trustee of the temple from 1921 up to September 1927; defendant 2 is said to have been the trustee from 26th July 1914 to 8th February 1928; defendant 3 was appointed trustee on 22nd May 1927 while the plaintiffs were appointed trustees only in June and July 1928. The suit was instituted on 15th September 1930 claiming that the defendants should be directed to pay certain amounts to the plaint temple in the following circumstances: Two schedules, Schs. A and B, were attached to the plaint. Sch. A mentions items of amounts due to the temple

up to fasli 1332 which remained uncollected up to the date of the suit. Sch. B mentions amounts said to have accrued due to the devasthanam subsequent to the commencement of fasli 1332, and remaining uncollected up to the date of the suit. The plaint refers to the difficulties experienced by the plaintiffs in getting possession of the account books relating to the trust after they were appointed to the office and proceeds to say in para. 7 that on a scrutiny of the accounts and documents handed over by defendant 1 it was found that the various amounts specified in Schs. A and B had not been collected and that as many of them had become barred the temple had been put to loss thereby. There was a further allegation that in respect of items which had become barred even before the defendants took office, the defendants would be liable to the temple by reason of their failure to take steps against their predecessors in office to recover damages under that head.

It is to this claim that the defendants pleaded the bar of limitation under Art. 36, Lim. Act. The learned Subordinate Judge held that the plea was well founded and was supported by the decision in 33 Mad 308[1] and accordingly dismissed the suit. Hence this appeal. It cannot be denied that the decision in 33 Mad 308[1] does support the defendants' contention. But there is very little discussion of the question in that judgment and no reference has been made in that judgment to 20 Mad 398[2] which clearly proceeded on the footing that an action like the present would be governed by the six years' rule, apparently under Art. 120 though the Article is not specifically referred to. We might add that there are several reasons which in our opinion make it unreasonable to hold that Art. 36 applies to a case like the present. The words "malfeasance, misfeasance and non-feasance" may not perhaps be said to be inappropriate words to be applied to a trustee; but, it hardly seems to us right to speak of a claim like the present on behalf of the trust as a claim for compensation. We may in this connexion refer to Column 1 of Art. 98 which uses the very language found in illustration (a) to S. 23, Trusts Act, namely that the trustee is in such cases liable to make good to the trust estate the amount lost by reason of his breach of trust. Referring to Column 3 of Art. 36 we may also point out that it will be scarcely reasonable to expect the very trustee who has been guilty of breach of trust to take steps against himself to recover damages for the benefit of the trust, whereas if Column 3 of Art. 36 is to be applied, the suit would become barred on the expiry of two years from the date of misfeasance, malfeasance, or nonfeasance irrespective of the fact that the same trustee may continue in office.

Again, comparing Column 3 of Art. 36 with Column 3 of Art. 98, it will be noticed that where a claim like the present is made against the estate of a deceased trustee, limitation starts from the date of the trustee's death and if loss has not resulted on that date, from the date of the loss. It could scarcely have been intended that when a breach of trust has been committed by a trustee by negligence to collect trust funds, limitation could start immediately on the date of the breach of trust if the action to recover the amount of the loss should be brought during his lifetime, but there should be a fresh starting point from the date of his death or from the date of the loss, when the loss is sought to be made good out of his general estate. These considerations lead us to think that it could not be the intention of the Legislature that the general language of Art. 36 should be applied to a well-known category of cases in the law of trusts. It is true that there is no Article (corresponding to Art. 98), which specifically deals with actions for breach of trust brought during the lifetime of the trustee or ex-trustee. But the absence of such an Article will only lead to the application of Art. 120, to such action and will not justify the Court putting an unreasonable interpretation on Art. 36. In A I R 1936 Bom 30,[3] the learned Judges were of opinion that a suit similar to the present would be governed by Art. 120. It has not been seriously contended before us that the present case is governed by S. 10, Lim. Act : *vide* 41 Mad 319.[4] The only question therefore is whether the case is governed by Art. 36 or by Art. 120.

1. Subramania Aiyar v. Gopala Aiyar, (1910) 33 Mad 308=7 I C 898=20 M L J 633.
2. Ranga Pai v. Baba, (1897) 20 Mad 398.
3. Shirinbai Dinshaw v. Navroji Pestonji, (1936) 23 A I R Bom 30=160 I C 612=37 Bom L R 946.
4. Tholasingam Chetti v. Vedachella Aiyar (1918) 5 A I R Mad 624=42 I C 544=41 Mad 319.

If Art. 120 is to be held applicable, the further question will arise, what is the starting point. The general expression 'right to sue accrues' has been held in several cases to be an expression that must be construed in the light of the substantive law. There can be no doubt that in several English cases and in A I R 1936 Bom 30,[3] limitation has been held to commence to run from the date of the breach of trust. Whatever may be the appropriateness of this view in the case of private trusts where the beneficiary may be expected to enforce his own rights, there are obvious difficulties in applying this view to public trusts where, as long as the trustee remains in office, there may be no other person entitled to sue the trustee to make good the loss occasioned by the breach of trust unless some member of the public takes steps to institute a suit under S. 92, Civil P. C., and have a receiver appointed in whom the right of action may be vested. Here again Col. 3 of Art. 98 would rather suggest that the date of the cessation of the trusteeship whether by death or otherwise may be a reasonable starting point, but there is no authority which specifically supports that view. Even if the starting point under Art. 120 is held to be the dates of the various breaches complained of, the decree of the lower Court dismissing the entire suit cannot be sustained, because according to the plaint allegations, some of the breaches of trust might have happened within six years of the institution of the suit.

It is therefore necessary for the purpose of the case to decide whether Art. 36 or Art. 120 is the proper Article applicable to a suit filed against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect moneys due to the trust. In view of the conflict between 20 Mad 398[2] and 33 Mad 308,[1] we would refer the question to a Full Bench; we would also invite the opinion of the Full Bench on the question whether if Art. 120 is applicable, what is the starting point.

Opinion of the Full Bench.

Leach C. J. — This reference embraces two questions which may be stated as follows : (1) Does Art. 36 or Art. 120 of Sch. 1, Lim. Act, 1908, apply to a suit filed against a trustee or ex-trustee to make good loss sustained by the trust by reason of his omission to collect moneys due to the trust ? (2) If Art. 120 is applicable, when does limitation commence to run ?

Article 36 relates to suits for compensation for malfeasance, misfeasance or nonfeasance independent of contract, and not specially provided for in the schedule of the Act. It fixes a period of two years from the date when the malfeasance, misfeasance or nonfeasance takes place. Art. 120 is the residuary Article. It fixes a limitation period of six years in respect of suits for which no period of limitation is provided elsewhere in the Schedule and time begins to run when the right to sue accrues. It has been necessary to refer the questions set out above to a Full Bench because there are conflicting decisions of this Court with regard to the first question, and the second question follows if Art. 120 applies, because in some cases for more than six years there may be no one in a position to sue. In 20 Mad 398[2] Shephard and Davies JJ. applied Art. 120. In 33 Mad 308,[1] Sir Ralph S. Benson, Offg. C. J. and Krishnaswami Aiyar J. considered that Art. 36 governed a suit of the nature of the one under discussion. In 20 Mad 398[2] the plaintiffs and the defendants, together with one Subbaraya Pai, were the trustees of a temple. Subbaraya Pai died in 1884, but for some years before his death he was left in exclusive management of the temple affairs. He was succeeded in the management by the defendants, who remained in management of the temple until 1891, when their co-trustees filed the suit to exclude them from trust and to compel them to make good sums lost as the result of breaches of trust alleged to have been committed by them. The question whether S. 10, Lim. Act, applied was discussed and the Court was of the opinion that it did not. It was however held that the defendants were liable for the loss occasioned by them within six years from the date when the suit was instituted. Art. 120, Lim. Act, was not specifically referred to, but as the Court decided that the period of limitation was six years it follows that it considered that this Article applied. In 33 Mad 308[1] the suit was instituted by the plaintiff as the trustee of a temple for recovery of a sum of money representing the loss to the temple occasioned by breaches of trust committed by the father of the defendant, he having been the preceding trustee. The suit was dismissed on the ground that it was barred by the

law of limitation. On appeal it was argued that Art. 98 was applicable, but the argument was rejected as the Court was of the opinion that the suit against the father was time-barred under Art. 36 and therefore no suit would lie against his son.

Another case bearing on the first question embodied in the reference and quoted to us is that of A I R 1936 Bom 30,[3] where a Division Bench of the Bombay High Court held that a suit against trustees for alleged breaches of trust was governed by Art. 120 and time began to run from the date of the breach. In none of these cases however was there any real discussion of the questions now under consideration. In 20 Mad 398[2] and in A I R 1936 Bom 30[3] the learned Judges took it for granted that Art. 120 did apply and in 33 Mad 308[1] the discussion was limited to the application of Arts. 36 and 98. I may here mention that my learned brother Varadachariar, sitting alone, held in 40 M L W 275[5] that a suit by a trustee of a temple against a previous trustee to recover moneys misappropriated by him was governed by Art. 120 and not by Art. 61 or Art. 62 Limitation Act, and that no cause of action accrued to anybody as long as the defaulting trustee continued to be in office. This decision really embodies the answers to the questions under reference.

Article 36 applies to torts not specially provided for, and if it stood alone there would be little to indicate that it was not intended to apply to breaches of trust of the nature of those we have now in mind. But there is Art. 98, and when the two Articles are considered together there are strong indications that the Legislature did not intend Art. 36 to apply to trustees. In the first place, in Art. 36, the word "compensation" is used, which is the appropriate word to apply in connexion with a suit to remedy an injury to a person or a person's property. Art. 98 speaks of suits "to make good" the loss, which are more appropriate than the word "compensation" when the loss is not a personal one. Then it must be remembered that when the prescribed period of limitation has commenced it continues until the sands have run out. Something may happen to start a fresh period of limitation, but that is another matter. If Art. 36 were to apply to an act of non-feasance on the part of the trustee, it would mean that if the trustee lived he would be free from all liability in two years, but if he died before the two years had elapsed his estate would continue to be liable for another three years. This could never have been the intention of the Legislature and leads in itself to the conclusion that Art. 36 does not include wrongs committed by trustees in respect of trusts. As Art. 36 does not apply, the only Article which can apply to a suit like the one out of which this reference arises is Art. 120 and we answer the first question accordingly.

With regard to the second question, it will be observed that Art. 120 declares that limitation shall start to run when the right to sue accrues. There can be no cause of action until there is a party capable of suing and until there is a cause of action there can be no question of the law of limitation coming into operation. *See* (1821) 5 B & Ald 204=24 R R 325=106 E R 1167,[6] 20 C W N 833,[7] 50 Cal 49[8] and 11 Lah 657.[9] It follows that if a sole trustee of a public trust commits a breach of trust the loss cannot be made good, without voluntary action on the trustee's part, until there is a new trustee. The right to sue in such a case would have to lie in abeyance until a new trustee was appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned, because they will have in themselves the right to sue their co-trustee for the loss occasioned by him. Of course, if the co-trustees have also made themselves liable for the breach of trust the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the cestui que trust would ordinarily have the right to sue from the date of the breach of trust. It

5. Krishna Kudva v. Mulki Sri Venkataramana Temple, (1934) 21 A I R Mad 542=152 I C 345=40 M L W 275.

6. Murray v. East India Co., (1821) 5 B & Ald 204=24 R R 325=106 E R 1167.

7. Meyappa Chetty v. Supparamanian Chetty, (1916) 3 A I R P C 202=35 I C 323=43 I A 113=20 C W N 833 (P C).

8. Charu Chandra Pramanik v. Nahush Chandra Kundu, (1923) 10 A I R Cal 1=74 I C 630=50 Cal 49=36 C L J 35.

9. Mt. Bolo v. Mt. Koklan, (1930) 17 A I R P C 270=127 I C 737=57 I A 326=11 Lah 657 (P C).

will therefore, depend on the circumstances when time will commence to run and we answer the second question in this sense.

(After the expression of the opinion of the Full Bench the Court delivered the following judgment.)

Varadachariar J.—Now that the Full Bench has held that Art. 36, Limitation Act, does not govern the present case, the decision of the lower Court dismissing the suit on the ground that it was governed by Art. 36 cannot stand. It is not possible at this stage to deal finally with the existence and extent of the possible bar under Art. 120. It will be much more convenient to leave it to the lower Court to deal with that question in the light of the observations contained in the judgment of the Full Bench after taking such evidence as may be relevant to that question. In view however of the fact that it is about seven years now after the suit was instituted, the lower Court would do well to try the whole case instead of confining itself again to the question of limitation. The decree of the lower Court is set aside and the case remanded for disposal on the merits. Costs to abide the result. The court-fee paid on the memorandum of appeal will be refunded.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1938 Madras 357

SPECIAL BENCH

LEACH C. J., VARADACHARIAR AND MOCKETT JJ.

Ramachandra Naidu and others — Appellants.

v.

Vengama Naidu and others — Respondents.

Letters Patent Appeal No. 292 of 1927, Decided on 15th December 1937, against judgment of Venkatasubbarao J. in A. S. No. 110 of 1923.

(a) Appeal—New plea—Point not raised in pleadings by parties but raised by Court itself — Parties to appeal should be given opportunity of meeting it.

While it is open to the Court to decide a case on any rule of law which it considers applies, it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. [P 359 C 1]

(b) Part Performance — Widow obtaining decree for maintenance against her step-sons — Maintenance made charge on family property — One step-son selling his share to other persons — Agreement between widow and alienees providing that in case alienees pay balance of maintenance, widow would execute formal release of her charge on property—Balance not paid—Assignee of widow's decree selling property in execution and bringing suit for possession of share — Doctrine of part performance held did not apply.

A widow obtained a decree for maintenance against her step sons and the amount of maintenance was made a charge on the family property. One of the step sons sold his share in the property to certain persons. The widow entered into an agreement with the alienees under which they were to pay her a certain sum in satisfaction of her claim for future maintenance against the properties in their hands. Of this sum a certain portion had already been paid. The agreement provided that when the balance would be received, the widow was to execute a formal release of the charge created by the decree. The balance was never paid and the assignee of widow's decree sold the property in execution, purchased it himself and sued for possession of the share:

Held that the doctrine of part performance did not apply to the case. [P 359 C 2]

T. M. Krishnaswamy Iyer, M. S. Vaidhyanatha Iyer and T. S. Srinivasa Iyer — *for Appellant.*

K. V. Sesha Iyengar — *for Respondent.*

Leach C. J. — In O. S. No. 1 of 1889 of the District Court of Trichinopoly a Hindu widow, one Venkalakshmi Ammal, sued her step-sons, Venkatarama Iyer and Ramarathnam Iyer for maintenance, and on 2nd September 1890 obtained a decree which applied to the maintenance then due and to future maintenance. The maintenance was made a charge on the family properties. The decree was not expressed in precise terms, but it was held in subsequent execution proceedings that the decree did in fact give a charge on the family properties and this question must be regarded as having been finally decided. On 13th November 1888 Ramarathnam sold his share in 393 acres of the family lands to one Krishna Iyer, who was defendant 21 in the widow's suit. On 27th November 1888 Krishna Iyer sold his interest in these properties to Vengama Naidu and Perumal Naidu. Between 7th December 1888 and 2nd June 1890 Vengama Naidu and Perumal Naidu under 13 deeds disposed of their interest in the properties to various people. On 27th September 1908 the widow assigned her decree to the plaintiffs in the suit out of which this appeal arises. As assignees of the decree, the plaintiffs instituted proceedings in execution and obtained an order for the sale of Ramarathnam's interest. At the Court

auction they purchased Ramarathnam's interest. On 14th September 1915 the plaintiffs filed a suit in the Court of the District Munsif of Kulitalai for partition of the properties and for possession of their half share. The District Munsif's Court had no jurisdiction to try the suit because of its value and the plaint had to be returned for filing in the Court of the Subordinate Judge. This was done and the suit was numbered as O. S. No. 45 of 1917. There were 101 defendants, of whom 98 were sued as alienees under transfers executed after 7th December 1888.

In 1894 the widow entered into an agreement with Vengama Naidu and Perumal Naidu under which they were to pay her a sum of Rs. 1400 in satisfaction of her claim for future maintenance against the properties in their hands. Of the Rs. 1400, a sum of Rs. 1000 had already been paid. The agreement provided that when the balance of Rs. 400 had been received and the widow had realized the amount representing the arrears of maintenance at the date of the agreement, she was to execute a formal release of the charge created by the decree on Ramarathnam's half share in the family properties. The arrears were not realized and consequently the agreement was renewed in 1903 and again in 1906. The original agreement has not been put in evidence; but the agreements of 1903 and 1906 have been and are marked as Exs. 18 and 18a respectively. The agreement of 1903 reads as follows:

> If according to what you have executed and given you pay with interest the sum of Rs. 400 which is the balance due after deducting the amount of Rs. 1000 received from you, I shall, as soon as the whole of the decree amount due upto this day is realized, cause the plaintiff in the said suit to execute and deliver a memorandum of release in your favour to the effect that the liability for the decree of the lands purchased by you from Krishna Iyer has been given up. I shall not attach the said lands and proceed in execution for the amounts due under the said decree.

This document was signed by one P. Ramaswamy Iyer as the agent of the widow. That he had the authority to sign is not in question. The agreement of 1906 is in similar terms, but instead of the words "as soon as the whole of the decree amount due up to this day is realized" we have the words "after the realization of the entire balance of the decree." There can be no doubt that the effect of each of these documents was this: If Vengama Naidu and Perumal Naidu paid the balance of Rs. 400 with interest and the widow was able to realize from other properties the amount due to her as arrears of maintenance at the date of the document she would execute the contemplated release; in the meantime, she would not take steps in execution of the decree against the properties in the possession of Vengama Naidu and Perumal. These agreements were not recorded under the provisions of O. 21, Rule 2, Civil P. C. and therefore cannot be regarded as adjustments of the decree. On 17th September 1908, that is two days before the assignment by the widow of her decree in favour of the present plaintiffs, Vengama Naidu instituted O. S. No. 406 of 1908 in the Court of the District Munsif of kulitalai for a decree for specific performance of the agreement of 1906, the last renewal of the agreement of 1894. On 14th August 1911 the District Munsif dismissed the suit. An appeal followed to the Subordinate Judge of Trichinopoly, who held that the suit was premature and accordingly dismissed the Appeal. A second appeal was then filed in this Court. The widow died during the pendency of the appeal and the present plaintiffs were added as parties. This Court held that the plaintiffs, as assignees of the maintenance decree, were not the legal representatives of the widow and being assignees an action for specific performance did not lie. This judgment was delivered on 12th March 1915.

Returning now to the suit out of which this appeal arises, the Subordinate Judge accepted the contention that the doctrine of lis pendens applied to the alienations and therefore regarded them as being subject to the charge in favour of the widow. But he dismissed the suit on the broad ground that there were enough equities with the alienee defendants to override all consequences arising from the operation of the doctrine of lis pendens. This judgment was delivered on 21st August 1922. An appeal was filed against this decision in this Court and it came before Krishnan and Venkatasubba Rao JJ., on 6th and 14th September, and on 1st and 8th October 1926. After the arguments had closed, judgment was reserved and was delivered on 5th November 1926. Venkatasubba Rao J., agreed that the doctrine of lis pendens did apply and accepted the contention that the agreement of 1894 and its subsequent renewals

did not operate to bar the execution of the widow's decree. The learned Judge however laid great stress on the fact that the plaintiffs had taken the assignment of the decree with full knowledge of the agreement, and considered that 'in these circumstances it was a fraud on the alienees to enforce the maintenance decree. He also held that the doctrine of part performance applied and on this basis refused the plaintiffs the reliefs they sought, but instead granted them a money decree for Rs. 400 with interest from 1894. Krishnan J. considered that the suit could be maintained as framed and relied on the decision of this Court in 42 Mad 338.[1] In that case a Full Bench consisting of Abdur Rahim, Oldfield and Seshagiri Ayyar JJ. held that a decree which had been satisfied was still capable of execution so long as the satisfaction was not reported to and certified by the Court. The only remedy for a judgment-debtor who is called upon to pay in execution proceedings, having already paid out of Court, is an action for damages, against the decree-holder, but when the decree has been executed by an assignee no action for damages will lie against the assignee, notwithstanding that he has taken the assignment with notice of the fact that the decree has been satisfied. Krishnan J. also accepted the application of the doctrine of lis pendens.

It falls to be observed that the doctrine of part performance on which Venkatasubba Rao J. relied was not raised in the pleadings, was not made the subject of an issue and was not raised in the course of the arguments. Krishnan J. added a note to his judgment, after he had perused that of Venkatasubba Rao J. and that pointed out that this was an entirely new question which was not raised by the parties and not argued at the bar. While it is open to the Court to decide a case on any rule of law which it considers applies it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. O. 41, Rule 2 Civil P. C. says that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the Appellate Court in deciding the appeal, shall not be confined to the ground of objection set forth in the memorandum of appeal or taken by leave of the Court under the Rule. There is however this important proviso. The Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. With great respect, I consider that before Venkatasubba Rao J. based his decision on the doctrine of part performance he should have given the plaintiff's advocate an opportunity of stating his views on the question. As the doctrine of part performance was relied on by Venkatasubba Rao J. and has been made the subject of argument before us I will express my views on the question. The widow had obtained a decree for maintenance and the amount she was entitled to receive by way of maintenance was made a charge on the family properties. If her step sons did not pay what was due as maintenance she was entitled to proceed against those properties, notwithstanding that they had passed or that some of them had passed into other hands. It was open to her to agree with the alienees to release the properties in their hands from the charge, but until there was a release by her, valid in law, the properties remained charged. In this case all that had happened was that an agreement was entered into by the widow with the original alienees under which she undertook to release the properties with which they were concerned on certain events happening. Until they happened — and they never did happen—the properties remained charged. The fact that the widow received Rs. 1000 out of the Rs. 1400 did not entitle Vengama Naidu and Perumal Naidu to a release. Therefore I fail to see how the doctrine of part performance can have any application whatsoever. Venkatasubba Rao J. also considered that the present action constituted a fraud on the alienees. There was here clearly no fraud. The plaintiffs took with notice of the agreement of 1894, but that did not disentitle them to execute the decree. They were at full liberty to do so.

I have already mentioned that it was accepted by the trial Court and by Krishnan and Venkatasubba Rao JJ. on appeal that the doctrine of lis pendens applied. It was suggested at one stage in the arguments before us that this view was

1. Krishna Iyer v. Savurimuthu Pillai, (1919) 6 A I R Mad 424 = 50 I C 584=42 Mad 338= 36 M L J 376.

wrong but when it was pointed out to the learned advocate for the respondent that the question had been raised in the execution proceedings to which the present parties or their representatives were parties and there decided, he very properly did not press the point. It is clear that it was raised on the execution proceedings and there finally decided, and consequently the argument is not open to the defendants in this Court. The same remarks apply to a suggestion which has been made that the agreement of 1894 and its subsequent renewals operated to prevent the widow proceeding in execution against the properties in the possession of the alienees. This question was also raised in the execution proceedings and there also decided. Therefore the position is this: The plaintiffs are the assignees in law of the widow's decree and they were entitled to execute it against the family properties, notwithstanding that they had passed into the hands of the defendants. They did execute the decree and in the execution proceedings they bought in the half share of Ramarathnam. Consequently they now possess Ramarathnam's half interest in the family estate It has been suggested that S. 91 of the Trusts Act applies, but it is clear that it does not. The decision in the suit for specific performance entirely disposes of this argument.

The appeal will be allowed and the case remanded to the trial Court for disposal on the merits. The appellant will be entitled to costs here and before the Division Bench. He will also be entitled to a refund of the court-fee paid on the appeal as on the Letters Patent appeal. A regrettable feature of this case is the tremendous delay which has taken place. The suit was filed as long ago as 1915 and an appeal lay direct to this Court. As I have pointed out, the learned trial Judge delivered judgment on 21st August 1922. An appeal was filed in that year to this Court and it came before Krishnan and Venkatasubba Rao JJ. in September and October 1926. The learned Judges disagreed, and in accordance with the practice of this Court which then ruled it was necessary that the appeal should be heard by a Full Bench. It has taken 11 years for this to happen. The appeal has been in this Court from 1922 until now a total period of 15 years. But for the fact that these dates appear on the record I should not have believed it possible that there could be such delay. The fact that the number of parties is large and that some of them died and their legal representatives have had to be brought on the record can be no justification for this great delay. The delay is so great that it would appear to amount to a scandal, and I have directed that a full inquiry be made into the matter.

Varadachariar J.—I agree.

Mockett J.—I agree.

C.R.K./D.S. *Case remanded.*

** A. I. R. 1938 Madras 360

FULL BENCH

LEACH C. J., VARADACHARIAR AND MOCKETT JJ.

Manickam Chettiar — Petitioner.

v.

Income-tax Officer, Madura and another — Respondents.

Civil Revn. Petn. No. 1238 of 1935, Decided on 16th December 1937, from order of Dist. Munsif, Madura, D/- 2nd May 1935.

**** (a) Crown Debts — Priority — Money decree against debtor — Property sold in execution — Arrears of income tax due by debtor — Court can order payment of this Crown debt to Government on mere application by Income-tax officer without formal suit—S. 46, Income-tax Act, does not bar such application.**

The Crown has the right of priority in payment of debts due to it over all unsecured creditors. [P 363 C 1]

Where in execution of a money decree against a debtor his property is sold and arrears of income-tax are due by the debtor, the Crown has priority in respect of this debt and the Court has inherent power under S. 151, Civil P. C., to order the payment of this Crown debt to the Government, on the mere application of the Income-tax Officer without having to file a suit. S. 46 of Income-tax Act does not profess to be exhaustive and it cannot, without express words to that effect, take away from the Crown the right of enforcing payment by mere application. Similarly no special Act of the Legislature is required to enable the Crown to apply to the Court for payment out of money to which it has an undoubted right: *A I R 1936 Mad 132, A I R 1934 Rang 8 and 33 Cal 1040, Rel. on.* [P 363 C 1, 2]

(b) Attachment—Attaching creditor is not secured creditor.

An attachment does not confer title. Hence simply because the decree-holder in execution of his decree has attached judgment-debtor's property, that does not make him a secured creditor: *26 Mad 673 (F B), Foll.* [P 363 C 2]

K. Balasubramania Aiyar for Watrap S. Subramania Aiyar—*for Petitioner.*

N. Sreenivasa Aiyangar for Govt. Pleader — *for Respondents.*

Order of Reference

Varadachariar J. — Mr. Balasubramania Aiyar raised two questions before me, in support of this revision petition. On one of them I feel little doubt, but the other point is one of some importance and notwithstanding the reliance placed on behalf of the Government on the decisions in 59 Mad 428[1] and 11 Rang 467,[2] I think that it should be considered by a Division Bench or even by a Full Bench if the Chief Justice so directs. This revision petition arises out of an application made by the Income-tax Officer of Madura South to the District Munsif of Madura Town, purporting to be under S. 151, Civil P. C. and praying that out of some monies in the custody of that Court in the course of the execution of a decree obtained by the present petitioner against the assessee, the arrears of income-tax due by the assessee might be paid in the first instance. Two questions were raised before the lower Court on behalf of the present petitioner, viz. (i) whether the Government's claim was entitled to priority and (ii) whether as a matter of procedure, the petition by the Income-tax Officer to the Civil Court was sustainable. On both those points, the lower Court held against the present petitioner and directed payment to the Government in the first instance. Hence this revision petition by the decree-holder. So far as the priority of the Government's claim is concerned, I see no reason to differ from the view taken by the lower Court. Mr. Balasubramania Aiyar relied on an expression of doubt in 7 Mad 434,[3] as to the applicability in this country of the English doctrine relating to the priority of Crown debts; but I think the weight of authority in favour of the recognition of that priority even in this country is so strong that this expression of doubt cannot help the petitioner to any material degree. (*cf.* 59 Mad 428[1] and 59 Mad 872,[4] 33 Cal 1040,[5] 11 Rang 467[2] and the provisions in the Insolvency Acts relating to the priority of Crown debts.) It is on the question of procedure that I have felt some difficulty. Some of the cases above referred to arose out of applications on behalf of the Government to recover court-fees payable to Government in pauper suits. There is no difficulty in supporting the maintainability of the petition by Government in that class of cases, because the Civil Procedure Code treats the Government as a decree-holder to the extent of the court-fee payable and the ordinary procedure under the Code is available for the enforcement of that claim. In 11 Rang 467[2] the petition related to the recovery of income-tax, and in that sense the case is directly in point; but though the learned Judge gave a ruling in favour of the maintainability of the petition, he also states that the application was not opposed on behalf of the respondents and that they consented to the payment. I am therefore unable to treat that decision as concluding the point. In 59 Mad 428[1] Cornish J. was dealing with a claim for arrears of motor tax; and relying upon (1878) 9 Ch D 469,[6] and on the decision in 33 Cal 1040,[5] the learned Judge held that an application like the present must be treated as maintainable. The *33 Calcutta case* is not strictly analogous because it related to a claim for court-fee payable to Government in respect of which, as already observed, Government is in the position of a decree-holder.

The proposition that the declaration of a first charge on the subject-matter of the suit does not preclude the Government from enforcing its claim as a decree-holder in other ways does not throw much light upon the question now raised before me. (1878) 9 Ch D 469[6] no doubt recognized the right of the Crown to proceed otherwise than in the manner pointed out by the Income-tax Act; but as in that case, the application was made in the course of liquidation proceedings, an application would be the proper form. The Indian Income-tax Act of 1922 makes detailed

1. Deputy Commissioner of Police, Madras v. Vedantam, (1936) 23 A I R Mad 132=159 I C 634=59 Mad 428=69 M L J 882.
2. Soneram Rameshur v. Mary Pinto, (1934) 21 A I R Rang 8=147 I C 1014=11 Rang 467.
3. Ramachandra v. Pitchaikanni, (1884) 7 Mad 434.
4. Varadachari v. Secretary of State, (1936) 23 A I R Mad 602=162 I C 868=59 Mad 872=70 M L J 601.
5. Gayanoda Bala Dassee v. Butto Kristo Bairagee, (1906) 33 Cal 1040=10 C W N 857.
6. In re Henley and Co., (1878) 9 Ch D 469=39 L T 58=26 W R 885.

provision in S. 46 for the recovery of income-tax. Certain powers are given to the Collector and certain powers are given to the Income-tax Officer. I make no further reference to the provision relating to the Collector's powers because no application has been made in the present case by the Collector and the Act does not expect him to make an application but to exercise certain powers of his own. The Income-tax Officer is authorized under certain conditions to adopt the procedure available for the collection of arrears of Municipal tax or local rate. Provision is also made in sub-cl. (5) for a requisition to persons paying salaries to assessees. It is a matter requiring consideration whether in view of these detailed provisions having been made by the statute itself for the recovery of assessment, it is permissible to recognize in addition an application to the ordinary Civil Court which must prima facie be regarded as dealing only with the rights of litigants in the ordinary Civil Court. It may be that arrears of income-tax can be made the subject-matter of a regular suit as a Crown debt; but whether an application under S. 151, Civil P. C. or under any general principle of law was at all contemplated by the Income-tax Act or by the provisions of the Civil Procedure Code is a matter about which I entertain grave doubts, notwithstanding the respectful attention that I have givent o the cases to which I have already referred. It is this point that I should like to be heard and decided authoritatively by a Bench subject to the order of the Chief Justice. The decision in C. M. P. No. 2083 of 1933 affords me no guidance because there was in that case a distraint order issued by the Tahsildar under the provisions of the Revenue Recovery Act.

Opinion of Full Bench.

Leach C. J. — The petitioner obtained a money decree against one Govinda Rao and in execution thereof attached certain moveable properties belonging to the judgment-debtor and brought them to sale. Govinda Rao under an order of assessment dated 28th August 1934 was required to pay a sum of Rs. 301.13.0 by way of income-tax. He did not comply with the notice of demand for payment and on 12th November 1934 a penalty of Rs. 10 was imposed by the Income-tax Officer because of the default, thus increasing the total amount due by the assessee to Rs. 311.13.0. Before the sale, the Income-tax Officer filed an application in Court asking for an order directing the payment out to him from the sale proceeds when the sale took place of the amount due to Government by Govinda Rao. The sale in execution was in due course carried out, but only realized Rs. 227.9.0. After reserving the amount required for the costs of execution, the District Munsif ordered the balance to be paid out to the Income-tax Officer. The question which we are called upon to decide is whether the Court had power to order the payment out of moneys due to Government on mere application.

I had occasion to consider this question in 11 Rang 467,[2] when sitting as a Judge of the Rangoon High Court, and, following the decision of Sale, J. in 33 Cal 1040,[5] held that inasmuch as the Crown has priority over unsecured creditors in the payment of debts the Court can, on application and without a formal attachment being issued, order the payment of a Crown debt due by the debtor where there are funds in Court belonging to the debtor. The District Munsif referred to this decision in his order. The order which I passed in that case was passed by consent, and the only arguments were those addressed to the Court on behalf of the Crown, but the question has been fully argued before us today and I see no reason for changing the opinion there expressed.

It has been suggested that inasmuch as S. 46, Income-tax Act, provides modes for the recovery of arrears of income-tax the Crown is not entitled to adopt any different method. Sub-s. (2) states that the Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from the assessee the amount specified as if it were an arrear of land revenue. Without prejudice to any powers of the Collector in this behalf, he shall, for the purpose of recovering the amount, have, in respect of the attachment and sale of debts due to the assessee, the powers which under the Civil Procedure Code a Civil Court has in respect of attachment and sale of debts due to a judgment-debtor for the purpose of the recovery of an amount due under a decree. By sub-s. (3) it is provided that in any area in respect of which the Com-

missioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any Municipal tax or local rate imposed under any enactment for the time being in force in any part of the province, the Income-tax Officer may proceed to recover the amount due by such process. Under sub-s. (5) if any assessee is in receipt of income chargeable under the head "salaries" the Income-tax Officer may require the employer to deduct from his salary what is due by way of income-tax. This section however does not profess to be exhaustive and it cannot without express words to that effect take away from the Crown the right of enforcing payment by any other method open to it. Therefore I do not regard S. 46 as imposing a bar to an application of the nature of the one we are now concerned with.

The learned advocate for the petitioner then contends that as a private person cannot enforce payment without first obtaining a decree, the Crown is in the same position. The argument is that a private person is governed by the provisions of the Civil P. C. and as there is nothing in the Code which places the Crown in a different position the procedure there contemplated must be followed. I am unable to agree. This argument ignores the special position of the Crown, the special circumstances and the Court's inherent powers. It cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognized in India. If the Crown is entitled as it is, to prior payment over all unsecured creditors, the position of secured creditors does not arise. I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course it must be a debt which is not disputed or is indisputable. In this case the debt represents money due to the Crown under the Income-tax Act and the demand of the Income-tax Officer is not open to question.

What would be the effect if the Crown were not able to apply to the Court for the withdrawal of the money in a case like this? According to the argument it would mean that the Crown would have to file a suit against the debtor and the opposing creditor and then obtain an interim injunction preventing the money from being withdrawn from Court pending the decision of the suit. When the suit came on for hearing the Court would be bound to decree it. Therefore there would be not only a great waste of the time of the parties and of the Court, but the opposing creditor would run the danger of being mulcted in costs. The Court must pay money in its hands out to the person entitled to it. If the Court were asked to pay out money to *A* with the certain knowledge that the money belonged to *B* it would naturally decline to do so and would make sure that *B* got it. Here, the Crown is entitled to the money in Court, there is no question about this, and asks the Court to pay it out. The right to payment being indisputable, justice requires that it should be paid out to the Crown and formal application for payment has been made. It seems to me that both right and convenience demand that the Court should exercise its inherent power. At one stage the learned advocate for the petitioner suggested that the attachment having taken place the petitioner was in the position of a secured creditor. This argument is not open to him in view of the decision of a Full Bench of this Court in 26 Mad 673[7]. He did suggest that this decision had been overruled by the Judicial Committee in 56 Mad 405[8], but it is clear from a perusal of the report that their Lordships there refused to go into the question and reserved their decision for a future occasion. Consequently we have got to accept the decision in 26 Mad 673[7] as stating the law correctly; and the petitioner is not in the position of a secured creditor.

The learned advocate for the petitioner has also argued that unless there is some statute which expressly authorizes a petition of this nature the petition cannot be maintained. I have in effect already dealt with this question and it follows from what I have said that I do not consider that a special Act of the Legislature is required to enable the Crown to apply to the Court for payment out of money to which it has an undoubted right.

7. Krishnaswami Mudaliar v. Official Assignee of Madras, (1913) 26 Mad 673=13 M L J 278 (F B).
8. Gumedalli Ananthapadmanabhaswami v. Official Receiver of Secunderabad, (1933) 20 A I R P C 134=142 I C 552=60 I A 167=56 Mad 405 (P C).

In 59 Mad 428,[1] Cornish, J. took the same view. There money was due to the Crown as arrears of tax under the Madras Motor Vehicles Taxation Act. The learned Judge also relied on the judgment of Sale J., in 33 Cal 1040.[5] For these reasons I am of the opinion that the District Munsif came to the correct conclusion and his order should not be disturbed. The petition will be dismissed with costs.

Varadachariar J. — My doubts have been indicated in the order of reference. I am not able to say that they have been wholly dispelled. They are however not serious enough to warrant my dissenting from the conclusion which my Lord and my learned brother have reached on what is after all a question of procedure; even when making the reference, I felt no doubt as to the right of the Crown to priority. I may add that the balance of convenience certainly seems to be in favour of the view indicated in the judgment just delivered. I therefore agree with the order dismissing the petition with costs.

Mockett J.—I agree with my Lord the Chief Justice. It must be remembered that the Court holds the money for the purpose of paying it to the person entitled to it and in this presidency so long as the decision in 26 Mad 673[7] is law, as it undoubtedly still is, there is no difficulty with regard to third parties claiming prior rights by way of attachment. The position being so, this case does not seem to present any difficulty. As a matter of expediency, it is obvious that the course adopted here is the better. The alternative seems to be this, as has been pointed out by my Lord the Chief Justice, a suit is filed with regard to a matter which the defendant cannot contest and the only result is that there is delay and unnecessary expenditure for the parties. What happens under the present procedure? Here is this money lying in Court for the purpose of being paid out to the person who is entitled to receive it. The Crown goes to the Court and says: "Here is a debt which is due to me about which there can be no dispute." I consider that under those circumstances the Court can rightly invoke its power under S. 151, Civil P. C., in making the payment to the person entitled to it. Cornish J. in the case to which my Lord has referred, 59 Mad 428,[1] draws attention to a decision from which I have derived assistance (1878) 9 Ch D 469.[6] In that case a Bench consisting of James, Brett and Cotton L. JJ. emphasized the fact that a remedy given by a statute for the recovery of a debt due to the Crown in no way takes away the right of the Crown to invoke other methods if it thinks fit. I agree that the decision of the Court below is right and that this petition should be dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

** A. I. R. 1938 Madras 364

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Angamuthu Muthirian and another — Appellants.

v.

Sinnapennammal and others — Respondents.

Appeal No. 130 of 1932, Decided on 21st October 1937, against decree of Sub-Judge, Trichinopoly, in Pauper O. S. No. 93 of 1931.

(a) Hindu Law — Succession — Half-sister was heritable bandhu before Act 2 of 1929 came into force.

Before the Hindu Law Inheritance Amendment Act, 2 of 1929, came into force, a half-sister was an heir as a heritable bandhu though in the order of succession she would be postponed to a full sister. [P 366 C 2]

**** (b) Hindu Law Inheritance Amendment Act (2 of 1929)—Sister does not include half-sister.**

The word "sister" is a plain English word and according to the rule of law governing the construction of statutes it must receive its plain ordinary and grammatical meaning. So interpreted, a sister is a "woman born of same parents as oneself." A half-sister not being mentioned in the Act will retain the place hitherto assigned to her as an heir in presidencies where her right of heirship is recognized, and therefore "sister" does not include a half-sister in Act 2 of 1929: *A I R 1933 All 491 and A I R 1935 Oudh 332, Rel. on.* [P 366 C 2; P 367 C 1, 2]

(c) Hindu Law—Family arrangement between widow and reversioners—Essentials of—Widow succeeding to her son's estate after his death—Suit by next presumptive reversioner *N* against widow on footing that widow inherited property as heir to her son and that *N* was next presumptive reversioner—Widow denying that she took property as heir to her son and setting up independent title as devisee under her husband's will whereby she was to enjoy property for life and after her death her step-daughters were to take it absolutely Suit compromised—Half of the property going to *N* and half to be retained by widow for her life and thereafter to daughters — Compromise held bona-fide family settlement.

It is competent to a Hindu female holding a limited interest in the estate she holds as the heir of the last male owner to enter into a family settlement with the reversioners to the estate. The Courts in India and the Privy Council have applied the principles of English law relating to family settlements to such settlements. In doing so, Courts have always regard to the nature of the interest possessed by such a limited owner and the reversioners to the estate and the limitations on their power recognized by the law to which they are subject. A Hindu widow is the owner of the estate which she inherits for the time being and fully represents it whether in litigation or otherwise. The interest of reversioners is only a spes successionis and it cannot be made the subject-matter of any bargain. The arrangement entered into by the widow with the reversioners must not be a device to divide the estate between her and the reversioners to defraud the actual reversioners when the succession opens. Subject to these limitations, a family settlement bona fide entered into by a Hindu widow will be valid and binding on the reversion. The question of bona fides is to be considered with reference to the date when the transaction was entered into. [P 367 C 2]

A Hindu after his death left two widows *A* and *B*. *G* was the son of *A* and *B* had two daughters. After *G's* death his mother *A* succeeded to his property, *B*, having died only a day after *G*. The next presumptive reversioner of the estate namely *N* brought a suit against the widow for an injunction from committing waste. He based his claim on the footing that the widow *A* took the property as an heir to her son and that *N* was the next presumptive reversioner. The widow denied this and set up an independent title as a devisee under her husband's will whereby she was to take the property for her life and after her death the daughters of *B* were to take the property absolutely. Thus her claim denied the existence of any outstanding reversion. The suit on the advice of certain friends was compromised. Under the compromise, the half of the property in possession of the widow was given to her for her life and thereafter to *B's* daughters absolutely. The other half went to *N* and his sons :

Held that the compromise was a bona fide family settlement and was binding on the daughters of *B*. [P 370 C 2]

K. M. Balasubramaniam, T. K. Rajagopalan and S. S. Rajagopalan — *for Appellants.*

K. V. Sesha Ayyengar and T. R. Ramachandran — *for Respondents.*

Venkataramana Rao J. — Two questions which are of some importance were raised in this appeal. The one is whether the word "sister" in Act 2 of 1929, includes a half-sister ; and the other relates to the validity and binding nature of an arrangement embodied in a compromise decree in a litigation between the mother of a last male owner and the next presumptive reversioner concerning his estate. The relevant facts are not in dispute. One Muthukaruppa Muthiriyan died in 1921 possessed of property both moveable and immovable and leaving him surviving his two wives Chinnammal and Ammachi Ammal and a son Ganesa Muthiriyan by the said Chinnammal and two daughters, the plaintiffs in this suit, by Ammachi Ammal. Ganesa Muthiriyan died on 11th October 1924 unmarried and Ammachi Ammal died on 12th October 1924. Muthukaruppa Muthiriyan's property thus came into the sole possession of Chinnammal. The next presumptive reversioner to the estate of Ganesa Muthiriyan was his paternal uncle, that is his father's brother Neelamega Muthiriyan, defendant 2 in this suit. On 10th March 1926 Neelamega Muthiriyan filed a suit, O. S. No. 85 of 1926 on the file of the Court of the District Munsif of Srirangam against Chinnammal and others for an injunction restraining Chinnammal and her brother from committing waste of the property in her possession and for appointment of a Receiver in respect thereof. His claim was on the footing that Chinnammal inherited the said property as heir to her son Ganesa Muthiriyan and he was the presumptive reversioner to the estate. Chinnammal in her written statement denied that she took the property as her son's heir. She set up an independent title as the devisee under her husband's will. She alleged that all the property which her husband died possessed of was his self-acquired property, that shortly before his death he made an oral will to the effect that in case his son Ganesa Muthiriyan should die before attaining majority both his wives should enjoy his property for their lives and thereafter his daughters the plaintiffs herein should take the property absolutely and that she was in possession and management of the property, in pursuance of the said will. Thus the claim set up was a denial of any subsisting estate of Ganesa Muthiriyan and any outstanding reversion.

After the trial had begun, and evidence had been partly taken, common friends appear to have intervened and brought about a settlement of the matters in dispute and the terms of the settlement were reduced to writing in a razinamah dated 22nd July 1927 and a decree was obtained thereon. The result of the settlement was that the property then available and in the possession of the widow except jewels was divided into two halves, one half to be enjoyed by Chinnammal for her

life and thereafter by the plaintiffs absolutely and the other half by Neelamega Muthiriyan and his sons. The jewels in the possession of Chinnammal were declared to be her absolute property. The suit against the other defendants was withdrawn, each party bearing his respective costs. The above arrangement was given effect to and the parties entered into possession of their respective shares and have been in enjoyment thereof. Two years after this decree, the Hindu Law of Inheritance Amendment Act (Act 2 of 1929) was passed and came into force in February 1929 in and by which a sister would be entitled to succeed in preference to a paternal uncle and his descendants. Two years thereafter in January 1931 the present suit was instituted by the plaintiffs alleging that by virtue of the said Act they became the presumptive reversioners to the estate of Ganesa Muthiriyan, that the said compromise could not operate in any manner whatsoever as against their reversionary right (*vide* para. 11 of the plaint) and they therefore prayed for a declaration that the said decree could not operate as against them [*vide* relief (a) in the prayer of the plaint]. They impleaded as parties to the suit in addition to Chinnammal the said Neelamega Muthiriyan and his four sons who are respectively defendants 2 to 6 in the suit. They pleaded that the plaintiffs were not heirs under the Hindu law at all as administered in this presidency, that Act 2 of 1929 did not confer on them any right and that the arrangement embodied in the said decree was a bona fide family settlement binding on the reversioners to the estate of Ganesa Muthiriyan and in any event on the plaintiffs on whom benefits were conferred thereunder. The learned Subordinate Judge negatived all their pleas and gave a decree to the plaintiffs declaring that the said decree is not binding on them. It is against this decree that this appeal has been preferred by defendants 3 and 4. Defendant 2 died since the institution of the suit and his sons defendants 3 to 6 are on record as his representatives.

The questions which fall to be decided are (1) (a) whether the plaintiffs as half-sisters of Ganesa Muthiriyan were his heirs before the Act came into force and (b) whether the word "sister" in the said Act includes a half-sister; (2) whether the compromise of the said decree in O. S. No. 85 of 1926 is a family settlement and if so, is it binding on the plaintiffs. There is no direct decision in this presidency recognizing a half-sister as an heir to the estate of a person dying intestate though she is assumed to be so in 5 Mad 29[1] and 5 Mad 241.[2] In fact the claims of a sister were not recognized in provinces where the Mitakshara law prevails except in Bombay on the ground that she was not mentioned as an heir in the Mitakshara. Her claim was however ultimately recognized in Madras on the ground that she would be a Bhinna Gothra Sapinda and therefore a heritable bhandu the list of bandhus mentioned in Mitakshara having been considered to be only illustrative and not exhaustive : 8 M H C R 88,[3] 5 Mad 241,[2] and 18 Mad 168.[4] On the same principle, a half-sister would be a heritable bandhu though in the order of succession she would be postponed to a full-sister. The plaintiffs must therefore be held to be included in the list of heirs to the estate of Ganesa Muthiriyan even before the said Act came into force.

The next question is whether "sister" includes a half-sister in Act 2 of 1929. The word "sister" is a plain English word and according to the rule of law governing the construction of statutes it must receive its plain, ordinary and grammatical meaning. So interpreted, a sister is a "woman born of same parents as one-self." This meaning has to be adhered to unless it is repugnant to the context or it is in variance with the intention of the Legislature as apparent from the Act. It seems to us that this interpretation would carry out the intention of the Legislature and any other would frustrate it. If one looks at the surrounding circumstances attending the passing of the Act and the cause and the necessity of it, as it is legitimate to do, if there is any doubt, the matter is put beyond doubt. Before the Act many near relations of a person dying intestate did not inherit to him at all in certain provinces and in others were postponed to distant relations remotely connected with him by ties of blood. It was felt that

1. Kumaravelu v. Viranna Goundan, (1882) 5 Mad 29.
2. Lakshmanammal v. Tiruvengada, (1882) 5 Mad 241.
3. Kutti Ammal v. Radhakrishna Aiyan, (1876) 8 M H C R 88.
4. Balamma v. Pullaya, (1895) 18 Mad 168=5 M L J 22.

his obvious injustice should be remedied by an alteration in the law and the Legislature did so in regard to certain specified relations. The Preamble of the Act shows what its object is, viz. "to alter the order in which certain heirs . . . . . are entitled to succeed." The word "certain" means definite or particular. What is meant by the expression "certain heirs" is specified heirs. In Cl. 2, four heirs who fulfil a particular description are specified. It is the order which was fixed for them in the then state of the law that was intended to be altered. Cl. 2 says that the heirs therein mentioned shall in the order so specified be entitled to rank in the order of succession next after a father's father. In provinces where the sister and the half-sister are recognized as heirs under the Mitakshara law, the order that is assigned to the half-sister is after the sister and not on a level with the sister. She has thus a distinct and separate order.

The order that is sought to be displaced is only in the case of a sister and not in the case of a half sister. This is consistent with the object of the Act which has for it the principle of propinquity of blood. Before the Act, in Madras, a sister's son would exclude the sister though she is more closely related to him by ties of blood, the reason being that under the Mitakshara the male bandhu excludes the female. But this principle was deliberately superseded by the Act in favour of the principle of affinity and hence a sister had been preferred to a sister's son. If therefore a sister were to include a half-sister she would exclude a sister's son, an interpretation which would defeat the intention of the Legislature. In 55 All 725,[5] the Full Bench of the Allahabad High Court has taken the view that a sister would not include a half sister. This decision has been followed in 11 Luck 148.[6] Mulla in his Book on Hindu Law, Edn. 8, also states that a half sister not being mentioned in the Act will retain the place hitherto assigned to her as an heir in the presidencies where her right of heirship is recognized. We think this is the correct view and therefore hold that 'sister' does not include a half sister in Act 2 of 1929 and the plaintiffs are not therefore the presumptive reversioners to the estate of Ganesa Muthiriyan.

The next question is whether the compromise decree is binding on the plaintiffs. It is sought to be supported on the ground that it is a bona fide family settlement. It cannot be doubted that it is competent to a Hindu female holding a limited interest in the estate she holds as the heir of the last male owner to enter into a family settlement with the reversioners to the estate. Courts in India and the Privy Council have applied the principles of English law relating to family settlements to such settlements. In doing so, Courts have always regard to the nature of the interest possessed by such a limited owner and the reversioners to the estate and the limitations on their power recognized by the law to which they are subject. A Hindu widow is the owner of the estate which she inherits for the time being and fully represents it whether in litigation or otherwise. The interest of a reversioner is only a spes successionis and it cannot be made the subject-matter of any bargain. The arrangement entered into by the widow with the reversioners must not be a device to divide the estate between her and the reversioners to defraud the actual reversioners when the succession opens. Subject to these limitations, a family settlement bona fide entered into by a Hindu widow will be valid and binding on the reversion. The question of bona fides is to be considered with reference to the date when the transaction was entered into. When therefore Chinnammal compromised the said litigation, O. S. No. 85 of 1926, what were the circumstances and the state of affairs of the family? The property to which the claims were advanced by the respective parties were made the subject-matter of the litigation. The result of the litigation, if the contentions of the parties are upheld would be this: If Chinnammal succeeds, there is no estate of Ganesa Muthiriyan and no question of reversion to his estate; neither defendant 2 nor his sons and grandsons nor anybody can succeed at any time as heirs to his estate. If the contentions of defendant 2 were to prevail the plaintiffs will lose their rights as remaindermen with absolute rights under the alleged will of Muthukaruppa Muthiriyan and they will be relegated to the position of distant heritable bandhus

5. Ram Adhar v. Mt. Sudersa, (1933) 20 A I R All 491 = 145 I C 529 = 55 All 725 = 1933 A L J 680 (F B).

6. Mt. Kabootra v. Ram Padarath, (1935) 22 A I R Oudh 332=155 I C 94 = 1935 O W N 545=11 Luck 148.

of Ganesa Muthiriyan with a very remote prospect of ever succeeding to his estate.

It will be seen that the existing body of reversioners to the estate of Ganesa Muthiriyan on the date of the compromise were defendant 2, after him his four sons and after them his grandsons, the plaintiffs and the brother of Chinnammal who as the maternal uncle of Ganesa Muthiriyan would be a nearer bandhu than the plaintiffs. Thus the reversion to the estate will be in the family of defendant 2 for, at least three generations and the possible reversioners who are likely to be affected by any arrangement entered into are the descendants of the plaintiffs, taking the normal course of events; Chinnammal was entitled to enjoy the property during her life, the plaintiffs are persons who may be said to have a possible interest in the estate but a remote possibility. The effect of the said settlement is this: Chinnammal sacrificed her life-interest in half of the property for the rest of her life; the plaintiffs were secured a vested remainder with absolute rights in half the property and their right as devisees under the will of their father was to that extent recognized, and defendant 2 secured for himself and his descendants the present possession of half the property and thus the reversionary interest in the said half which in one event his family would never have got. Therefore the claims of all persons who had any actual or possible interest in the property were taken into account and adjusted. In one view defendant 2 represented or must be deemed to have represented all the reversioners who were then existing, including the plaintiffs; in another view, the said Chinnammal must be deemed to have represented the plaintiffs in that she put forward their separate claims as devisees under their father's will, being in possession of the estate under the said will. The parties came to this arrangement with the aid of common friends and under legal advice as is evidenced by Ex. 3, the razinamah. Under such circumstances, can it be said that the settlement was not bona fide to secure family peace and avoid litigation? Does it violate any rule of law for a Court to decline to give effect to it? Mr. Sesha Ayyangar contends that it is not bona fide, having regard to the nature of the claim advanced by Chinnammal as it would have been very difficult to substantiate it. The question is not whether the matter was really doubtful but whether the parties considered it so. It is immaterial whether Chinnammal found it impossible or difficult to prove. The claim was one which imperilled the reversion. She asserted that the declaration was made by the husband in the presence of several people; the razinamah recites the claims and the mediators seem to have considered them. Absolutely no evidence has been given in this case to show any want of bona fides. Once it is found that there was a real dispute as to title to the property between the widow and the reversioners and it required settlement and the settlement arrived at is proved to be bona fide, the contention that it is a device to defeat the estate fails.

In 48 Cal 100,[7] the facts were as follows: One *N* died in April 1906 leaving a widow, four daughters and a son. The son died and the mother succeeded to the estate. The daughters set up a will of their father under which they claimed title to the immovable properties left by him on failure of the son with a certain provision for the widow. *M*, the next reversioner filed a suit for a declaration that the will was invalid, that the son got the property and that the mother was entitled to a woman's interest and on her death he would be the next presumptive reversioner to the estate. Both the mother and the daughters opposed the suit and then a compromise was arrived at, the result of which was that half the property was taken by the reversioner and the other half was taken by the daughters and both the reversioners and daughters gave certain property to the widow. The form in which this compromise was arranged was a surrender by the widow to the next reversioner and then a transfer by the reversioner to the daughters. Sometime later *M* died and the nephews of *M* who became the next presumptive reversioners filed a suit for a declaration that the compromise was invalid. Their Lordships held that it was a bona fide family settlement and not an arrangement to divide the estate and dismissed the suit. The observations of Lord Dunedin at pp. 108 and 109 may be usefully referred to in this connection:

> An arrangement, by which the reversioner as a consideration for the surrender promised to convey a portion of the property to a nominee or nominees of the lady surrendering, might

7. Sureshwar Misser v. Mt. Maheshrani Misrain, (1921) 8 A I R P C 107=57 I C 825=48 Cal 100=47 I A 233 (P C).

well fall under the description of a device to divide the estate. It is here that the fact of the arrangement being a compromise becomes of importance. Once the bona fides is admitted, we have the situation of a contest under which, if decision were one way, the estate was carried to the daughters away from the family and a litigation in the course of which the estate would probably be much diminished. This situation made it a perfectly good consideration for the lady in order to avoid these results to consent to give up her own rights by surrender. On the other hand, it was a good consideration for the reversioner to get rid of the will and in a question with the daughters, who would take all by the will, to agree to give them a half of the property .... The arrangements of the compromise cannot be stigmatised as a device to divide the estate between the surrendering lady and the nearest reversioner, and cannot now be taken exception to.

No doubt in this case the compromise took the shape of a surrender. Their Lordships viewed the matter not only as a surrender but also as a compromise. As pointed out by their Lordships in 1 Pat 741[8] at p. 745, the mode by which a compromise is carried into effect is immaterial if the compromise was reasonable and prudent. The above reasoning of their Lordships in 48 Cal 100[7] would apply to this case having regard to the similarity of facts.

We shall now deal with some of the cases relied on by Mr. Sesha Ayyangar for the position that the settlement now in question cannot be held to be binding on the reversioners. The case on which he placed most reliance was 33 All 356[9] and particularly the following observations therein at p. 367 :

> The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case Khairati Lal acquired no right from the daughters of Daulat, for, 'compromise' to use their Lordships' language in 1 I A 157[10] at p. 166 is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is.

In that case, Ratan Singh, the father, and Daulat Singh, the son, formed members of a joint family and Ratan Singh abandoned Hinduism and adopted Muhammadanism. Daulat Singh predeceased his father leaving his widow Sen Kunwar and two daughters. Ratan Singh subsequently died leaving his widow Rani Raj Kuwar. After the death of both Ratan Singh and Sen Kunwar disputes arose between the daughters of Daulat and Khairati Lal a grandson of Ratan Singh, each claiming title to the property, one claiming title on the ground that Ratan Singh by conversion forfeited his right in the joint property and Daulat became entitled to the entire property, while the other contending that the conversion had not extinguished the rights of Ratan Singh and that on the death of Daulat, he became entitled to the property. It was in this state of circumstances a compromise was entered into, dividing the property into two shares. It was held that it was a perfectly bona fide family settlement and the above observations of the Privy Council were made with reference to this state of facts. No doubt, each party set up title to the property but this condition is not absolutely necessary. Their Lordships of the Privy Council explained this case in a later case in 1 Pat 741.[8] Lord Phillimore referring to 33 All 563[9] observed thus at p. 747 :

> The property belonged to one or other or possibly both, of the parties to the dispute and the compromise proceeded upon the footing that it was uncertain in which of them the title was. As their Lordships, put it, it was based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledged and defined what that title was.

It will be seen from these observations that it is enough even if the property belonged to one or the other and it need not necessarily belong to both. The title set up in this case was a complete title in the widow and the plaintiffs under the will of Muthukarruppa Muthirlan and a complete denial of the reversion. Therefore the compromise must be deemed to have proceeded on the assumption of an antecedent title of some kind in the widow and the plaintiffs based on the said will and the test laid down in 33 All 356[9] is satisfied in this case. The next case relied on by Mr. Sesha Ayyangar was A I R 1936 P C 304.[11] In that case a person gave up his reversionary right to the estate in consideration of getting some personal advantage in some other estate and their Lordships rightly held that the

8. Ramsumran Prasad v. Mt. Shyam Kumari, (1922) 9 A I R P C 356=69 I C 71=49 I A 342=1 Pat 741 (P C).
9. Khunni Lal v. Govind Krishna Narain, (1911) 33 All 356=10 I C 477=38 I A 87=8 A L J 552 (P C).
10. Rani Mewa Kuar v. Rani Hulas Kuwar, (1873) 1 I A 157=13 Beng L R 312=3 Sar 814 (P C).
11. Mt. Binda Kuer v. Lalita Prasad, (1936) 23 A I R P C 304=164 I C 840 (P C).

person had no right to bargain away the chances of his descendants in order to get for himself an immediate share in some other estate and the compromise arrived at by him cannot be held to be binding on the next reversioners. Mr. Seeba Ayyangar also laid considerable emphasis on the Full Bench decision in A I R 1936 All 507[12] and particularly the observation that a reversioner has no right to obtain a share in the property exclusively for himself and his descendants. But the facts of the present case are different. Defendant 2 in entering into the compromise did not obtain anything exclusively for himself or for his descendants. The interests of the plaintiffs were also safeguarded. So far as the family of defendant 2 was concerned, it was a benefit which he obtained not only for himself but for the entire joint family of his sons and grandsons who can be the possible reversioners after him in the normal course of events. His sons defendants 3 to 6 have adopted the transaction and it will not be open to them in any future litigation to repudiate it. They are all members of a joint family and the property is being enjoyed by themselves and their sons who have thus acquired immediate benefits and so far as any possible reversioner in that family is concerned, namely, defendants 3 to 6 are their sons, they cannot challenge the settlement and defendant 2 did really represent them and their interest in the compromise.

Therefore on a consideration of the entire circumstances of this case we are of the opinion that the arrangement embodied in O. S. No. 85 of 1926 is a bona fide family settlement binding on the reversioners to the estate of Ganesa Muthiriyan or at any rate on the sons and grandsons of defendant 2 and the plaintiffs and the first defendant's brother who was a party to the compromise decree by which he was exonerated from the suit without costs. The plaintiffs are therefore not entitled to the declaration sought for in this suit. We accordingly allow the appeal and set aside the decree of the learned Subordinate Judge but we direct the parties to bear their own costs throughout. The memorandum of objections is not pressed. It is therefore dismissed but without costs.

C.R.K./D.S. *Appeal allowed.*

12. Mt. Rajpali Kunwar v. Surju Rai, (1936) 23 A I R All 507=163 I C 756=1936 A L J 659 =58 All 1041 (F B).

A. I. R. 1938 Madras 370

CORNISH J.

Kandaswami Goundan and others — Appellants.

v.

Rangaswami Goundan and others — Respondents.

Appeal No. 296 of 1935, Decided on 2nd November 1936, against order of Dist. Court, Salem, D/. 10th August 1934.

(a) Provincial Insolvency Act (1920), S. 75(3) — Creditor aggrieved by order of District Court may appeal to High Court without first applying to Official Receiver to appeal and getting refusal from him.

The words "any such person aggrieved" in S. 75 (3) also include a creditor who is aggrieved by an order of the District Judge in an application to set aside a sale under S. 53 of the Act made by him upon the refusal of the Official Receiver to take steps. Such a creditor therefore may appeal with the leave of the High Court under S. 75 (3) without first applying to the Official Receiver to appeal and getting a refusal from him : *A I R 1931 Lah 651, Distng.* [P 371 C 1, 2]

(b) Provincial Insolvency Act 1920), S. 53 — Suit to set aside sale All facts should be relatively considered and weighed as a whole.

In an action to set aside a sale under S. 53, it is not enough to pick out a few circumstances and to find explanations for them and then deduce therefrom that the creditor has discharged his burden of proof. But it is essentially necessary that the Court should consider all the facts in relation to each other and weigh them as a whole and then come to a conclusion : *A I R 1919 P C 6, Foll.* [P 371 C 2]

(c) Provincial Insolvency Act (1920), S. 53 Transfer not bona fide — Subsequent transfers also fall.

Where a transfer by an insolvent is not bona fide, the subsequent transfers by the transferees also fall : *A I R 1933 Mad 971, Rel. on.* [P 372 C 2]

K. P. Ramakrishna Aiyar — *for Appellants.*

C. S. Venkatachari and D. Ramaswamy Aiyengar — *for Respondents.*

Judgment.—The appellant is a creditor who upon the refusal of the Official Receiver to take steps to set aside a sale under S. 53, Provincial Insolvency Act, obtained leave of the Court under S. 54. A to file a petition for that purpose. The petition was dismissed, the District Judge holding that the appellant had not succeeded in proving that the sale which he impeached was not a transfer in good faith

and for valuable consideration. The appellant in pursuance of S. 75 (3) obtained leave of the High Court to appeal against the decision of the District Judge. A preliminary objection has been raised by Mr. Venkatachariar, who appears for the alienees, the respondents to this appeal, that the appeal will not lie. His contention is that the appellant is not competent to appeal as a person aggrieved unless he had first applied to the Official Receiver to appeal and the Official Receiver had refused. The learned advocate seeks to draw analogy from S. 54.A in support of his proposition. I think that the appellants' right of appeal depends entirely upon the terms of S. 75. Sub.s (1) enumerates the persons to whom a right of appeal is given; they are, "the debtor, any creditor, the receiver or any other person aggrieved by a decision." Under sub.s. 1, it is the decision of an Insolvency Court subordinate to the District Court which is appealable, and an appeal is given from the decision of the Subordinate Court to the District Court. Sub.s. 2 provides for an appeal by "any such person aggrieved" —which means any of the persons named in sub s 1—by a decision of a District Court on the matter specified in Sch. I of the Act. And sub s. 3 gives a right of appeal by leave of the High Court to "any such person aggrieved" by an order of the District Court made otherwise than in appeal from a Subordinate Court.

There is no doubt that a creditor is among the persons who may be aggrieved by an order of an Insolvency Court whether it be a subordinate Court, or a District Court to whom a right of appeal is given by S. 75. Mr. Venkatachari has relied upon a decision of Addison J. reported in 132 I C 589.[1] In that case an objection was taken at the hearing of the appeal that an appeal would not lie because the leave of the Court had not been obtained under S. 75 (3). All that the learned Judge decided was that it was not a fit case to give leave to appeal, because the appellant had not requested the Official Receiver to appeal and the Official Receiver had refused. The learned Judge referring to S. 54.A — although it does not appear from the report that the creditor had originally taken steps to set aside the sale under that section—said :

> It follows that leave to appeal should also not be given to a creditor unless either the District Judge or this Court is satisfied that the Receiver had been requested and has refused to appeal.

He does not lay down that the High Court can only give leave to a creditor to appeal upon these conditions. In my judgment the language of S. 75 gives no warrant for attaching any such condition to the power vested in the High Court by sub.s. 3. The preliminary objection therefore fails. I now come to the merits of the appeal. The appellant filed a suit on a promissory note against the debtor on 22nd December 1925. On that same day the debtor executed a registered sale deed, Ex. 1, to respondent 2, his cousin, of land for a sum of Rs. 1500. The appellant obtained a decree in his suit on 15th February 1926. He petitioned to have the debtor adjudicated on 22nd March 1926, the alleged act of insolvency being the transfer made by Ex. 1. The debtor was adjudicated on 9th August 1926. The appellant is the sole creditor. On 1st November 1928, respondent 2 executed Ex. 2, a sale deed of the same property, to respondent 3, a brother of the debtor, for Rs. 1500, and one of the attestors of that sale deed is the debtor. Now undoubtedly the appellant had to establish that these were not bona fide transactions. He had to produce evidence either in chief or by means of cross-examination of the respondents' witnesses, to show that the circumstances of these sales were such that the reasonable inference was that they were simply a device to screen the property from the creditor. It is not enough, as the learned District Judge seems to have done, to pick out a few circumstances and to find explanations for them, and then to deduce therefrom that the appellant has not discharged his burden of proof. The Judicial Committee has pointed out that it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole : 36 M L J 483.[2]

The District Judge has first of all referred to some evidence that the debtor had other immovable property at date of Ex. 1. The evidence is that of respondent 3 who giving evidence in 1934, says that the debtor sold a land 'two or three years ago' and another land 'one and half

1. Puran Chand v. Ramchandar Gupta, (1931) 18 AIR Lah 651=132 I C 589=33 P L R 65.

2. Seth Ghunsham Das v. Uma Pershad, (1919) 6 A I R P C 6=50 I C 264=15 N L R 68=36 M L J 483 (P C).

years ago'. But the debtor had been adjudicated in 1926 and is still undischarged, and it seems most improbable that he would have been disposing of property which had vested in Official Receiver. If on the other hand the witness was deposing to alienations made by the debtor prior to the insolvency, the evidence would be quite immaterial to the question whether the sale by Ex. 1 was not bona fide and for valuable consideration. The District Judge then refers to the registration of Ex. 1, and appears to think that the circumstances that this document was 'publicly registered' and that pattas were transferred to respondent 2 show the bona fides of the parties. But obviously, the least the parties to the transaction could be expected to do if it was a sham would be to give it the appearance of reality. The District Judge admits that there may be some suspicions attaching to Ex. 1 owing to the relationship of the parties, but he finds himself unable to hold that appellant had discharged the burden of proving that the sale was not bona fide and without consideration. He does not so much as allude to the co-incidence of the filing of the appellant's suit with the execution and registration of the sale deed on the same day; nor to the hurry, (evidenced by the writing, execution and registration of Ex. 1 in Sub-Registrar's Office), to get Ex. 1 completed on this same day. He has not apparently considered the very unconvincing reason given by respondent 2 for purchasing this property on this particular date, he being a resident in another village five miles away, or the equally unconvincing evidence he has given regarding the use which he made of this land after his purchase. He says he let it on varam to an uncle. The appellant's evidence is that the debtor continued to be in possession of the land and to enjoy its produce. There is no evidence as to who paid the kist. The village munsif cannot say; respondent 2 says he paid kist, but he did not produce any kist receipt. He admitted that he had no rental agreement in respect of the land. The District Judge appears to have failed likewise to consider the inadequate explanation given by respondent 3, the debtor's brother, for his purchase from respondent 2 under Ex. 2. This is what respondent 3 says in cross-examination :

> Respondent 2 lives in Alavoypatti village, five miles off my village. He never lived in my village. Respondent 2 is my maternal uncle's son. He was in possession for two or three years. Then he sold to me. I do not know why he purchased this land in my village. Nor why he sold it.

I think upon the evidence that it is not possible to hold that Ex. 1 was a bona fide sale. With regard to the question whether consideration was given for the sale, there are three attesting witnesses who say that consideration passed. But the only one of these witnesses who can be regarded as independent, after first of all stating in examination-in-chief that Rs. 1500 was paid in cash, said in cross-examination that he did not see the passing of consideration. The evidence of consideration is worthless. In my judgment the only reasonable inference upon the evidence is that Ex. 1 was a sham transaction. It must be set aside; and Ex. 2 being merely another stage in this sham falls with it : *see* A I R 1933 Mad 271.[3] The appeal therefore succeeds and is allowed with costs throughout against respondents 2 and 3. Rs. 50 advocate's fee.

C.R.K./S.C. *Appeal allowed.*

3. Pullayya v. Official Receiver of Kistna, (1933) 20 A I R Mad 271=143 I C 372.

A. I. R. 1938 Madras 372

PANDRANG ROW J.

K. M. Srinivasam Pillai — Petitioner.

v.

Y. P. R. L. Alagappa Chettiar and another — Respondents.

Civil Revn. Petn. No. 384 of 1935, Decided on 12th November 1937, to revise decree of Dist. Court, Coimbatore, in C. M. A. No. 97 of 1934.

(a) Civil P. C. (1908), O. 41, R. 27 (b)—Word 'requires'—Meaning.

The word 'requires' in O. 41, R. 27 (b) means "finds it needful". [P 373 C 2]

(b) Civil P. C. (1908), O. 41, R. 27 (2)—Reason merely of "in the interests of justice" is not sufficient.

Order 41, R. 27, sub-r. (2) clearly requires that reasons should be given for admitting additional evidence. Saying merely "in the interests of justice" is not sufficient. [P 373 C 2]

(c) Civil P. C. (1908), O. 41, R. 29—Non-observance of R. 29 is material irregularity.

Rule 29 of O. 41 serves a very useful purpose, namely it ensures that the Appellate Court will consider exactly in what points there is a lacuna which requires to be rectified and also that an opportunity will be given to both sides to adduce additional evidence on the particular points on which additional evidence is allowed to be taken

in appeal. Non-observance of this rule is material irregularity. [P 374 C 1]

T. R. Venkatarama Sastry and T. S. Venkatesa Iyer — *for Petitioner.*

V. Radhakrishnayya, V. Rajagopala Ayyer and T. V. Ramiah — *for Respondents.*

Order. — This case arises out of an application filed by two creditors of the insolvents in I. P. No. 133 to 135 of 1927 in the Court of the Subordinate Judge, Coimbatore, to declare as void a mortgage deed executed by two of the insolvents for Rs. 20,000 on 7th December 1926, in favour of the respondent 1 and also for cancellation of the assignment of the mortgage bond by respondent 1 on 2nd January 1930 in favour of respondent 2. The application was dismissed by the Subordinate Judge who heard the witnesses, but, on appeal by the creditors, the District Judge allowed the application and set aside the mortgage deed Ex. 3. In revision, it is contended inter alia that the procedure adopted by the learned District Judge in the disposal of the appeal was not according to law, and in particular that his reception of additional evidence in appeal was contrary to the provisions of law which govern admission of additional evidence in appeal. To understand this contention, it is necessary to state that soon after the appeal was filed, that is to say on 10th September 1934, the creditors who were the appellants filed an application under O. 41, R. 27, Civil P. C., to the District Judge for admitting certain documents as additional evidence in appeal. On the same day they applied to the Subordinate Judge to review the order passed by him under O. 47, R. 1, Civil P. C., on the ground that certain important evidence had been discovered subsequent to the disposal of the application by the Subordinate Judge. Evidence was taken in the review petition and a number of documents were marked for the creditors. After full enquiry, the petition for review was dismissed by the Subordinate Judge. Thereupon it would appear that the same documents which had been marked for the creditors in the review application before the Subordinate Judge were tendered as additional evidence in appeal in the District Court. These documents appear to have been referred to and discussed at the hearing of the appeal before the District Judge before they were actually admitted as additional evidence in appeal or exhibited.

It would also appear that no opportunity was actually given to the opposite side, that is the present petitioner, to adduce rebutting evidence. The provisions of O. 41, R. 27, Civil P. C., have been considered by their Lordships of the Judicial Committee more than once. It is sufficient to refer in this connexion to 31 Bom 381[1] and 10 Pat 654.[2] The relevant provisions themselves are to the effect that additional evidence may be allowed by the Appellate Court to be given in appeal if the Appellate Court requires such evidence in order to enable it to pronounce judgment or for any other substantial cause. As observed by their Lordships of the Judicial Committee, the word "requires" in O. 41, R. 27 (b) means "finds it needful". In this case it does not appear that this additional evidence that was actually admitted was necessary for the determination of the appeal or for any other substantial cause, as far as can be seen from the judgment of the learned Judge who at the end makes the following observation, "I do not base my finding on the documents filed by the appellants and marked in this appeal." Though no doubt he adds that in his opinion these documents prove that the mortgage in question was fraudulent and not supported by consideration, nevertheless, if even in the absence of this additional evidence, the learned District Judge was in position to arrive at a finding, there was obviously no necessity or need to admit additional evidence in appeal, the effect of which was only to confirm the finding which he had come to on the existing evidence. Moreover O. 41, R. 27, sub rule (2) clearly requires that reasons should be given for admitting additional evidence. In this case, the reason given by the learned District Judge does not appear to be sufficiently definite; the reason given is the formula "in the interests of justice" which may mean everything or which may mean very little.

It is difficult to see in the circumstances of this case, especially in view of what the District Judge has said, namely that he does not base his finding on the additional evidence, why the interests of justice required additional evidence to be taken. O. 41, R. 29, Civil P. C., provides that

1. Kessowji v. G. I. P. Ry. Co., (1907) 31 Bom 381=34 I A 115=9 Bom L R 671 (P C).
2. Parsotim Thakur v. Lal Mohar Thakur, (1931) 18 A I R P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).

where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the point to which the evidence is to be confined, and record on its proceeding the points so specified. This rule has not been observed by the learned District Judge. This Rule serves a very useful purpose, namely it ensures that the Appellate Court will consider exactly in what points there is a lacuna which requires to be rectified and also that an opportunity will be given to both sides to adduce additional evidence on the particular points on which additional evidence is allowed to be taken in appeal. What has happened in this case illustrates the the danger of not observing the provisions of this Rule, namely R. 29 of O. 41, Civil P. C. The documents which were put forward by the appellants were admitted at the end of the hearing of the appeal, and the other side had apparently no opportunity whatever to adduce any evidence of their own on the points to which the admitted documents related, and the result is that additional evidence has been taken in appeal only on one side without the other side being given a proper opportunity of adducing evidence. In view of the irregularity of the procedure adopted by the learned District Judge which must obviously have prejudiced the petitioner, I am of opinion that the order of the District Judge in appeal cannot be allowed to stand. It is accordingly set aside and the District Judge of Coimbatore is directed to restore C. M. A. No. 97 of 1934 to his file and dispose of it according to law. It will be open to him to admit additional evidence in appeal in accordance with law and if he should think it necessary. The petitioner's costs in this petition must be paid by the respondents who will bear their own costs in this petition.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 374

BURN J.

Sakkarai Chettiar and others — Appellants.

v.

Chellappa Chettiar and another — Respondents.

Second Appeal No. 753 of 1932, Decided on 9th November 1936, against decree of Dist. Court, West Tanjore at Tanjore, in A. S. No. 186 of 1930.

(a) Civil P. C. (1908), O 41, R. 4—Death of one appellant—Abatement of appeal—Court can yet vary decree.

Provisions of O. 41, R 4 enable the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death ; *A I R 1918 Mad 794 and A I R 1925 Mad 235, Rel. on.* [P 375 C 1]

(b) Madras Impartible Estates Act (2 of 1904), S 4—S. 4 does not prohibit grant of cowle at favourable rent or umbalam land rent free—Cowle granted long before Estates Land Act came into force—Presumption in favour of grant likely—Cowle is good encumbrance on estate.

Section 4 does not prohibit either a cowle at favourable rate of rent or the grant of umbalam lands rent free. [P 375 C 2]

Where the evidence showed that a certain cowle was granted long before the passing of the Madras Estates Land Act of 1908 and in the absence of any evidence to the contrary, a presumption that the said grant was supported by consideration could be drawn :

Held that the said grant was not one that would come to an end under S. 26 (3) and that the said cowle was valid as an encumbrance on the estate. [P 376 C 2]

K. V. Krishnaswamy Iyer and G. Gopalaswamy — *for Appellants.*

S. Ramanuja — *for Respondents.*

Judgment.—This was a suit for rent under S. 77, Madras Estates Land Act. The facts have been clearly and fully set out in the judgments of the learned Deputy Collector and the learned District Judge and need not be repeated in detail now. The lands on which rent was claimed are situated in the village of Sinnayavidu thi and its hamlet Krishnapuram in the Neduvasal Zamin. The principal points in dispute between the plaintiff who was the landholder, and the defendants, related to 1¼ velis of land which the defendants claimed to be holding rent free as umbalam lands and 5 velis of land which they claimed to be holding under a permanent cowle at the rate of Rs. 5 per veli. The learned Deputy Collector found against the landholder on both these points. On his appeal the learned District Judge found in favour of the tenants with regard to the umbalam lands and in favour of the landholder with regard to the cowle. The tenants preferred this appeal.

A preliminary objection was raised with regard to the maintainability of this appeal. The appeal was preferred by defendants 2, 3 and 4 who were the only defendants interested and after the appeal was filed defendant 4 died. No application was made to bring his legal representatives on

record within the time allowed and a belated application for that purpose was dismissed. The appeal of defendant 4 therefore abates, and it was contended on behalf of the respondent that since defendants 2, 3 and 4 claimed to be jointly interested in the lands, being undivided brothers, the appeal as a whole must be held to have abated. O. 22, R. 3, Civil P. C. was quoted in support of this contention and the ruling in 15 Lah 667[1] was relied upon as well as the cases in 45 All 286,[2] 53 I C 548[3] and 106 I C 313.[4] Whatever may be the views of other High Courts upon this question, the view of this High Court is against the contention of the respondent. In 40 Mad 846[5] a Bench of this Court held that the provisions of O. 41, R. 4 enabled the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death. This case was followed by Spencer J. in 20 M L W 402[6] and the judgment of Spencer J. was confirmed by a Bench of this Court in L. P. A 96 of 1924. These cases were followed by Curgenven and Sundaram Chetty JJ. in 38 M L W 278.[7] This matter is therefore settled against the contention of the respondent so far as this High Court is concerned.

Mr. A. V. Viswanatha Sastri for respondent then points out that, in any case it is a question for the discretion of the Court to exercise its power to refuse to exercise its power under Civil P. C. O. 41, R. 4. That is so and the present case is, I think, a fit one for the exercise of this discretion in favour of the appellants. I therefore overrule the preliminary objection.

Neduvasal Zamin is one of the estates scheduled under the Madras Impartible Estates Act and it was contended on behalf of the landholder that the cowle as well as the grant of the umbalam lands rent free would be prohibited by S. 4 of that Act The learned District Judge agreed with the learned Deputy Collector that S. 4, Impartible Estates Act, would not prohibit either of these alienations though the learned District Judge's reasons were not quite the same as the reasons of the learned Deputy Collector. It is quite clear as Mr. K. V. Krishnaswami Ayyar contends for the appellants that S. 4, Impartible Estates Act, cannot be held to prohibit either the cowle at a favourable rate of rent or the grant of umbalam lands rent free. It is clear beyond the possibility of any doubt that the defendants held two usufructuary mortgages (Exs. C and D) of the village of Sinnayaviduthi and Krishnapuram in 1913 when the plaintiff's predecessor-in-title wished to purchase these villages. The usufructuary mortgage Ex. D had still 16 years to run and Ex. C some shorter period. It was only in consideration of the perpetuation of the grant of umbalam lands and of the cowle that the defendant's predecessor in title agreed to surrender his rights under Exs. C and D. This is proved by the agreement (Ex. I) and the perpetual cowle (Ex. II) executed on 29th May 1913 by the zamindar Sankaranarayana Panikondar and his son Tiruvengada Panikondar. But for the surrender of the usufructuary mortgages, the zamindar would not have been able to sell the villages to the plaintiff's predecessor-in-title who undertook the discharge of Exs. C and D as part of the purchase price. It follows from this that if the sale to the plaintiff's predecessor-in-title is valid and not prohibited by S. 4, Impartible Estates Act, the alienations of the umbalam lands and cowle also are equally valid. Mr. Krishnaswami Aiyar's contention is that if the grant of the cowle is not prohibited under S. 4, Impartible Estates Act, there is no other provision of law which can invalidate it. On behalf of the respondent, the contention is that this cowle cannot enure after the lifetime of Sankaranarayana Panikondar who was the zamindar when Ex. II was executed in 1913. S. 26, Estates Land Act, deals with cowles granted (i) for the purpose of clearing and bringing waste land in an estate into cultivation, (ii) or for the purpose of making any permanent improvement, (iii) or for planting trees on a holding in

1. Aminchand v. Baldeo Sahai Ganga Sahai, (1934) 21 A I R Lah 206=151 I C 784=15 Lah 667=35 P L R 92.
2. Ambika Prasad v. Jhinak Singh, (1923) 10 A I R All 211=71 I C 321=45 All 286=21 A L J 91.
3. Balaram Pal v. Kanysha Mashi, (1919) 16 A I R Cal 410=53 I C 548.
4. Saru Khan v. Jan Muhammad, (1928) 15 A I R Lah 43=106 I C 313.
5. Somasundaram Chettiar v. Vaithilinga Mudaliar, (1918) 5 A I R Mad 794=41 I C 546=40 Mad 846.
6. Chengamma Naidu v. Ganguiu Naidu, (1925) 12 A I R Mad 285=82 I C 420=20 M L W 402.
7. Chenchuramayya v. Venkatasubbayya Chetti, (1933) 20 A I R Mad 655=146 I C 26=38 M L W 278.

an estate under a contract made prior to the commencement of Act 1 of 1908 for any premium, loan or other valuable consideration. Such cowles are valid under S. 26 (1) for the period for which the favourable rate is payable in accordance with their terms. Sub-s. 3 provides that except as provided by sub-s. (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the raiyat before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood. There is no contention on the part of the appellants that the cowle in favour of their father was a cowle for the purpose of clearing and bringing waste land into cultivation or for the purpose of making a permanent improvement or for planting trees. Their contention is that it is a cowle granted under a contract made before the beginning of Act 1 of 1908 and that it is therefore binding for ever since it is a permanent cowle. The learned Deputy Collector accepted this contention but the learned District Judge found that the cowle came into existence in 1913 and held accordingly that it was not saved by sub-s. (1) of S. 26, Estates Land Act. It is this finding which is attacked by the appellants and which is supported by the respondents.

Whether this cowle came into existence in 1913 or was in existence before, is undoubtedly a question of fact and on this ground, the learned advocate for the respondents contends that the finding of the learned District Judge must be taken as conclusive and cannot be attacked in second appeal. Unfortunately, the finding of the learned District Judge on this point is, as the learned advocate for the appellants contends, in the teeth of all the evidence. The learned District Judge himself has pointed out that both Ex. I and Ex. II refer to the cowle as an old grant made to the grandfather of the present appellants. There is a distinction between the cowle and the umbalam. The umbalam is referred to Exs. C and D, the mortgages executed in 1893 and 1909. The cowle is not mentioned in those mortgages. There is no record of payment of rent at the rate of Rs. 5 per veli on these 5 velies but, as the learned District Judge himself has recognized, it is impossible that there should be any record because the villages were held by the tenant under the usufructuary mortgages. There is however a distinct reference to the cowle in Exs. I and II and there is oral evidence also to the effect that the cowle had been granted to the appellant's grandfather. There is no evidence whatever to the contrary. The learned District Judge's observation "I do not think it is proved that the cowle was in existence before 1913," is therefore based upon no evidence whatever. The only meaning it can have is that there was no document in existence before 1913. All the evidence shows that the grant itself had been made before 1893, i. e., long before Act 1 of 1908 or the Impartible Estates Act came into force and in these circumstances it is obviously right to presume that the grant was supported by consideration. I therefore disagree with the finding of the learned District Judge that the cowle was not in existence before 1913. All the evidence is that it was and it is therefore not a grant which must come to an end under S. 26 (3), Estates Land Act, after the death of the landholder who was entitled to the rent in 1913. It is quite clear that the respondents' predecessor in title was aware of the existence of this cowle at the time of his purchase. There was a reference made to it in the endorsement of discharge written upon the usufructuary mortgage (Ex. D) by the defendants' father. Considered in that light the cowle is valid as an encumbrance on the estate at the time of the purchase by the landholder's predecessor-in-title.

Mr. Krishnaswami Aiyar attempted to argue that if the cowle did not come under S. 26, Estates Land Act, it would be invalid and that since the defendants have been holding the 5 velies of land at the rate of Rs. 5 since 1913 they must be deemed to have prescribed for a right to hold the lands at the same rate. I do not think there is much force in this contention and I see no reason to discuss it because no foundation was laid in the written statement for any such plea nor was any such plea taken in the appeal to the learned District Judge. For the reasons already given, this appeal is allowed with costs in this Court and in the First Appellate Court. (Leave to appeal refused).

C.R.K./B.D. *Appeal allowed.*

**** A. I. R. 1938 Madras 377**

FULL BENCH

LEACH C. J., VARADACHARIAR AND MOCKETT JJ.

S. Maruthamuthu Naicker — Plaintiff.

v.

P. Kadir Badsha Rowther and others — Defendants.

Referred Case No. 4 of 1937, Decided on 15th December 1937, stated by Sub-Judge, Tanjore in S. C. S. No. 204 of 1936.

**** (a) Pronote — Endorsement — Pronote executed by managing member of Hindu family — Ordinarily, endorsee has no remedy against non-executant co-parceners—Endorsement transferring instrument as well as debt and complying with stamp laws—Suit against non-executants can be maintained :** *32 M L J 354= A I R 1917 Mad 61=38 I C 339, Overruled.*

(Per *Full Bench.*) — The indorsee of a promissory note executed by the managing member of a Hindu family is limited to his remedy on the note, unless the endorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore in the case of an ordinary endorsement, the indorsee cannot sue the non-executant co-parceners on the ground of their liability under the Hindu law : *32 M L J 354=A I R 1917 Mad 61=38 I C 339*, **Overruled.**; *A I R 1916 Mad 424, Expl.*; *A I R 1919 Mad 370, Disting.*; *A I R 1918 P C 146, Referred.*

[P 379 C 2]

(b) Pronote— Assignment—Position of assignee of debt — Assignee governed by principles in Ch. 8, T. P. Act — Privileges of endorsee under Negotiable Instruments Act however will not be available to him. (Per *Varadachariar J.*)

In his capacity as an assignee of the debt, the transferee will be governed by the principles laid down in Ch. 8, T. P. Act, and will not be entitled to all the privileges of an endorsee under the Negotiable Instruments Act. S. 137 must be deemed to exclude these principles in the case of negotiable instruments only to the extent that they are dealt with and are sought to be enforced as such instruments. [P 379 C 2]

(c) Negotiable Instruments Act (1881), S. 50 — Endorsement- Ordinarily only property in instrument and not debt is transferred —For assignment of debt, endorsement must comply with provisions of stamp duty. (Per *Leach C. J.*)

Where the indorsement is in blank it only operates to transfer the property in the instrument and not as an assignment of debt. An endorsement may operate to assign the debt as well when it is so worded and the requirements of the law with regard to stamping are complied with, but unless there is an indorsement of this nature the indorsee has right merely on the instrument: *A I R 1935 Mad 240, Rel. on.* [P 379 C 1, 2]

G. Chandrasekara Sastri for S. Narasimha Aiyangar — *for Plaintiff.*

T. V. Venkatarama Aiyar — *for Defendants.*

Leach C. J. — This is a reference under O. 46, R. 1, Civil P. C., by the Subordinate Judge of Tanjore in a suit on a promissory note. The note was executed by defendants 1 and 2 in favour of one Ponnuswami Naicker who indorsed it to the plaintiff. The two sons of defendant 2 who constitute with him an undivided family have been made defendants, as it is sought to make them liable on the ground that the debt was incurred for family purposes by defendant 2 in his capacity of managing member. The sons having raised the plea that the plaintiff as the indorsee is not entitled to sue them on the strength of the indorsement of the instrument, the Subordinate Judge has referred to us this question :

Whether an indorsee of a promissory note executed by the managing member is entitled to recover the debt from the property of the non-executant coparceners on the ground of their liability under the Hindu law or whether he is limited to the remedy available on the note.

It is a fundamental principle of the law relating to negotiable instruments that no one whose name does not appear on the instrument can be held liable thereon, but this principle has unfortunately been lost sight of in some of the cases which have come before this Court. Before examining the reports which have been quoted to us in the course of the arguments I wish to refer to a decision of the Privy Council and to two English cases as the law is to be found there clearly stated. The decision of the Judicial Committee is that in 46 Cal 663,[1] which was an appeal arising out of a suit on a hundi, Lord Buckmaster in delivering the judgment observed :

It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand.

Later in the judgment Lord Buckmaster said :

Their Lordships' attention was directed to Ss. 26, 27 and 28, Negotiable Instruments Act of 1881, and the terms of these sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connexion to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly

1. Sadasuk Janki Das v. Kishen Pershad (1918) 5 A I R P C 146=50 I C 216=46 I A 33=46 Cal 663 (P C).

appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

In (1842) 9 M & W 720=152 E R 304,[2] it was held that where the drawer of a bill indorses it in blank, and delivers it to another, who passes it without a fresh indorsement to a third person, the latter cannot maintain an action of debt against the drawer. The contract transferred by the delivery of the bill being only the contract on the bill the holder could not sue the drawer with whom he had no privity of contract In (1891) 1 Q B D 413,[3] Lord Esher, M. R. had to consider the claim of an indorsee of bills of exchange accepted by a minor. It was said that the bills were accepted for necessaries supplied to the minor. Lord Esher in deciding that the petitioner was not entitled to hold the minor liable said :

He supplied no necessaries to the infant; he is only the indorsee of some bills of exchange accepted by him. As regards an indorsee of a bill of exchange, it is immaterial whether there was any consideration for the bills as between the drawer and the acceptor ; he can sue the acceptor as the indorsee of the bills, and nothing else. The question therefore whether necessaries were supplied to the infant by the drawer of the bill, is immaterial.

For these decisions, it will be observed that there are two principles to be borne in mind. The first is the principle which I have already stated, namely that no one whose name does not appear on a negotiable instrument can be sued on it. The second is that there is no privity of contract between an indorsee and the maker or acceptor.

Turning now to the cases quoted to us, in 22 Mad 49[4], a Full Bench of this Court consisting of Shepherd, Subramania Aiyar, Benson and Moore JJ. held in a suit brought by a creditor of a Hindu family in respect of debts which were said to have been incurred for the benefit of the family that the plaintiff could have prosecuted his claim against the sons in that suit and have obtained a decree, making their shares in the family property liable for the debts of the father. There was no negotiable instrument here and the correctness of the decision is therefore not open to question. In 23 Mad 597[5], Shepherd, Subramania Aiyar and Davies JJ., had to consider a suit on a promissory note, in which the plaint was sufficiently widely drawn to cover a claim on the debt as well. In this case a member of an undivided Hindu family had borrowed moneys from the plaintiff to purchase lands for the benefit of his family and executed a promissory note in respect of the loan. It was sought to make the other members of the family also liable, and it was held that they were, Davies J. dissenting. It is clear however from the judgments of Shepherd and Subramania Aiyar JJ. that the non-executant members of the family were held liable because as against them the suit could be regarded as being on the debt and not on the instrument. In the course of his judgment, Shepherd J. said :

It is argued that the present suit was strictly confined to a demand for payment of the note and that the plaint did not include a demand in respect of the original debt. It appears to me on reading the plaint that it contains all the allegations that are needed in order to charge the appellants with liability. The charge is that the debt was incurred for the expenses of the family and that they are bound to discharge it. There can be no doubt that the Courts below as well as the appellants understood fully the case which the plaintiff was seeking to establish.

Davies J. dissented because he considered that the suit as framed was on the note alone, which did not allow the non-executant members of the family to be held liable. While it is manifest that Shepherd and Subramania Aiyar JJ. did not hold that where a promissory note has been signed by the managing member of the family alone the other members of the family can be made liable on the instrument itself, it has unfortunately been interpreted in the contrary sense. The case which I have at present in mind is that in 32 M L J 354,[6] where Ayling and Seshagiri Aiyer JJ. held that an indorsee of a promissory note executed by a member of a joint Hindu family could sue not only the maker but the other members of the family on the instrument. The learned Judges here not only failed to appreciate the real nature of the decision in 23 Mad 597[5] but also misunderstood the judgment of the Judicial Committee in 39 Bom 261=23 M L J 515,[7] which they considered to decide that

2. Lewin v. Edwards, (1842) 9 M & W 720=152 E R 304.
3. *In re* Soltykoof, Ex parte Margrett, (1891) 1 Q B D 413=60 L J Q B 339=39 W R 337 =65 J P 100=8 Morrell 27.
4. Ramaswami Nadan v. Ulaganatha Goundan, (1899) 22 Mad 49=8 M L J 312 (FB).
5. Krishna v. Krishnaswami, (1900) 23 Mad 597.
6. Nataraja Naicken v. Ayyaswami Pillai, (1917) 4 A I R Mad 61=38 I C 339=32 M L J 354.
7. Karmali Abdullah v. Vora Karimji Jiwanji, (1914) 1 A I R P C 132= 26 I C 915=42 I A 48=39 Bom 261=28 M L J 515 (P C).

on a negotiable instrument executed by one member of a partnership the other members can be held liable. Their Lordships did not so hold. A perusal of the judgment shows that they treated the suit as being one for an account embracing mercantile transactions between the parties.

In 1915 M W N 217,[8] Wallis C. J. and Hannay J. held that in a suit upon a promissory note against a Hindu father and his sons the cause of action was the same as the cause of action against the father and it was not necessary for the holder of the note to prove that the debt was incurred for family purposes. The sons could be joined in order to give them an opportunity of showing that the debt was not binding on them. The learned Judges regarded the decision in 23 Mad 597,[5] being the authority for this. The case cannot be interpreted as deciding that the sons could be sued on the note. In 37 M L J 369[9] however Sadasiva Aiyar J. sitting with Spencer J. went much further and held that a creditor could not join two separate causes of action in the same suit, one on the debt and one on the note, and that the junior members could be held liable on a promissory note executed by the manager for proper debts. This is going too far, and we must express our dissent. The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of debts incurred on behalf of the family or by the father for his own purposes, provided that they are not incurred for illegal or immoral purposes, does not affect the principle involved. We are not in this reference called upon to decide whether the decision of the Privy Council in 46 Cal 663[1] affects the decision in 23 Mad 597[5] and 1915 M W N 217[8] as these were not suits by indorsees.

Where the indorsement is in blank it only operates to transfer the property in the instrument and not as an assignment of the debt, as was pointed out by Madhavan Nair J. in 41 M L W 177.[10] An endorsement may operate to assign the debt as well when it is so worded and the requirements of the law with regard to stamping are complied with, but unless there is an indorsement of this nature the indorsee has rights merely on the instrument. In 24 Mad 654,[11] Shephard and Bhashyam Aiyangar JJ. decided in a case where a promissory note had been made in favour of two payees, one of whom indorsed it to the other, that the indorsee could not sue on the note in the capacity of indorsee or in the capacity of one of two joint payees, but he could maintain a suit for the sum due under the instrument as the assignee of the chose in action by reason of the other joint payee having transferred his interest therein to him. The plaintiff there sued a person whose name appeared on the face of the instrument as the maker which is quite a different matter. We are concerned here merely with a case in which an indorsee is seeking to make liable persons whose names do not appear on the instrument. This he clearly cannot do. Accordingly, we answer the reference in this way. The indorsee of a promissory note executed by the managing member of a Hindu family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well and the stamp law is complied with, and therefore in the case of an ordinary endorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law. It follows from this that we consider that 32 M L J 354,[6] was wrongly decided and it is overruled. The cost of this reference will be costs in the cause.

Varadachariar J. — I concur in the above answer. (*See also* (1808) 1 Camp 175.[12]) I only wish to add that in his capacity as assignee of the debt, the transferee will be governed by the principles laid down in Chap. 8, T. P. Act, and will not be entitled to all the privileges of an endorsee under the Negotiable Instruments Act. S. 137 must be deemed to exclude these principles in the case of negotiable instruments only to the extent that they are dealt with and are sought to be enforced as such instruments. I have elsewhere dealt with 1915 M W N 217[8] and reserve my opinion on the point dealt with therein.

---

8. Nachiappa Chetty v Dakshinamurthi Servai, (1916) 3 A I R Mad 424=28 I C 345 = 1915 M W N 217.
9. Thankammal v. Kunnamma, (1919) 6 A I R Mad 370=53 I C 878=37 M L J 369.
10. Periakaruppan Chetti v. Mottayya Mudali, (1935) 22 A I R Mad 240=156 I C 455=69 M L J 30=41 M L W 177.
11. Muhammad Khumaralli v. Ranga Rao, (1901) 24 Mad 654.
12. Waynam v. Bend, (1808) 1 Camp 175=170 E R 918.

Mockett J.—I agree with my Lord the Chief Justice.

C.R.K./B.D. *Answer accordingly.*

---

* A. I. R. 1938 Madras 380

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Amtalathilakath Kuttoossa and another —Appellants.

v.

Mundayatan Korothveettil Kunhamma Amma and others—Respondents.

Letters Patent Appeal No. 110 of 1936, Decided on 24th November 1937, against order of High Court, D/. 20th October 1936, reported in A I R 1937 Mad. 285.

* Civil P. C. (1908), O. 41, R. 10 — Appeal raising issues not jeopardizing appellant's position — Appellant's suit of vexatious character Court will grant application for security for costs even if effect of that order is to stifle appeal —Appellant cannot rely on his poverty to resist application for security for costs : *168 I C 924=A I R 1937 Mad 285, Reversed.*

Where the liberty of the appellant is in question or where highly penal consequences will be entailed upon him by the order appealed against, the Court as a general rule will refuse to order security for costs. Similarly, where appeal raises grave issues which vitally affect the appellant's position, the Court may well refuse to make an order, which will have the effect of stifling the appeal, although circumstances may exist which normally would justify an order for security. But where the facts are just the other way, that is, not only is the position of the appellant not jeopardized but the suit he brought is of a harassing and vexatious character, the Court will pass order for security for costs even though it will have the effect of stifling the appeal. The appellant cannot rely upon his own poverty, as being an important or decisive factor to resist the application for security on that ground : *A I R 1923 Mad 204, Rel. on ; 168 I C 924=A I R 1937 Mad 285,* Reversed. [P 380 C 2 ; P 381 C 1]

B. Pocker—*for Appellants.*

K. Kuttikrishna Menon —

for Respondents.

Venkatasubba Rao J.—This is a Letters Patent appeal from an order of a learned Judge of this Court refusing an application for security for costs in a pending first appeal. The learned Judge bases his order on three grounds : (1) that there was delay in applying, (2) that the application was not bona fide, and (3) that the effect of granting the application would be to stifle the appeal. We regret we are unable to uphold the learned Judge's view.

We should be reluctant to interfere in a matter of this sort, but for the fact, that the case raises certain questions of principle, in regard to the exercise of the Court's discretion, when security is demanded from an appellant. The proposition is well established that the appellant's poverty by itself would not be sufficient to warrant his being required to furnish security. That has not been seriously disputed here, but surely that does not mean that the appellant can rely upon his own poverty, as being an important or decisive factor, and resist the application on that ground : 17 M L W 26.[1] The suit has been brought by certain members of a tarward to set aside the alienations made by the Karnavan, who has been impleaded as defendant 1. The lower Court has found that the properties alienated were the self acquisitions of the Karnavan and that the case set up by the plaintiffs that they belonged to the tarwad, is false. The effect of the judgment is, that the suit is a vexatious one, and we wish to observe that had the matter stopped there, we should probably have hesitated to interfere with the order under appeal. But the Subordinate Judge goes on to point out that it was defendant 1, the alienor, that was in fact conducting the suit. He observes :

> I have closely watched his (defendant 1's) examination and cross-examination and I am convinced beyond doubt that his evidence is all stage-managed . . . . . I have little doubt that he is practically engineering the whole suit.

In the affidavit filed in support of the application, it is alleged that the plaintiffs are paupers and that defendant 1 is the person financing and conducting the litigation. This very important assertion remains uncontradicted. True, every order for security passed, not complied with, has the effect of stifling the appeal. Does it follow from this that a pauper appellant can successfully resist the application by relying upon his own poverty? To hold so would be to frustrate the very object of the provision. In (1896) 2 Q B 375[2] Lord Esher lays down, if we may say so with respect, what may be regarded a very sound principle. Where the liberty of the appellant is in question or where highly penal consequences will be entailed upon him by the order appealed against the Court as a general rule will refuse to order security for costs; that seems to be the true

1. Konammal v. Jadaya Goundan, (1923) 10 A I R Mad 204=70 I C 586=17 M L W 26.
2. Hood-Barrs v. Heriot, (1896) 2 Q B 375=65 L J Q B 624=45 W R 17.

doctrine. Where the appeal raises grave issues which vitally affect the appellant's position, the Court may well refuse to make an order, which will have the effect of stifling the appeal, although circumstances may exist which normally would justify an order for security. But here the facts are just the other way; not only is the position of the appellants not jeopardized but the suit they brought, as the lower Court points out, is of a harassing and vexatious character. No Court will regard with sympathy the argument that the order for security will have the effect of putting an end to a litigation of that sort.

Is there any ground for the contention that the application was not bona fide? In the lower Court costs amounting to about Rs. 100 were ordered. Execution was taken out and the crop on the land belonging to some of the plaintiffs was attached. Immediately thereafter the land was fraudulently assigned away to a third party and was thus put beyond the reach of the creditor. Another plaintiff was arrested, who forthwith sought the protection of the Insolvency Court. The net result is that about a moiety of the costs was realized and the sum now remaining due with interest and further expenses incurred, amounts to more than Rs. 100. These facts, far from showing that the application was mala fide, indicate a wilful determination on the plaintiffs' part to withhold the payment of the costs already ordered. There were several defendants to the action, there having been several alienees. There was a similar application for security made by one of them, which was granted and the order not having been complied with, the appeal has already been partially dismissed. These facts show that there were circumstances in addition to the appellants' poverty, on which the application was based.

There is yet another matter which shows how mala fide the conduct of the plaintiffs has been. Of the several plaintiffs that brought the action, four alone were adult males. Of these four, one only figures as the appellant, while the remaining three have conveniently been impleaded as respondents. In the affidavit filed in support of the application, it is stated (this has not been denied) that this device was employed for the purpose of defeating any order for costs that may be made in the appeal. This assertion seems to be well founded and furnishes further evidence of the mala fides of the plaintiffs.

Lastly remains the question of delay. The proposition that the respondent should be prompt in applying for security does not admit of doubt. But here the very occasion for the application is the non-recovery of the costs ordered by the lower Court. Steps had to be taken and were being taken for recovering those costs and the application was deferred till it was definitely found that those costs could not be recovered. We are not prepared to hold that there has been, having regard to the circumstances, such delay as to deprive the applicants of their remedy under the provision.

We direct that the appellants in the first appeal shall furnish security in the sum of Rs. 300 (Rs. 100 representing the costs in the lower Court and Rs. 200 the costs here) to the satisfaction of the lower Court within two months from this date. In default, Appeal No. 292 of 1934 will stand dismissed with costs as against respondents 9 and 10 in the appeal (the appellants in Letters Patent appeal.) In this Letters Patent appeal we make no order as to costs.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 381

LEACH C. J. AND BURN J.

Royts of Garabanda, Sariapalli and Ramchandrapuram Village, Garabandha Group, Parlakimedi Estate, represented by Peddini Ramalingam Sabhudhi and others—Petitioners.

v.

Zamindar of Parlakimedi — Respondent.

Civil Misc. Petn. No. 1832 of 1937, Decided on 5th November 1937, to issue a *writ of certiorari*.

Madras Estates Land Act (1 of 1908), Ss. 30 (1) (b) and 168 (2)—In settling fair and equitable rent under S. 168 revenue officer is not bound by limitations of S. 30 (1) (b).

The words "and shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot" in sub-s. (2) of S. 168 can only apply to the provisions of the Act which have general application. Proviso (b) of S. 30 (1) merely applies when the landholder seeks enhancement of rent on the ground that there has been a rise in the average local prices of staple food crops. Hence in settling a fair and equitable rent under S. 168, the Revenue Officer is not bound by

the limitations of S. 30 (1) (b): *A I R 1926 Mad 480, Rel. on.* [P 383 C 2; P 384 C 1]

B. Jagannadha Doss — *for Petitioners.*

L. S. Veeraraghava Ayyar, K. S. Krishnaswamy Aiyengar and N. Srinivasa Aiyengar — *for Respondent.*

Leach C. J. — In 1925 the Zemindar of Parlakimedi applied to Government under Chap. 11, Madras Estates Land Act, for a settlement of rents in respect of all the ryoti villages in his estate, and Government acceded to his request. A Special Revenue Officer was thereupon appointed to conduct the enquiry and after a lengthy investigation he announced his findings. The ryots contended that the rates fixed in the year 1868 were permanent and were not liable to be altered. They further contended that in the event of this question being decided against them, S. 30 of the Act limited any enhancement of rents to 12½ per cent. The Special Revenue Officer decided both these questions against the ryots and directed that the rents should be enhanced cent per cent. An appeal followed to a single member of the Board of Revenue under S. 171 of the Act. By an order dated 30th March 1936, the member of the Board who heard the appeal upheld the contention of the ryots that the prevailing rates of money rent could not under the law be enhanced by over 12½ per cent. in settlement proceedings. The Zamindar then applied under S. 172 to the Board for revision of this order. On 9th October 1936 the Board by a majority decided that the 12½ per cent limit was not applicable to proceedings under Ch. 11, but they disagreed with the Special Revenue Officer's finding that the rents should be enhanced cent per cent. They decided that the enhancement should not exceed 37½ per cent. The ryots then applied to this Court for a writ of certiorari, with a view to an order being passed quashing the Board's order of 9th October 1936. This application is now before us.

One of the grounds for asking for the issue of a writ of certiorari was that the Board of Revenue had no power to revise the order of the single member passed on 30th March 1936, but where it was pointed out that the ryots had appeared before the full Board and had submitted to its jurisdiction this contention was dropped. The learned advocate for the ryots however contended that if the Board had no power to increase the rents beyond 12½ per cent. it acted illegally, and therefore had no jurisdiction to increase them by 37½ per cent. The learned Government Pleader very properly conceded that if the Act did not allow an increase beyond 12½ per cent. the ryots would be entitled to the issue of the writ. He however denied the contention that the Act did limit enhancement to 12½ per cent and this is the question which we are called upon to decide. In order to do so, it is necessary to examine certain of the provisions contained in Chs. 3 and 11 of the Act.

Chapter 3, as amended by the Madras Act 8 of 1934, consists of Ss. 24 to 44 which are headed: "General provisions relating to the rates of rent payable by ryots." The sections must speak for themselves without reference to the heading, but in passing it may be remarked that some of the sections obviously do not have general application and only apply in special cases. S 24 states that the rent of a ryot shall not be enhanced except as provided by the Act. S. 27 provides that if a question arises as to the amount of rent payable by a ryot or the conditions under which he holds in any revenue year, he shall be presumed until the contrary is shown, to hold at the same rate and under the same conditions as in the last preceding revenue year. S. 28 says that in all proceedings under the Act the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable until the contrary is proved. S. 29 provides that the "waram" (that is, the established rate of the village for dividing the crop between the landholder and the ryot) is not liable to enhancement. In view of the importance of S. 30 so far as this case is concerned, it is advisable to set it out in full. It reads as follows:

> Where for any land in his holding a raiyat pays a money rent the landholder may apply to the Collector to enhance the rent on one or more of the following grounds and no others:
>
> (i) that during the currency of the existing rent there has been a rise in the average local prices of staple food-crops in the taluk or samindari division; (a) Provided that if the rent be permanently payable at a fixed rate or rates it shall not be liable to be enhanced under this clause on the ground of a rise in prices; (b) Provided also that no enhancement under this clause shall raise the rent by more than two annas in the rupee of the rent previously payable for the land;
>
> (ii) that during the currency of the existing rent, the productive powers of the land held by the raiyat have been increased by an improvement effected by, or at the expense of, the landholder.

(iii) that a work of irrigation or other improvement has been executed at the expense of Government, and the landholder has been lawfully required to pay in respect of the holding an additional revenue or rate to Government in consequence thereof;

(iv) that the productive powers of the land held by the raiyat have been increased by fluvial action.

Explanation: "Fluvial action" includes a change in the course of a river rendering irrigation from the river practicable where it was not previously practicable.

It will be observed that proviso (b) of Cl. (i) limits any enhancement made in pursuance of an application under this clause to 2 annas in the rupee, of the rent previously payable for the land, that is 12½ per cent. S. 31 contains rules with regard to the enhancement of rent on the ground of a rise in prices when the enhancement is claimed under S. 30 (i). S. 32 states the rules to be observed when an enhancement is claimed under S. 30 (ii). Ss. 33 and 34 relate respectively to applications made under Cls. (iii) and (iv) of S. 30. S. 35 provides that notwithstanding anything contained in Ss 31 to 34, the Collector shall not in any case order any enhancement which is under the circumstances of the case unfair or inequitable, or which would operate so as to raise the rent beyond the value of the established waram of the village in which the holding is situated, commuted in accordance with the provisions of S. 40. S. 36 confers upon the Collector the power to order the enhancement to be gradual. It is not necessary to refer to the remaining sections in the Chapter.

I will now turn to Ch. 11, which is headed "Survey, Record of Rights and Settlement of Rents". This chapter consists of Ss. 164 to 180 It will be sufficient for the purposes of this case if I refer to Ss. 164, 166 and 168 S. 164 gives power to the Local Government to make an order directing that a survey be made and a Record of Rights be prepared by the Collector in respect of an estate or portion of an estate. S. 166 provides that when the Collector has, after making such inquiry as he sees fit, completed a preliminary record for the estate or part of the estate, he shall publish a draft thereof in the prescribed manner and for the prescribed period, and shall receive and consider any objection to any entry therein or to any omission therefrom, which may be made during the period of publication. When such objections have been considered and disposed of according to such rules as the Local Government shall prescribe, the Collector shall finally frame the record and shall cause it to be published locally in the prescribed manner, and the publication shall be conclusive evidence that the record has been duly made under Chap. 11. Sub-s. 2-A states that the Collector shall, along with the final record, cause to be published the name or official designation of the person to whom and the date on or before which the Local Government direct that applications for settlement of rent under sub-s. (1) of S. 168 should be made. The relevant parts of S. 168 are sub-ss. (1) and (2) which are in the following terms:

(1) If on or before the date fixed under sub-s. (2-A) of S. 166 in respect of any village or any area for which a Record of Rights is published where such area is less than a village or within such further period, if any, as the Local Government may, in their discretion, from time to time, think fit to allow either the landholder or the ryots apply for a settlement of the rent, provided that in the case of ryots the application is made by holders of not less than one-eighth of the total extent of the holdings in such village or area, the Collector shall, if the Local Government so direct, settle a fair and equitable rent in respect of the land situated in such a village or area.

(2). In settling rents under this section, the Collector shall presume until the contrary is proved that the existing rent or rate of rent is fair and equitable and shall have regard to the provisions of this Act for determining the rates of rent payable by raiyat.

It is on the strength of sub-s. (2) that the petitioners contend that the powers of the Board of Revenue in enhancing rents is limited to 12½ per cent. It is said that proviso (b) to S. 30 (i) absolutely prohibits any further enhancement. I consider this argument to be entirely fallacious. Proviso (b) of S. 30 (i) only applies to an enhancement made in the case of an application under that clause and the application which led to enhancement of rents in this case was not under S. 30 (i) but under S. 168. S. 30 does not set out all the occasions on which it may be fair and equitable to revise rents. It deals with special circumstances, four in number under which the landholder can apply for enhancement under that section. Chap 11 is designed to give authority to Government to step in at the instance either of the landholder or the raiyats to settle what is a fair and equitable rent so far as the holding generally is concerned. The words "and shall have regard to the provisions of this Act for determining the

rates of rent payable by a raiyat," in sub-s. (2) of S. 168 can only apply to the provisions of the Act which have general application. Proviso (b) of S. 30 (i) merely applies when the landholder seeks enhancement of rent on the ground that there has been a rise in the average local prices of staple food crops.

This very question was raised in 49 Mad 499,[1] where Devadoss and Waller JJ. held that in settling a fair and equitable rent under S. 168 the Revenue Officer is not bound by the limitations of S. 30. In that case it was also held that in proceedings under Ch. 11, the Court had revisional powers over the orders of the Board of Revenue passed on appeals under S. 171 of the Act from the orders of the Revenue Officer in such proceedings, but in 63 M L J 450,[2] a Full Bench disagreed with this part of the judgment; though it did not question the validity or the correctness of the decision with regard to the scope of S. 30. If S. 30 has the effect which the learned advocate for the petitioners says it has, it would mean that notwithstanding that rents are so unreasonably low that a rise of 12½ per cent. would not do justice to the landholder there would be no remedy. This could never have been the intention of the Act, and, in my opinion, it is not possible without disregarding all canons of construction and the meaning of the words used to give to sub-s. (2) of S. 168 the interpretation suggested by the petitioners. It follows that in my opinion the Board of Revenue had full power to enhance the rents in this case by 37½ per cent. and this being so the petitioners are not entitled to the issue of a writ of certiorari. Consequently, the application will be dismissed with costs in favour of Government and those we fix at Rs. 250.

C.R.K./D.S. *Application dismissed.*

1. Narasimha Rao v. Ryots of Peddamamidipalli, (1926) 13 A I R Mad 480=94 I C 164=49 Mad 499.
2. Rajah of Mandasa v. Jagannayakalu, (1932) 19 A I R Mad 612=140 I C 331=55 Mad 893=63 M L J 450 (F B).

A. I. R. 1938 Madras 384

NEWSAM J.

Sangapu Sangayya and others — Petitioners.

v.

Pannala Venkatalakshmi Narayana Sastri and another — Respondents.

Civil Revn. Petn. No. 90 of 1937, Decided on 29th September 1937, from order of Dist. Court, Guntur, D/- 24th December 1936.

Madras Hindu Religious Endowments Act (2 of 1927), S. 84 (2)—Persons successfully opposing trustee's application under S. 84 are proper though not necessary parties to application under S. 84 (2).

Where certain persons have successfully opposed the application of the trustees under S. 84 to have a temple declared as an excepted temple, such persons are proper though perhaps not necessary parties to the application under S. 84 (2) by the trustees to set aside that order. [P 384 C 2]

B. Somayya — *for Petitioners.*

P. V. Rajamanner, K. Subba Rao, T. V. Ramanatha Iyer and M. Seshachalapathi — *for Respondents.*

Order.—I do not see why respondents 2 to 4 should be removed from the record. Under S. 84, Hindu Religious Endowments Act, the trustee of Sri Maleswaraswami Temple in Guntur town moved the Board to declare the temple an excepted temple. The Board issued notice to all persons interested. The three present petitioners came forward and successfully opposed the trustee's application. The Board held that the temple was non-excepted.

The trustee moved the District Court under S. 84 (2) of the Act to set aside that order and made the present petitioners respondents to his petition. A question seems to have arisen in the District Court as to whether the petitioners were necessary parties and the learned District Judge has held that they are not, on the grounds that no relief is asked for against them and the Board may be trusted to support its own order.

I am of opinion that since petitioners were proper parties in the petition under S. 84 before the Board, they are proper though perhaps not necessary parties to the application before the District Judge under Section 84 (2). I allow this petition. There will be no order as to costs.

C.R.K./K.S. *Petition allowed.*

A. I. R. 1938 Madras 385

PANDRANG ROW AND
ABDUR RAHMAN JJ.

Valli Ammal and another—Appellants.
v.
Arunachala Moopanar and others —
Respondents.

Letters Patent Appeal No. 115 of 1935, Decided on 17th November 1937, against judgment of Wadsworth J., D/- 24th October 1935, reported in A I R 1936 Mad 406.

(a) Oaths Act (1873), S. 12 — Challenger should not be permitted to resile, except on good grounds, after his offer is accepted by other party — Court should administer oath in spite of revocation of his offer by challenger.

A challenger should not be permitted to resile after his offer had been accepted by the other party unless good ground is shown to the satisfaction of the Court by the challenger. It would therefore follow that if a party has not been permitted to resile from the agreement to abide by the oath of his opponent, the Court must proceed to have it administered and the statement thus given on oath would be held to be conclusive of the facts thus stated on oath. [P 386 C 2]

(b) Oaths Act (1873), S. 12 — Challenger to perform some act in proceedings for administration of oath as condition precedent to his offer to be bound by oath—Challenger refusing to perform the act as agreed—Condition should be deemed to have been waived by him.

Unless the oath is taken in pursuance of an agreement, the case cannot be disposed of on the basis of a default either on behalf of the challenger or by the acceptor. The provisions of S. 11, Oaths Act, can only be attracted after the oath has been taken in accordance with the agreement arrived at between the parties. [P 386 C 2]

Where a challenger offers to be bound by an oath on condition precedent that he should perform certain act in the proceedings for administration of oath and if he fails or refuses to do that act as agreed he must be deemed to have waived that condition and cannot insist upon it. The duty of administering the oath devolves upon the Court and it cannot be said to be acting in excess of its powers if it orders the commissioner to be appointed by it, to perform certain terms which the challenger refuses to execute in spite of his agreement. [P 387 C 2]

(c) Oaths Act (1873), S. 12 — S. 12 does not apply to refusal of challenger to do certain act in compliance with form of oath stated in agreement.

The Legislature has not intended to extend the provisions of S. 12 to the refusal of a challenger to do certain act in compliance with the form of oath stated in the agreement. Had the Legislature intended it, it would have said so. [P 387 C 2]

K. V. Sesha Ayyangar and Subramania Iyer — *for Appellants.*

V. Ramaswamy Ayyer and Sethurama Ayyer—*for Respondents.*

1938 Mad 49 & 50

Abdur Rahman J. — When the trial of a suit for declaration that a certain alienation by defendant 1 as a widow would not affect the plaintiff's reversionary interests was about to commence, he challenged her (defendant) to take a special oath in a temple where camphor was to be lighted by him and extinguished by her while taking the oath. This offer was duly accepted by defendant 1 and the trial Court consequently appointed a commissioner to administer the oath in the form proposed by the plaintiff. The date and time were fixed for the purpose, but, on account of certain negotiations between the parties to have the matter settled otherwise, the oath could not be administered and the commissioner submitted a report to the Court and related the circumstances in which the order of the Court could not be carried out. Since the defendant was willing to take the oath, the trial Court ordered the plaintiff to pay another fee to the commissioner, which he declined to do and his suit was accordingly dismissed. As the plaintiff was not prepared to abide by his agreement, the appeal filed by him was also dismissed by the Subordinate Judge of Sivaganga. He then filed a second appeal to the High Court which was accepted by our learned brother Wadsworth J. and the suit was ordered to be remanded for trial on its merits. The defendant has now filed an appeal under the Letters Patent.

The only legal question which we have been called upon to answer in this appeal may for the sake of convenience be subdivided into two: (1) Should the Court order an oath to be administered in spite of revocation of his offer by a challenger after the offer was accepted by the opposite party who is willing to take the oath in pursuance of the agreement. (2) Would the answer to the first question be different if the form of the oath offered requires the co-operation or the presence of the challenger at the time when the oath is going to be administered in case the challenger refuses to co-operate or be present on the occasion?

A study of the provisions of the Indian Oaths Act would show that although a provision is made in the Act in regard to the contingency when the person who is to take the oath refuses to do so, yet no procedure has been laid down in regard to the case when a challenger tries to resile from his agreement. It has been held in a number of cases, however, that a challenger

should not be allowed to resile from the agreement and the Court should proceed to administer the oath in spite of a revocation of his offer by the challenger unless he is in a position to satisfy the Court that he has good reasons for doing so. *See* the rulings in 16 I C 733,[1] 22 Bom 281,[2] 22 Mad 234[3] and 17 I C 339.[4] A contrary view has, however, been taken in a later Allahabad ruling, A I R 1935 All 276,[5] where Bennet J. relying on two earlier decisions of that Court held that it was not necessary for a party to assign any reasons for resiling from an offer made by him to the opposite party to take the oath even after it had been accepted.

The authorities on the basis of which, the learned Judge appears to have arrived at that finding, 52 All 235,[6] 53 All 673[7] and A I R 1932 All 404,[8] are distinguishable. The important fact which distinguishes 52 All 235[6] is that the statement recorded before the Subordinate Judge in that case was, as stated by the learned Judges, only to the effect that the parties would accept certain terms which might be stated or suggested by one Bagavant Singh.

Coming to 53 All 673[7] it appears that the parties to the suit had agreed in that case that a certain pleader might be appointed as a referee and that the case might be decided in accordance with the statement which he might make without any oath being given to him. The learned Judges decided that case on the basis that the statement by the referee was not to be of the nature of evidence on any particular fact, but rather of the nature of a pronouncement on the case.

A reference was made in that case to 49 All 388,[9] yet it appears in view of the two rulings mentioned above, that the learned Judge did not fall in with the view expressed by Lindsay J. No reference was however made to a Division Bench ruling of the Allahabad High Court in 18 All 46[10] which laid down in unmistakable terms that a party offering to be bound should not be allowed to revoke the offer after it had been accepted by the opposite party except upon the strongest possible grounds which were proved to the satisfaction of the Court to be genuine. It would thus be clear that there is a great preponderance—even if there is no unanimity—in favour of the view that a challenger should not be permitted to resile after his offer had been accepted by the other party unless good ground is shown to the satisfaction of the Court by the challenger. Apart from the authorities, I see no principle of law on which an agreement can be allowed to be broken with impunity without any valid reason. It would therefore follow that if a party has not been permitted to resile from the agreement to abide by the oath of his opponent, the Court must proceed to have it administered and the statement thus given on oath would be held to be conclusive of the facts thus stated on oath.

In this particular case, no circumstance has been shown to the satisfaction of the Court which would entitle the plaintiff to resile from the agreement. It may also be stated here that unless the oath is taken in pursuance of an agreement, the case cannot be disposed of on the basis of a default either on behalf of the challenger or by the acceptor. The provisions of S. 11, Oaths Act, can only be attracted after the oath had been taken in accordance with the agreement arrived at between the parties as mentioned in Ss. 9 and 10 of the Act. The order of dismissal of the suit by the trial Court without administering the oath to the defendant was therefore obviously incorrect and was rightly set aside in second appeal.

This brings us to the second but more difficult question. It has been contended on behalf of the appellant that in view of the plaintiff's own conduct, in trying to resile from the agreement and refusing to participate in the proceedings to be taken for the administration of the oath and lighting camphor which he was to do in accordance with the offer made by him it should be held that this part of the offer

1. Hira Lal v. Joggeswar, (1912) 16 I C 733.
2. Abaji v. Bala, (1898) 22 Bom 281.
3. Thoyi Ammal v. Subbaraya Mudali, (1899) 22 Mad 234.
4. Thukku Goundan v. Kuppanda Goundan, (1912) 17 I C 339.
5. Rup Singh v. Mrs. Arjun Sen, (1935) 22 A I R All 276=153 I C 686=1935 A L J 212.
6. Umman Singh v. Sheo Darshan Singh, (1930) 17 A I R All 162=122 I C 186=52 All 235=1930 A L J 397.
7. Bishambhar v. Radha Kishunji, (1931) 18 A I R All 557=133 I C 29=53 All 673=1931 A L J 393.
8. Chand Rehka v. Janki Prasad, (1932) 19 A I R All 404=138 I C 606=1932 A L J 481.
9. Salik Ram v. Wali Ahmad, (1927) 14 A I R All 590=100 I C 473=49 All 388=25 A L J 297.
10. Ram Narain Singh v. Babu Singh, (1896) 18 All 46=1895 A W N 158.

has been waived and cannot in any case be insisted upon by him. In our opinion there is a great deal of force in this contention. It has already been held that the party cannot be permitted to resile from the agreement unless good cause is shown on his behalf. In the absence of any such cause being shown, would it be right to hold that a party should be allowed to achieve his object by his refusal or failure to carry out the terms of the agreement when he cannot achieve by showing satisfactory reasons to the Court for the purpose of resiling from the agreement? In our opinion this would be intolerable and cannot be permitted. It was held in (1881) 6 A C 251[11] that if in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. Lord Watson in delivering his judgment says at page 270 :

> They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition.

The noble Lord adds :

> The passage cited by Lord Shand from Bell's Principles (S. 50) to the effect that if the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor has done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement.

Lord Blackburn in his judgment at page 264 says :

> And by his own default he can now never be in a position to call upon the pursuers to take back the machine on the ground that the test had not been satisfied, he must, as far as regards that, keep and consequently pay for it.

The same principle has been enunciated in Halsbury, Vol. 7, para. 308 (Hailsham edition) :

> The performance of a condition precedent is excused where the other party has prevented its performance or has done something which puts it out of his power to perform his part of the contract, or has intimated that he does not intend to perform it. In the latter case he has made himself liable for a breach of the contract and has dispensed with the performance of any promise which was originally a condition precedent to his liability.

Our learned brother Wadsworth felt that rulings such as 22 Mad 234[3] and others quoted by me in an earlier portion of this judgment could not be safely applied to a case like this where the challenger was to perform some act in compliance with the form of oath stated in the agreement. He therefore preferred to apply S. 12 of the Act to the challenger also on the ground that if the suit had to proceed on the refusal to take the oath by the person who had once agreed to take it, there was no reason why should the challenger be not placed in the same position. A ruling of this Court in 49 M L J 379[12] was referred to by him in support of his decision.

We have considered the matter very carefully and feel that this would be extending the provisions of S. 12 of the Act in a manner which is not justifiable. Had the Legislature intended S. 12 to apply to a challenger, it would have said so. The reason of a provision for a person who had decided to accept the oath was clear. It has been provided in S. 12 of the Act that nobody could be compelled to take an oath against his will. A provision had thus to be made for the case when a party declined to take the oath after he had accepted the offer made in that behalf. The same reason however does not apply to the challenger. Moreover, no reasons have been given by the learned Judge who decided 49 M L J 379[12] and in the absence of any cogent reasons we are, with deference, unable to agree with him. The legal position then is that the plaintiff, who was to light camphor in accordance with the offer made by him and has refused to perform that which he had undertaken to do, should be taken to have waived that condition. Moreover, it does not appear to us to be very material whether camphor is burnt by the plaintiff or by some one else on his behalf so long as it is extinguished by the defendant at the time when she is taking the oath.

The duty of administering the oath under the Act devolves on the Court and it cannot be said to be acting in excess of its powers if it orders the commissioner to be appointed by it, to perform certain terms which the challenger now refuses to execute in spite of his agreement. In the circumstances mentioned above the only order which could, in our opinion, be passed in this appeal appears to be to give the plain-

11. Mackay v. Dick, (1881) 6 A C 251=29 W R 541.

12. Siddayya v. Ambu Nair, (1925) 12 A I R Mad 1264=90 I C 577=49 M L J 379.

tiff another opportunity to carry out his part of the agreement and light camphor on the date and time to be now fixed by the Court in the temple where the oath is to be taken and which the defendant should be required to extinguish when the oath is being taken by her. If the plaintiff refuses to be present or to light camphor, it may be lighted under the orders of Court by the Commissioner who is appointed to administer the oath. The camphor must however be extinguished by the defendant when she is taking the oath. It is hardly necessary to add that if the oath is taken by the defendant, her statement must be taken to be conclusive under S. 11 of the Act so far as this suit is concerned. If she however fails to take the oath, there is no other alternative for the Court but to proceed under S. 12 of the Act.

For the foregoing reasons the appeal must be allowed with costs and the suit remanded to the trial Court for compliance in terms of the order above stated. The costs of the trial Court shall abide the result. As the appeal was wrongly dismissed by the Subordinate Judge without any oath having been actually taken by the defendant and had to be allowed to that extent in the second appeal, there will be no order as to costs in the first and second appeals.

C.R.K./D.S. *Suit remanded.*

A. I. R. 1938 Madras 388

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Sambasiva Ayyar — Appellant.

v.

Natesa Ayyar and others —

Respondents.

Appeal No. 165 of 1932 and Civil Revn. Petn. No. 1850 of 1931, Decided on 22nd October 1937, against decree of Sub-Judge, Tanjore, in O. S. No. 46 of 1929.

* **(a) Partnership—Accounts—Joint family, partner in firm—Partnership dissolved—Member of joint family can recover his share in the family assets after taking account, if necessary —Suit would not lie if there has been no dissolution—But Court cannot dismiss suit as framed without deciding question whether or not there was dissolution before suit.**

When the assets of a joint Hindu family are in the hands of a stranger on the dissolution of a partnership in which the family was a partner, any member of the family who is entitled to a share in the assets has a right to recover his share of the assets and if it is necessary for the purpose of ascertaining such share to take an account, such account has to be taken by the Court at the instance of the plaintiff. The case would however be different if there was no dissolution of the partnership before the suit. In that case the suit as framed would not lie, but, still it would not be open to the Court to dismiss the suit on the ground that it is not maintainable even if the plaint allegations are assumed to be true without deciding the question whether there was a dissolution or not before the suit. [P 389 C 1, 2]

Where therefore a suit is instituted by a member of a joint Hindu family claiming a share in the assets of the family in a firm and the defendant alleges that there has been no dissolution of the partnership, it is not open to the Court to dismiss the suit on the ground that it is not maintainable without arriving at a finding on the question whether there was dissolution or not before the suit. [P 389 C 2]

(b) Pleadings —Amendment of—Defects in pleadings not affecting substantial rights — Amendment should not be refused.

In the matter of rectifying defects in pleadings which do not affect any substantial rights it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay. Any carelessness or delay can always be punished, so to speak, by imposing terms. [P 389 C 2]

T. V. Muthukrishna Iyer and N. Muthuswami Iyer — *for Appellant.*

S. Ramachandra Iyer and S. Rajagopala Iyer — *for Respondents.*

Pandrang Row J. — These arise out of O. S. No. 46 of 1929 on the file of the Subordinate Judge of Tanjore. The revision petition is for the purpose of revising the order passed by the Additional Subordinate Judge dismissing the application of the plaintiff for amendment of his plaint and the appeal is from the decree dismissing the suit itself with costs on the ground that it was not maintainable. The suit was by one Sambasiva Ayyar who claimed one-third of the share of defendant 1 in a certain firm described as the K. A. Rm. N. firm. The share in the firm originally belonged to an undivided Hindu family. The plaintiff is the son of one Krishna Ayyar. Defendants 2 and 3 are the grandsons of one Sundarappier by his deceased son, while defendant 1 is one Natesa Iyer. These three persons, Krishna Iyer, Natesa Iyer and Sundarappier were brothers. Defendant 4 is the other partner in the firm of K. A. Rm. N. which carried on a money-lending business and the plaintiff's case was that this share in the money-lending business belonged to the family and that this particular asset of the family was not divided at the time of the partition of

the remaining family properties which took place in 1926. In para. 7 of the plaint, it was clearly stated that the Subordinate Judge in the previous suit for partition, while affirming the award of the arbitrator, Rao Bahadur A. Krishnaswami Ayyar, Retired Assistant Commissioner of Police, had declared that "the rights of the parties in the K. A. Rm. N. firm are left open for future settlement or suit as the case may be." It is clear therefore that the subject-matter of the suit was the family share in the business of which the plaintiff claimed one-third. It was also alleged in the plaint that the partnership, i. e. the money lending firm in question, had been dissolved some time in January 1928, i. e. before the suit, and that after this dissolution, some secret arrangement was arrived at between defendant 1 and defendant 4, the partners, the details of which were not known to the plaintiff. The dissolution alleged in the plaint was denied by the contesting defendants in their written statements which were filed in December 1929 and January 1930. In September 1931, the plaintiff applied to amend the plaint so as to enable him to obtain an alternative relief for partition of the assets of the family in the partnership in case it was found by the Court that there was no dissolution of the partnership and for appointing a receiver to realize the family assets and to pay the one-third share of the plaintiff therein.

The only point raised in this appeal by the plaintiff is that the dismissal of the suit by the lower Court on the ground that it was not maintainable without taking evidence or recording any finding on the question of the dissolution of the partnership alleged in the plaint is wrong. We are of opinion that this contention of the appellant is right. The present case is more or less analogous to that in 47 M L J 554,[1] in which the plaintiff was a junior member of a Marumakathayam tavazhi ; here the plaintiff is a member of a Hindu family whose share in the partnership assets remains undivided. We see no real distinction in principle between the present case and that in 47 M L J 554.[1] The principle is that when family assets are in the hands of strangers any member of the family who is entitled to a share in the assets has a right to recover his share of the assets, and if it is necessary for the purpose of ascertaining such share of the assets to take an account, such account has to be taken by the Court at the instance of the plaintiff. The case would be different no doubt if there was no dissolution before the suit as was held in 41 Mad 454.[2] The learned Judge however did not decide the question whether there was a dissolution or not before suit. That was a question of fact and without any decision thereof it was not open to the Court below to dismiss the suit on the ground that it was unsustainable even if the plaint allegations were assumed to be true.

The appeal must therefore be allowed and the decree of the Court below dismissing the suit set aside. The suit is remanded to the Court below for fresh disposal according to law. The costs of this appeal will abide the event and be provided for in the revised decree to be passed by the Court below. The court-fee paid on the memorandum of appeal will be refunded to the appellant. As regards the revision petition, we are of opinion that the lower Court was not right in refusing permission to amend the plaint though there was considerable delay which was not satisfactorily explained. In the matter of rectifying defects in pleadings which do not affect any substantial rights it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay. Any carelessness or delay can always be punished, so to speak, by imposing terms. In this case it was not possible for the plaintiff to be certain whether there was a dissolution or not because he is not one of the partners and he can have no personal knowledge about the matter, and it is not right that he should lose all simply because he chose to institute a suit on the basis that there had been a dissolution; if it is found after trial that there was no dissolution, it is not right that he should fail altogether. In these circumstances therefore we think the lower Court ought to have allowed the petition for amendment. The order of the Court below dismissing the prayer for amendment is set aside and the amendment is allowed as prayed for, but in the circumstances of the case the petitioner in the civil revision petition must bear his own costs and pay the costs in the civil revision petition of the contesting respondents 1 and 4 and

1. Ottapurakkal Thazhath Soopi v. Abdulla, (1924) 11 A I R Mad 909=82 I C 198=47 M L J 554.

2. Gangayya v. Venkatramiah, (1918) 5 A I R Mad 87=43 I C 9=41 Mad 454=34 M M J 271.

also their costs in the amendment application in the Court below.

C.R.K./R.M. *Order accordingly.*

✲ A. I. R. 1938 Madras 390

VARADACHARIAR AND KING JJ.

Nyapati Narayana Rao and others — Appellants.

v.

Mudhavalapu Purushothama Rao — Respondent.

Appeal No. 114 of 1932, Decided on 7th October 1937, against preliminary decree of Sub-Judge, Guntur, D/- 28-3-1931.

✲ Hindu Law—Partition—Severance of joint status takes place from date on which communication of intention to become divided is sent and not from date on which communication is received by co-parceners.

A member of a joint Hindu family can become divided by a declaration of his intention to become so divided. The severance of status takes place from the date on which the communication of intention to separate was sent and not when the communication has been actually received by the co-parceners. The severance of status relates back to the date when the communication was sent and the date of receipt of communication by the co-parceners is not material : *A I R 1931 Mad 278, Rel. on.*

[P 392 C 1]

Vedantam Satyanarayana — *for Appellants.*

N. Rama Rao — *for Respondent.*

Varadachariar J.—The question for decision in this case is whether the will (Ex. 4) said to have been executed by one Seshagiri Rao on 4th August 1926 is genuine and valid. Seshagiri Rao had two sons, the plaintiff and defendant 1 ; defendants 2 and 3 are the sons of defendant 1. Many years ago, the plaintiff had been taken in adoption by Seshagiri Rao's wife's maternal uncle ; it happened that in the family of adoption the plaintiff did not get much property and the evidence establishes that the plaintiff had been pressing his natural father to make some provision for him and that the natural father intended to do so. Defendant 1 on the other hand was educated at his father's expense till he took his B. L. degree and settled down to practise at Guntur. Defendant 1 no doubt became a man with a large family and did not perhaps succeed as well at the profession as he might have desired and he might be justified in feeling that his father ought to have treated him more liberally than he had done. But the evidence leaves no doubt in our mind that defendant 1 was not altogether in the good graces of his father and that even making allowance for defendant 1's financial position the plaintiff stood in greater need of help from his father. There is also indisputable evidence that the father was consulting his lawyer friends and relations as to the best manner in which he could effectively carry out his intention to make some provision for the plaintiff. As the father and defendant 1 were undoubtedly members of a joint Hindu family and some of the properties which the father proposed to deal with were joint family properties, the father seems to have been advised that unless some arrangement could be effected by agreement with defendant 1, it would be necessary for him to get divided from defendant 1 by a notice of intention to become so divided. Ex. C, a draft notice prepared with this object in view by P. W. 9 some years before, makes it clear that the father was clearly aware that this was the only alternative open to him, unless it was possible to arrange amicably with defendant 1 to benefit the plaintiff to some extent.

Whatever might have been the relations between the father and defendant 1 prior to 1920, it is obvious that between 1921 and 1926 the cordiality between them was not by any means improving. The letters filed in the case show that the father was finding fault with defendant 1 for one thing or another and regretting the way in which he had spent his moneys on defendant 1. On the other hand, defendant 1 seems to have felt that his father was not treating him properly and more than once protested, though in vain, against any such treatment. It is in the light of these facts that we have got to determine the question whether Ex. H was a likely disposition to have been made by the father. In the view we take of the credibility of the direct evidence in support of the execution of the will by the father in a sound disposing state of mind, the question of the naturalness of the disposition is of only secondary importance; but as the learned counsel for the appellant has dealt with that question at length, we have set out the material facts above to show that even from this point of view the execution of the will was by no means improbable. (His Lordship then discussed the evidence and proceeded.) We have therefore no hesitation in holding that Ex. H was executed by the deceased Seshagiri Rao when he was in a sound disposing state of mind.

As the deceased was a member of an undivided Hindu family, the question of his right to make a will disposing of his share in the joint family property has next to be considered. To enable him to do so, it is alleged by the plaintiff that he sent a registered notice Ex. J on 3rd August 1926. Having regard to what we have already stated as to the advice that the deceased had been given on this matter, it is not by any means unlikely that this step would have been taken. The preparation of the draft for Ex. J is spoken to by P. W. 10, a witness whom the trial Judge regards as quite respectable; and the writing and execution of Ex. J is spoken to by P. W. 4, whom the learned Judge has unhesitatingly believed. We therefore see no reason to doubt the genuineness of Ex. J nor the fact of its having been sent with the knowledge of the deceased. Ex. J is a postcard and the postal seal shows that it was posted at Bezwada on 3rd August 1926.

In the ordinary course it would have been delivered to defendant 1 at Guntur on the 4th, but it so happened for reasons to which we shall presently refer that it was not actually received by defendant 1 till the 9th. An argument has accordingly been addressed to us as to whether the mere posting of Ex. J on 3rd August was sufficient to validate the will executed on the 4th when in fact the deceased died on the 5th before Ex. J had been received by defendant 1. To obviate such an argument, it was suggested on behalf of the plaintiff that defendant 1 must have become aware of the contents of Ex. J even on 4th August and that he purposely evaded receiving it. We are not satisfied that there is sufficient proof of this or even some justification for the suggestion. Seeing that this suggestion had been made or might be made, defendant 1 applied to the postal department for an exact statement of the reasons for the delay in the delivery and Ex. 3 gives the material information. Defendant 1 resides in one postal division of Guntur whereas the Court is situate in another postal division. The result was that by the time that this postcard was taken to defendant 1's residence on the 4th, he had left for the Court and on non-delivery at home it was transferred for delivery at the other division, but when it was taken to Court on the 5th defendant 1 is said to have been absent from the Court. On the 6th and 7th he was admittedly in Bezwada after hearing of his father's death and as the 8th was a Sunday the registered postcard was delivered to him only on the 9th.

On the above facts it has been argued on behalf of the appellant that as communication to the other coparceners is necessary before a member of a joint Hindu family can become divided by a declaration of his intention to become so divided, it must be held in this case that the division in status arose only on 9th August when defendant 1 received Ex. J and as the testator had died on 5th August the testament cannot take effect so far as the joint family property is concerned. We are unable to accede to this contention. It is true that the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners. The anomalous results following from any such view can easily be shown. It would be unfortunate indeed if the validity of a will should depend upon the accident as to whether a postman was able to find an addressee on a particular date or at a particular place or not; and it will sometimes be a very difficult task for the Court to decide how far the addressee had with some knowledge of what is coming evaded receipt of the notice. An illustration will forcibly demonstrate the anomalous position. If a person should have a number of coparceners living in a number of places far remote from one another what is to be the date of division of status when notice had been sent by one of the coparceners to those various other coparceners? It certainly cannot be that he will become divided from the family on different dates; and here again the uncertainty that may arise from the delay in delivery due to voidable or unavoidable causes is a fact to be taken into account. It may be that if the law is authoritatively settled, it is not open to us to refuse to give effect to it merely on the ground that it may lead to anomalous consequences, but when the law has not been so stated in any decision of authority and such a view is not necessitated or justified by the reason of the rule, we see no reason to interpret the reference to "communication" in the various cases as implying that the severance does not arise until notice has actually been received by the addressee or addressees.

The only reported decision in which the question of the date of severance was dis-

cussed is a judgment of Madhavan Nair J. in 33 M L W 384.[1] So far as it goes, it is an authority against the appellant's contention, because the learned Judge held that even if it should be assumed that the receipt of the notice by the other coparceners is material, the severance of status relates back to the date when the communication was sent. As pointed out by the learned Judge, the principle emphatically stated by the Privy Council that the other coparceners have no choice or option in the matter clearly indicates that the date of the receipt of the notice by them cannot be material. This decision of Madhavan Nair J. was sought to be distinguished by the appellant's learned counsel on the ground that in that case the testator lived till after the date of the service of the notice. In view of the basis of the decision, we do not see how that can make any difference. It was argued that if on the 5th the estate passed by survivorship to defendant 1, the receipt of the notice on 9th cannot divorce defendant 1 of the estate so vested in him. The answer is that the issue of the notice in so far as the testator is concerned, is sufficient to prevent the operation of the principle of survivorship. He was certainly justified in expecting that in the ordinary course his notice would have been delivered to defendant 1 on the 4th or at least on the 5th. It is unnecessary for us to say what the legal result would be in a case where a notice is posted in circumstances when it will be obviously impossible for it to reach the addressee before the testator's death. It may be possible to argue that this is merely a device to defeat the law, but no such suggestion can be made in the circumstances of this case. The appeal fails and is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

1. Rama Ayyar v. Meenakshi Ammal, (1931) 18 A I R Mad 278=130 I C 756=33 M L W 384.

---

* A. I. R. 1938 Madras 392

VENKATARAMANA RAO J.

In re Gopalakrishnan and others — Appellants.

Criminal Appeal No. 315 of 1937, Decided on 25th November 1937, against sentences of Sess. Court, South Arcot Division, in Case No. 15 of 1937.

*** Penal Code (1860), S. 147—Seven persons charged with offence of rioting—Four of them acquitted—Rest also should be acquitted.**

In order to sustain a conviction under S. 147, it is necessary to find that the person accused of that offence was a member of an unlawful assembly. Where therefore four out of seven persons charged with the offence of rioting are acquitted the rest do not form unlawful assembly and hence should be acquitted: *A I R 1923 Lah 692 and (1902) 2 K B 339, Rel. on.* [P 392 C 2]

Basheer Ahmed Sayeed — *for Appellants.*

A. S. Sivakaminathan for Public Prosecutor — *for the Crown.*

Judgment.—In this case, the case for the prosecution was that on 1st November 1936 accused 1 to 7 formed themselves into members of an unlawful assembly with the common object of causing injury to P. W. 3 and wresting from his possession the goods which were suspected to be smuggled and forcibly removed from their possession. The learned Sessions Judge has acquitted accused 3, 4, 6 and 7 but convicted accused 1, 2 and 5. All that was found against accused 1 and 2 was that they were found to be present at the scene of offence and that accused 5 ran away with the bundle which fell from the hands of P. W. 3 during the course of the scuffle with the assailants. There is no reliable evidence as to whether more than five took part in the attack against P. W. 3, and most of the witnesses who were called on the side of the prosecution have been disbelieved by the learned Sessions Judge. He therefore acquitted four out of the seven persons charged with the offence of rioting. It seems to me that accused 1, 2 and 5 should also have been acquitted : *see* A I R 1923 Lah 692,[1] and the view taken in this case has been taken also in this High Court. There is also authority in England for this view : *see* (1902) 2 K B 339[2] at p. 343. I therefore set aside the conviction of and the sentence passed on accused 1, 2 and 5 and direct them to be set at liberty. Their bail bonds are cancelled.

C.R.K./D.S. *Conviction set aside.*

1. Ata Muhammad v. Emperor, (1923) 10 A I R Lah 692=77 I C 894=25 Cr L J 494.

2. Rex v. Plumber, (1902) 2 K B 339=71 L J K B 805=86 L T 836=20 Cox C C 269=51 W R 137=66 J P 647=18 T L R 659.

A. I. R. 1938 Madras 393

VENKATARAMANA RAO J.

In re Morsan — Appellant.

Criminal Appeal No. 233 of 1937, Decided on 29th November 1937, from conviction and sentence passed by Sessions Judge, South Arcot Division, D/- 8-2-1937.

Penal Code (1860), S. 235—Conviction—Mere physical possession of instruments or material of counterfeiting are not sufficient—Prosecution must prove intention of using same.

Before an offence can be made out under S. 235, it is incumbent upon the prosecution to prove not only the possession of the instrument or material but also to prove that the possession was with the intention of using the same for the purpose of counterfeiting coin or with full knowledge and belief that it was intended to be used for that purpose. If the prosecution fails to prove the necessary intention, knowledge or belief, a person cannot be convicted under that section by a mere proof of physical possession of an instrument or material. [P 393 C 1]

Basheer Ahmed Sayeed — *for Appellant.*

A. S. Sivakaminathan — *for the Crown.*

Judgment.—The appellant in this case has been convicted by the learned Sessions Judge of South Arcot of offences under Ss. 235 and 243, I. P. C. and sentenced to five years' rigorous imprisonment under each section, the sentences to run concurrently. So far as the offence under S. 243, I. P. C., is concerned, the evidence on record does not warrant a conviction and the learned Public Prosecutor fairly conceded that it does not. He must therefore be acquitted of this offence. The next question is whether the conviction under S. 235, I. P. C., is sustainable. S. 235 runs thus:

> Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished . . . .

Before an offence can be made out under this section, it is incumbent upon the prosecution to prove not only the possession of the instrument or material but also to prove that the possession was with the intention of using the same for the purpose of counterfeiting coin or with full knowledge and belief that it was intended to be used for that purpose. If the prosecution fails to prove the necessary intention, knowledge or belief, a person cannot be convicted under that section by a mere proof of physical possession of an instrument or material. The facts found against the appellant in this case by the learned Sessions Judge are that when P. W. 1 saw him in the house of P. W. 8 and arrested him he was holding in his hands two pieces, one in each hand, M. Os. 1 and 2 in the case, which contained dies of the obverse and reverse sides of a King Edward rupee coin of 1907 and that on searching the appellant's house, two lead plates (M. O. 34) were recovered. The case for the prosecution was that the Circle Inspector received information some time before the arrest that the appellant was counterfeiting coins, that he proceeded to the village of P. W. 8 at about 3-30 P. M. sent for P. W. 8, who was the lessee of the house, where the appellant was at the time of the arrest, asked him to watch the appellant and at 6 P. M. surprised him and found him in possession of the said incriminating articles. It is in evidence that P. W. 8 is a blacksmith and that the house was rented by him; in the room was found not only M. Os. 1 and 2 but also M. Os. 3 to 33.

The learned Sessions Judge has found that M. Os. 3 to 33 save M. O. 14 were those normally found either in a blacksmith's or goldsmith's workshop and that all the said articles admittedly belong to P. W. 8. It is also the case for the prosecution that the appellant lives in a village 12 miles distant from the village of P. W. 8, that on the day previous, he requested P. W. 8 to allow him the use of the room for the purpose of making some silver articles, that P. W. 8 acceded to his request and that accordingly he came the next day and was at the work of counterfeiting coins. This was sought to be proved by P. W. 8, whom the learned Sessions Judge rightly disbelieved. There is absolutely no evidence that the appellant brought M. Os. 1 and 2 into the house; nor has the prosecution been able to establish that they were manufactured at the instance of the appellant. One is rather inclined to suspect that the real culprit is probably P. W. 8. He was admittedly the lessee of the house; it was in his house that the incriminating articles were found; he was present in the very same room where the appellant was arrested; and the evidence of P. W. 8 to the effect that the appellant manufactured the coins was rejected by the learned Sessions Judge. But however the question is, can the appellant be said to be guilty of any offence by reason of the possession of M. Os. 1 and 2? The case for the defence is that the whole case was foisted at the instance of one Kannuswami, the village

munsif of Vellaikuppam, who decoyed the mistress of the appellant and in consequence whereof there was considerable ill-feeling between the said Kannuswami and the appellant.

The appellant's case is that P. W. 9 owed him some money and when he demanded it, P. W. 9 asked him to come on the day of his arrest and when he went to his village, he took him to the house of P. W. 8 and Kannuswami conspiring with P. Ws. 8 and 9 introduced these articles into the house. P. W. 1 admits that Kannuswami and his son were in the house of P. W. 8 when he arrested the appellant and that they were present when he searched the house. It is rather surprising that Kannuswami's signature to the Mahazar was not taken, nor was his son examined. It is not possible to understand why Kannuswami was present at the house at the psychological moment of the appellant's arrest. There seems to be a good deal of foundation for the case set up by the accused having regard to the fact that no evidence is forthcoming of any actual counterfeiting of the coin by the appellant at any time and that he was supposed to have begun the work of counterfeiting coin in P. W. 8's house on the very day on which he was arrested. Accepting however the version as given by the prosecution that the appellant was having in his hands M. Os. 1 and 2 and that M. O. 34 was recovered from the house of the appellant, would he be guilty under S. 235 in the circumstances of this case? From the possession of M. O. 34 it is not possible to draw any inference on the evidence on record. P. W. 2, the Coin and Currency Expert, says that M. O. 34 looked as if they had been struck off M. Os. 1 and 2 and then flattened out. It is only a surmise and from a mere surmise, no adverse inference can be drawn and there is no other evidence in regard to this matter. The only other thing which remains against the appellant is his having M. Os. 1 and 2 in his hands. From the mere holding of M. Os. 1 and 2 in his hands, it cannot be said that the appellant was having them for the purpose of using the same for counterfeiting coin or knowing or having reason to believe that the same was intended to be used for that purpose. The prosecution has failed to prove the necessary *mens rea* on which alone a conviction can be based under that section. At any rate, it seems to me that the case against the appellant has not been established beyond all reasonable doubt. I therefore set aside the convictions and direct the appellant to be set at liberty.

C.R.K./V.B.B. *Convictions set aside.*

---

* A. I. R. 1938 Madras 394

ABDUR RAHMAN J.

Krishnaswami Ayyar — Appellant.

v.

Sabarathnam Chetti and others — Respondents.

Second Appeal No. 1023 of 1933, Decided on 5th November 1937, against decree of Sub-Judge, Cuddalore, D/- 19-6-1933.

*** Limitation Act (1908), Art. 134 — Word "transfer" in third column refers to transfer of possession and not merely to conveyance of title — Transfer by mortgagee—Possession not given on date of transfer — Suit by vendee of original mortgagor for possession — Art. 134 does not apply — Even if held to apply, limitation under Art. 134 cannot begin to run against original mortgagor or his alienee before cause of action for redemption accrues to them.**

Since Art. 134 contains a stringent provision of law, the onus of proving facts which would attract the provisions of Art. 134 in preference to Art. 148 or even possibly Art. 144 would lie heavily on the party who wishes to claim the benefit of an abridged period of limitation : *14 M I A 1 (P C) and 2 I A 48 (P C), Rel. on.* [P 395 C 2]

A close perusal of Art. 134 would show that it was brought into existence with the object of filing suits for possession of the properties primarily mortgaged and subsequently transferred by the mortgagees, etc., in excess of their rights. If a mortgagee did not exceed his rights, he would be assigning his mortgagee's interest alone and in that case obviously Art. 148 and not Art. 134 would be held to be applicable. If on the other hand the mortgagee exceeded his rights and transferred the entire property as an owner he must be held undoubtedly to have exceeded his rights as a mortgagee. In that case if it is necessary to institute a suit for possession either by a mortgagor or his alienees (as provided in Col. 1 of Art. 134 and which must be read along with what appears in Col. 3 of that Article) it must be presumed that the mortgagee had possession and delivered it to his alienee. This would imply that the word "transfer" used in Col. 3, Art. 134 must necessarily refer to a transfer of possession and not merely to a conveyance of title. [P 395 C 2; P 396 C 1]

Where therefore the mortgagee transfers the property without giving possession on the date of the transfer, and the vendee of the original mortgagor brings a suit for possession and redemption, Art. 134 does not apply. Even if it be assumed to apply, the time under it cannot begin to run before cause of action for redemption accrues to the original mortgagor : *Observation of Srinivasa Ayyangar J. in A I R 1919 Mad 972, Approved.* [P 396 C 2]

S. Panchapakesa Sastri and K. R. Krishnaswami Aiyar — *for Appellant.*

Judgment. — This is an appeal dismissing the plaintiff's suit for redemption and possession of 41 cents of land bearing survey No. 382-B, as being barred under Art. 134, Limitation Act. The defendants who are apparently quite rich, have not chosen to appear. The facts of the case are quite simple. The property in suit originally belonged to one Kuppa Goundan, who mortgaged it on 19th September 1890 with one Lakshminarayana. The mortgage was usufructuary and it was provided in the deed (Ex. K) that the mortgagor would pay the principal amount and redeem the property on 11th April 1901. Kuppa Goundan sold the property to the plaintiff's uncle in 1896 under Ex. A, and directed the vendee to pay the mortgage money due under Ex. K to the mortgagee. The property subsequently fell to the plaintiff under Ex. B. Prior to the date on which the mortgage could be redeemed, Lakshminarayanan died, apparently leaving large debts due to the father of defendants 1 to 4 and his widow therefore acting as a guardian on behalf of his minor son executed a simple mortgage (Ex. IV) for Rs. 35,000 on 17th October 1899. The property which had been mortgaged with Lakshminarayanan under Ex. K, and subsequently sold to the plaintiff was also included in the deed. The mortgage was without possession. She executed another mortgage in favour of the same mortgagee for Rs. 1,19,771-8-0 on 4th November 1900 (Ex. V). This purported to be a usufructuary mortgage for a period of ten years; but the recital in this deed points out to the fact that she was not in a position to surrender actual possession of the properties, as they happened to be in the possession of a Receiver appointed in connexion with O. S. No. 5 of 1900 and pending before the District Court of Cuddalore. A provision was therefore made that as long as she was not in a position to deliver possession, interest would be paid at as. 14 per cent. per mensem.

The question therefore arises whether in the circumstances of the case, Art. 134 would apply. If so, from what date did the period of limitation actually begin to run? It may be stated at the outset that since the property in suit was mortgaged in 1899 under a simple mortgage and in 1900 under a usufructuary mortgage for a period of ten years, the suit would be barred by limitation, if Art. 134 is held to apply, long before it was filed in 1928 and the present words now substituted in Column 3 of Art. 134 by Act 1 of 1929 would have no application to the facts of this case. It is hardly necessary to trace the history of how the words in Column 3 of Art. 134 were changed by various legislations from time to time. Suffice it to say that before the Amendment of 1929, the words appearing in Column 3 of Art. 134 were "the date of transfer" and it is these words which I have been called upon to consider and construe. There is no doubt that since Art. 134 contains a stringent provision of law, the onus of proving facts which would attract the provisions of this Article in preference to Art. 148 or even possibly Art. 144 would lie heavily on the party who wishes to claim the benefit of an abridged period of limitation. The remarks made in 14 M I A 1[1] and 2 I A 48[2] amply support the proposition mentioned above.

It is true that there is no mention of any alienation in favour of the plaintiff's uncle in the mortgage deeds effected by Lakshminarayana's widow on behalf of her son—but before the provisions of Art. 134 can be attracted, it must be shown that the mortgagee, i. e. the father of defendants 1 to 4 had no knowledge of any alienation by the original mortgagor, i. e. Kuppa Goundan of his rights. It might not have been actually necessary to prove "good faith" but the absence of such a knowledge must at least have been established. There is no evidence in this case from which such an inference may be drawn in favour of defendants 1 to 4. It may be contended that it was impossible for defendants 1 to 4 to produce any evidence on the point as their father had died before the suit was filed. I would, therefore, particularly in their absence, not like to rest my decision on the absence of this evidence merely. A close perusal of Art. 134 would show that it was brought into existence with the object of filing suits for possession of the properties primarily mortgaged and subsequently transferred by the mortgagee, etc., in excess of their rights: 51 All 367[3] at p. 374. If a mortgagee did not exceed his

1. Radhanath v. Gisborne & Co., (1870) 14 M I A 1 = 15 W R 24 = 6 Beng L R 530=2 Suther 397=2 Sar 636 (P C).
2. Juggurnath Sahoo v. Syud Shah Mahomed, (1874) 2 I A 48 = 23 W R 99 = 14 Beng L R 386=3 Sar 419 (P C).
3. J. R. Skinner v. Naunihal Singh, (1929) 16 A I R P C 158 = 117 I C 22=56 I A 192=51 All 367 (P C).

rights, he would be assigning his mortgagee's interest alone and in that case obviously Art. 148 and not Art. 134 would be held to be applicable. If on the other hand the mortgagee exceeded his rights and transferred the entire property as an owner he must be held undoubtedly to have exceeded his rights as a mortgagee. In that case if it is necessary to institute a suit for possession either by a mortgagor or his aliences (as provided in Col. 1 of Art. 134 and which must be read along with what appears in Col. 3 of that Article), it must be presumed that the mortgagee had possession and delivered it to his alienee. This would imply, in my opinion, that the word "transfer" used in Column 3 of Art. 134 must necessarily refer to a transfer of possession and not merely to a conveyance of title. This construction can be defended on another ground as well. If anything can really give notice to the outside world as to what the state of affairs actually is, it is possession and not merely a conveyance without possession which in some provinces of India could either be oral or by means of an unregistered document if the transaction did not exceed a sum of Rs. 100.

I am aware of dissenting opinions on this point of eminent Judges, like Wallis C. J. and Coutts-Trotter J., as expressed by them in 40 Mad 1040,[4] but the opinion of the majority was the other way. In fact Srinivasa Ayyangar J. went to the extent of laying down that if possession was not actually transferred on the date of conveyance, Art. 134 would not apply at all. The result of the opinion of the majority of the Judges in the Full Bench case would be that while according to Abdur Rahim and Seshagiri Ayyar JJ., limitation would actually begin to run from the date when possession was taken by the alienee from the mortgagee, the Article would not be applicable at all according to Srinivasa Ayyangar J. if possession was not delivered on the date of the conveyance. As I have already stated, possession under Ex. V could not have been given to the father of defendants 1 to 4 as the properties were stated in the mortgage deed itself to be in the receiver's possession. There is no evidence on the record when possession was actually delivered and in the absence of such evidence, it is impossible to fix a date when limitation actually began to run even if Art. 134 applied to the facts of this case.

There is another aspect of the case which is also quite important. The original mortgage of 1890 could not have been redeemed under the terms of the deed (Ex. K) before 11th April 1901. It was transferred by Lakshminarayana's widow first under a simple mortgage on 7th October 1899 and later on by means of what has been described as a usufructuary mortgage on 4th November 1900. Can it be reasonably held that the limitation against the original mortgagor or his alienee began to run even before the date before a cause of action for redemption accrued to them? In spite of what has been said by one of the Judges in the minority, I am afraid, I must, with great respect, agree with what was so lucidly observed by the learned Judge, Srinivasa Ayyengar at p. 1062 of that judgment. The result is that Art. 134 does not in my opinion apply to the facts of this case; but even if it did, it must be held that as the defendants have failed to prove the date on which they got into possession the suit would be within time. I would therefore set aside the judgment of the learned Subordinate Judge and send the case back to him for disposal of the remaining questions involved in the appeal. The plaintiff will be entitled to recover the costs of the second appeal in this Court. The court-fee put in by the appellant shall be refunded. The costs of the lower Court will abide the result. I must in the end express my recognition of the help rendered to me by Mr. Panchapakesa Sastri in arguing this case not only with his usual thoroughness and ability but with very great fairness in the absence of the opposite party.

C.R.K./D.S. *Case remanded.*

4. Setti Kutti v. Kunhi Pathumma, (1919) 6 A I R Mad 972=43 I C 31=40 Mad 1040=33 M L J 320 (F B).

---

* A. I. R. 1938 Madras 396

VENKATARAMANA RAO J.

In re Govindraj and others — Petitioners.

Criminal Revn. Case No. 378 and Petn. No. 347 of 1937, Decided on 24th November 1937, to revise order of Dist. Magistrate of Nilgiris, D/- 3rd May 1937.

*** Criminal P. C. (1898), S. 253 (2) and S. 537 — Number of accused tried for one offence — Magistrate discharging some of them and postponing giving reasons for discharge till final order as regards rest of accused — Order is not illegal — At best it is only irregularity which can be cured by S. 537.**

Where a number of persons are being tried for an offence, it is competent to a Magistrate to dis-

charge some of them and to postpone giving reasons for the order of discharge till he makes a final order as regards the rest of the accused. Because till the charge against the remaining accused is disposed of by a final order, the Magistrate must be deemed to be in seisin of the whole case and so long as he is in charge thereof, he can always give his reasons in regard to the order of discharge. There is nothing in the language of S. 253 which precludes him from doing so. Even assuming that it is obligatory on him to give reasons before he pronounces the order of discharge, his omission to do so is only an irregularity which can be cured by S. 537. [P 397 C 2 ; P 398 C 1]

K. S. Jayarama Ayyer, G. Gopalaswami and K. G. Srinivasa Ayyar — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—This is an application to revise the order of the learned District Magistrate of the Nilgiris ordering further inquiry into the case of the ten accused who are the petitioners before me and who along with nine others were charged by the police under Ss. 147, 452 and 426, I. P. C. and tried by the joint Magistrate of Coonoor in C. C. No. 10 of 1937 on his file. The joint Magistrate, after examining all but two of the witnesses for the prosecution, came to the conclusion that the charge against the petitioners was groundless and that in regard to the remaining nine accused there was a prima facie case for a charge being framed. Accordingly on 18th March 1937, he framed a charge in regard to the said nine persons and pronounced an order of discharge so far as the ten petitioners are concerned under S. 253 (2), Criminal P. C. On 29th March 1937, a revision petition was presented by the Crown before the District Magistrate, the Nilgiris, against this finding of discharge. He called for the records from the joint Magistrate who, while submitting them, also sent a memorandum containing the reasons for his order of discharge on 6th April 1937. The learned District Magistrate has taken the view that the joint Magistrate's order of discharge without giving reasons as required by S. 253 was illegal and the subsequent memorandum wherein the joint Magistrate stated his reasons would not cure the defect. He therefore ordered a further inquiry. Taking this view, he did not enter into the merits of the case and stated that he had no intention to go into the evidence and was solely concerned whether or not the joint Magistrate's order of discharge was in accordance with the section.

The question now before me is, was the order of the joint Magistrate in not recording his reasons at the time he pronounced the order of discharge illegal or was it only a mere irregularity which can be cured by S. 537, Criminal P. C.? Under S. 253, Criminal P. C., it is no doubt the duty of a trying Magistrate to examine all the witnesses tendered by the prosecution but power is also vested in him under Cl. (2) to discharge an accused at any stage when he comes to the conclusion that the charge is groundless, but it must be for reasons to be recorded by the Magistrate. In this case almost all the witnesses for the prosecution have been examined and only two more remained to be examined. The joint Magistrate thought that in the interests of justice the case against the petitioners should not be proceeded against and that it was not necessary to examine the other witnesses so far as they were concerned. In this memorandum dated 6th April 1937, he observes thus :

> There is therefore no point in waiting for their evidence and further victimizing these accused by keeping them in the position of accused while the case drags on.

On going through the memorandum which he submitted to the District Magistrate later, it is fairly clear that the joint Magistrate refrained from giving his reasons at the time of the order of discharge because he would be entering into the facts of the case and any discussion in regard thereto might prejudice the case for the prosecution in regard to the rest of the accused. It is also clear that he intended to give his reasons for the order of discharge at the time when he made the final order in the case in respect of the other nine accused. The question is, would the joint Magistrate be acting illegally under such circumstances in withholding his reasons and postponing them until the final order in the case? I am inclined to think that it would be competent to the joint Magistrate to do so. Till the charge against the remaining accused is disposed of by a final order, he must be deemed to be in seisin of the whole case and so long as he is in charge thereof, he can always give his reasons in regard to the order of discharge. There is nothing in the language of the section which precludes him from doing so. It may be that if he omits to give reasons when he passes a final order in the case, the question will arise whether his order would be legal. Of course the language of

the section would plainly indicate that a Magistrate should give his reasons at the time he pronounces the order of discharge and if it is the final order in the case, he is bound to give his reasons. The moment he pronounces the final order, he becomes functus officio and he is no longer in charge of the case. But in a case of this nature I am inclined to think that he has not become functus officio and it would be open to him to defer his reasons. Assuming that it was obligatory on him to give his reasons before he pronounced the order of discharge, his omission to do so is only an irregularity which can be cured by S. 537, Criminal P. C. It is not suggested before me that any failure of justice has been occasioned by the joint Magistrate not giving reasons at the time he pronounced the order of discharge. I therefore set aside the order of the District Magistrate.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 398

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Natesa Nattar and others — Appellants.

v.

Manicka Nattar and another —

Respondents.

Letters Patent Appeal No. 29 of 1936, Decided on 7th December 1937, against judgment of Cornish J., D/- 10th February 1936.

Minor—Debts incurred by guardian—Creditor's right of subrogation to guardian's rights against minor's estate—In absence of finding that guardian has right of recourse against minor's estate, creditor of guardian is not entitled to right of subrogation.

The right of subrogation of a creditor to the rights of guardian against the minor's estate arises from the principle, that the guardian himself has a right of recourse against the estate and that a creditor of his may be put in his place against the assets, that is to say, that he has a right to the benefit of the indemnity or lien which the guardian has got against the estate. This is a corollary to the doctrine that a trustee, who has properly accounted, has a right of recourse against the cestui que trust. But where the trustee himself has wronged the estate, he can have no right and ex hypothesi his creditor can have none. In an action by a trustee to be reimbursed for any particular debt he has paid or an obligation he has incurred, it would be a defence open to the cestui que trust, that on a general account being taken, the trustee would not be entitled to the relief claimed. Where the trustee himself has no right of recourse, his creditor, who claims no more than that he should be put in his place, can obviously get nothing whatsoever. Where the trustee has taken money out of the assets more than sufficient to pay the debts, the title of the creditor, so to speak, is a title to get nothing, because nothing is due to the trustee: *(1880) 15 Ch D 548* and *A I R 1937 Mad 1, Rel. on.* [P 399 C 1]

Kasturi Seshagiri Rao and V. Katchapeswara Iyer — *for Appellants.*

K. Bhashyam Iyengar and R. Viswanathan — *for Respondents.*

Venkatasubba Rao J. — This is a Letters Patent appeal from the judgment of Cornish J. The facts so far as they are material to the question before us may be briefly stated. The plaintiff obtained a decree against defendant 5, the mother of defendants 1 to 4 on the foot of a promissory note executed by her. Defendants 1 to 4 were minors and the suit was brought and the decree was obtained against the mother alone. In execution of that decree the plaintiff alleging that the promissory note was executed in respect of a debt binding upon the minors, attached their property. A claim petition was filed on their behalf, which was allowed. The plaintiff thereupon filed the suit, out of which the present appeal arises, for getting rid of the adverse order made against him on the claim petition. Subsequently, he was allowed to amend his plaint by the addition of a paragraph in which he alleged that he was entitled to be subrogated to defendant 5's right.

The District Munsif has found that there were dealings between defendant 5's husband and the plaintiff, that they were continued by the widow after her husband's death for the benefit of the estate and that it was in respect of the balance due on such dealings that the promissory note sued on, was executed by defendant 5. This finding has been affirmed by the learned Subordinate Judge, who agreeing with the trial Court, has further held that the right of subrogation claimed by the plaintiff has been made out. But both the Courts have concurred in dismissing the suit on the ground that it is barred by limitation. Cornish J., differing from the lower Courts on the question of limitation, has on certain grounds made an order remanding the suit for retrial; whether those grounds are right or not, it is unnecessary to discuss in the view we have taken.

Whether from the finding that the debt was incurred for a proper purpose it necessarily follows that it was binding upon the minors' estate, is also a question that need

not be considered : *cf.* A I R 1937 Mad 1.[1] Let it be assumed that the debt and the decree passed thereon were binding upon the estate; there can be no doubt then that a creditor of the widow can claim to be subrogated to her right against the estate of the minors. This right of subrogation arises from the principle, that the widow herself has a right of recourse against the estate and that a creditor of hers may be put in her place against the assets, that is to say, that he has a right to the benefit of the indemnity or lien which the widow has got against the estate. This is a corollary to the doctrine that a trustee who has properly accounted, has a right of recourse against the cestui que trust. But where the trustee himself has wronged the estate, he can have no right and ex hypothesi his creditor can have none. In an action by a trustee to be reimbursed for any particular debt he has paid, or an obligation he has incurred, it would be a defence open to the cestui que trust, that on a general account being taken, the trustee would not be entitled to the relief claimed. Where the trustee himself has no right of recourse, his creditor, who claims no more than that he should be put in his place, can obviously get nothing whatsoever. As observed by Jessel M. R., where the trustee has taken money out of the assets more than sufficient to pay the debts, the title of the creditor, so to speak, is a title to get nothing, because nothing is due to the trustee : 15 Ch D 548.[2] See also the judgment of Venkataramana Rao J. in A I R 1937 Mad 1[1] already referred to.

Turning now to the pleadings, they are utterly defective, the plaint not even containing the necessary averment. The ingredients of the subrogation claimed appear to have been lost sight of, and no evidence seems to have been directed to the question. Had the point been properly taken, and we must hold on the pleadings here that it has not been, the question of burden of proof might probably arise, on which we express no opinion. Then the question remains, will any good purpose be served by our merely declaring that the plaintiff is entitled to subrogation ? In the absence of a finding that the widow has a right of recourse, such a declaration would be futile. On this short ground the suit fails and it is unnecessary to deal with the question of limitation. The result is that the lower Appellate Court's decree dismissing the suit is confirmed (though on a different ground) and the Letters Patent appeal is allowed. In the circumstances, we direct each party to bear his own costs throughout.

C.R.K. D.S. *Appeal allowed.*

1. Muthuswami v. Annamalai, (1937) 24 A I R Mad 1=169 I C 261.
2. In re Johnson Shearman v. Robinson, (1880) 15 Ch D 548=49 L J Ch 745=43 L T 372=29 W R 168.

✻ A. I. R. 1938 Madras 399

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

In re Veeraswami Padayachi —

Appellant.

Stamp Register No. 19677 of 1937, Decided on 6th December 1937, against order of Pandrang Row J., D/- 16th April 1937.

✻ Letters Patent (Madras), Cl. 15—Order of High Court Judge refusing review from his judgment passed in second appeal— Appeal from such order is incompetent without leave.

Clause 15 when properly construed means that no judgment of a Judge of the High Court in the exercise of the second appellate jurisdiction is appealable without leave. An order of a High Court Judge refusing review from his judgment passed in second appeal is an order made in exercise of second appellate jurisdiction and hence an appeal from such order is incompetent without leave. [P 400 C 1]

K. P. Ramakrishna Aiyar—*for Appellant.*

Venkatasubba Rao J.—The point raised is a novel one. Pandrang Row J. decided a second appeal against the petitioner, who thereupon applied for a review of the learned Judge's judgment. Review was refused and the present appeal is from the order of refusal. The learned Judge was not asked to certify under Cl. 15 of the Letters Patent that the case was a fit one for appeal, and the question is, whether the present appeal without leave is competent. The argument turns on the following words within brackets in Cl. 15

not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court.

The contention is put thus: what these words contemplate is a judgment in respect of an appellate decree or order made by a Subordinate Court; Pandrang Row J.'s judgment refusing to review (for the present purpose his order may be assumed to be a judgment) is not in respect of such decree or order; for, what the learned

Judge refusal to review was his own order. From this it follows, it is contended, that the order in question is not covered by the express wording of the exception. The argument, though plausible, is without substance. The clause, properly construed, means that no judgment of a Judge of the High Court in the exercise of second appellate jurisdiction is appealable without leave. Here, the order refusing to grant review was made in the exercise of such second appellate jurisdiction; that is the short answer to the objection.

To test the matter, let us suppose that instead of refusing a review, the learned Judge made an order granting it. Mr. Ramakrishna Aiyar, to be logical, had had to contend that from such an order an appeal will lie; but when after granting the review, the Judge proceeds to dispose of the second appeal, no appeal will, without leave, lie from the final decision which of course is the undoubted effect of the Clause. The position that results is most anomalous. Apart from that, the absurdity of the contention is apparent. All that a defeated party in a second appeal need do is to apply for a review and, on his request being refused, to come to the Appellate Court and contend that an appeal lies from the refusal as a matter of right. No Court can accept a construction which involves such a startling result. We hold that the Letters Patent appeal is incompetent and accordingly reject it.

C.R.K./D.S. *Appeal rejected.*

A. I. R. 1938 Madras 400

PANDRANG ROW AND
ABDUR RAHMAN JJ.

A. V. Narayanaswami Pillai — Appellant.

v.

Secretary of State — Respondent.

Letters Patent Appeal No. 7 of 1936, Decided on 15th November 1937, against judgment of Wadsworth J., in A. S. No. 1088 of 1931.

(a) Grant—Lost grant—Person permitted by Public Works Department to repair certain channel at his own cost and to irrigate his land from that channel—Lost grant of right to irrigate his lands from that channel cannot be presumed.

The theory of a lost grant cannot be invoked where the grant sought to be relied upon is one which is not likely at all to have been granted, and when it is clear that there was no grant at least 50 years ago. [P 401 C 1]

Where the Public Works Department had permitted a person to repair a channel at his own cost and to irrigate his lands from that channel and even shown his lands as being included in the ayacut of that channel, this would not amount to a grant and there is no other grant that can be thought of in the circumstances. The Government always desire to preserve unfettered their discretion in the matter of distribution of water or regulating its supply; and in view of this policy it is most unlikely that any grant would have been made under due authority of the right to use water from a particular source for all time without reserving power to the Government to make a change later on. [P 401 C 1]

(b) Madras Irrigation Cess Act (7 of 1865), S. 1, Prov. 2—User of water with permission of Public Works Department—Penal water rate cannot be levied.

Where the user in the past has been with the permission of the Public Works Department, till such authority is revoked or withdrawn, the user cannot be penalized. [P 401 C 2]

S. Muthiah Mudaliar and S. G. Ranga-ramanujam — *for Appellant.*

K. S. Champakesa Ayyangar — *for Respondent.*

Pandrang Row J.—This Letters Patent appeal arises out of a suit instituted by one A. T. Venkatanarayana Pillai, who died subsequently, against the Secretary of State for India for a declaration that he is entitled to use the water of a channel known as Kandianmadai for irrigating his lands, and also for refund of the penal water rate collected from him in 1924, namely Rs. 203-3-6. The plaintiff's suit for the declaration was dismissed by the first Court, but he was given a decree for the actual amount of penal water rate levied from him, namely Rs. 193-12-0. On appeal by the Secretary of State for India against this decree, the Subordinate Judge of Tanjore went further and gave in addition a declaration in favour of the plaintiff of his right to irrigate the plaint wet lands with the water of the aforesaid channel. A second appeal was preferred by the Secretary of State and that was allowed with the result that the entire suit of the plaintiff was dismissed with costs throughout by Wadsworth J.

The facts of this case are simple and they can be stated in a few words. The irrigation source assigned to the plaintiff's lands according to the old settlement as well as according to the re-settlement is a channel known as the Dabir channel or Uthamadani channel. The Kandianmadai is a short channel connecting the Manniar river with the Dabir channel. The evidence very clearly establishes the fact, as

found by the trial Court and by the lower Appellate Court that the plaintiff was using the water of the Kandianmadai for very many years, and had been indeed permitted by the Public Works Department to execute repairs to the channel and that his lands were shown as a separate ayacut under the Kandianmadai, for many years. It was on this long user of the water that the plaintiff relied upon in support of what he called a lost grant of the right to irrigate his lands with the water of the Kandianmadai, a contention which was accepted by the lower Appellate Court and disallowed, and in our opinion rightly, in second appeal. The theory of a lost grant cannot be invoked where the grant sought to be relied upon is one which is not likely at all to have been granted, and when it is clear that there was no grant at least 50 years ago. No case in which any grant of the kind now put forward was recognized or proved has been brought to our notice; nor has our attention been drawn to any rule framed by the Government regulating such grants. The policy of the Government in this matter is very well known and in fact finds expression in B. S. O. No. 84. The Government always desire to preserve unfettered their discretion in the matter of distribution of water or regulating its supply; and in view of this policy, it is most unlikely that any grant would have been made under due authority of the right to use water from a particular source for all time without reserving power to the Government to make a change later on. In this particular case it is very clear that the theory of a lost grant has no place. In a similar case recently where a lost grant of poramboke land was sought to be relied upon, it was held that such lost grant cannot be presumed, for, it is contrary to the practice prevailing in the Revenue Department from time immemorial of not granting any poramboke land at all unless it was previously converted into ayan. A lost grant can only be presumed, if at all, as a matter of fact when all the circumstances go to show that there must have been such a grant, and not where the circumstances show that there could not have been such a grant. In this particular case there is no ground at all for inferring that there was a valid grant at any time. What actually happened was that the Public Works Department had permitted the plaintiff to repair the channel at his own cost and to irrigate his lands from the channel and even shown his lands as being included in the ayacut of that channel. This would not amount to a grant and there is no other grant that can be thought of in the circumstances. Our learned brother therefore was right in declining to accept the lower Appellate Court's view that there must have been a lost grant in this case in favour of the plaintiff. To that extent therefore this Letters Patent appeal must fail; in other words it must be held that the declaration granted by the lower Appellate Court was wrongly granted.

The question however remains whether the other part of the plaintiff's claim, namely the refund of the penal water rate collected from him, was rightly disallowed in second appeal. This part of the claim does not appear to have been prominently brought to the notice of our learned brother. A penal water rate can be levied under the Irrigation Cess Act only where the wet land is irrigated by using without due authority the water from any source different from or in addition to that which has been assigned by the Revenue Courts authorities as a source of irrigation of such land. In this case even assuming that the permission granted by the Public Works Department for irrigating the plaintiff's lands with the water of this channel does not amount to an assignment of that channel by the revenue authorities as a source of irrigation to the plaintiff's lands, nevertheless it cannot be said that such user, i.e. with the permission of the Public Works Department, was without due authority. This particular source, namely the Manniar river, is a major irrigation work in respect of which the officers of the Public Works Department, exercise complete control so far as distribution of water is concerned, as can be seen from Board's Standing Order No. 84. The concurrent findings of both the Courts below are to the effect that the user in the past has been with the permission of the Public Works Department. This user had gone on for over 40 years and the penal water rate has been levied in respect of such user which merely continued in the fasli year 1333. The authority or permission given by the Public Works Department is not shown to have been withdrawn or revoked at any time prior to the levy of this penal water rate, and in our opinion the user of the water during the fasli in question must be deemed to have been with due authority; till such authority is revoked or withdrawn the user cannot be

penalised. To this extent therefore the decree of Wadsworth J. must be modified; the decree of the First Court, i. e. of the District Munsif, Kumbakonam, is accordingly restored. As the Letters Patent appeal succeeds in part and fails in part the parties will bear their own costs throughout.

C.R.K./D.S. *Appeal partly succeeds.*

A. I. R. 1938 Madras 402

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Ikkassintakath Abdurahiman and another — Petitioners.

v.

Nadakkavu Malikkal Beeran Koya — Respondent.

Referred Case No. 5 of 1937, Decided on 10th December 1937, stated by Commissioner for Workmen's Compensation, Madras, D/- 21st January 1937.

Workmen's Compensation Act (1923), S. 8— Allotment or distribution of compensation made to dependant — Dependant dying — Compensation will not revert to employer but will devolve on descendants of dependant.

Once an allotment of compensation to a dependant or a distribution of compensation money among several dependants is made, the compensation so allotted or distributed becomes the property of the dependant and if the dependant dies, the said sum being his property will devolve on his or her heir or heirs and will not revert back to the employer. [P 402 C 2]

K. N. Kumaran — *for Petitioners.*

K. Kuttikrishna Menon—*for Respondent.*

Venkataramana Rao J. — This is a reference under S. 27, Workmen's Compensation Act (8 of 1923) made by the Commissioner for Workmen's Compensation in the following circumstances : A workman by name Saban employed under the respondent died in or about July 1934. A claim for compensation was preferred by his mother Pathumma under the Act. A question was raised whether the employer was liable to pay compensation to her. The matter was carried to the High Court and by an order dated 1st September 1936, it was decided by Burn and Lakshmana Rao JJ., that the employer was liable to pay compensation to the said Pathumma. Thereupon the Commissioner by his order dated 26th September 1936 decided that the only dependant of the deceased workman was the applicant Pathumma and he therefore allotted the entire compensation to her. The entire compensation referred to was a lump sum of Rs. 552 paid by the employer in pursuance of S. 8, Workmen's Compensation Act. The Act obliges every employer who is liable to pay compensation to deposit the amount which he is liable to pay under the Act with the Commissioner, in order that he may get full satisfaction of the claim. On such deposit being made, the Commissioner has to find out who the dependants are so that he may effect a distribution among them. Under Cl. 7 of S. 8, if the dependant happens to be a woman or a person under a legal disability, the Commissioner is enjoined to invest the compensation money for the benefit of the woman or of such person during his disability. It is therefore clear that once an allotment of compensation to a dependant or a distribution of compensation money among several dependants is made, the compensation so allotted or distributed becomes the property of the dependant and if the dependant dies, the said sum being his property will devolve on his or her heir or heirs. The Commissioner, in pursuance of Cl. 7 of S. 8 of the Act, directed an immediate payment of Rs. 50 out of the said sum of Rs. 552 to Pathumma and ordered that the balance be invested on her behalf in the Post Office Savings Bank and paid to her at the rate of Rs. 21 a quarter in advance beginning from October 1936. Before she could receive any sum, the said Pathumma died and an application was put in by her sons who are admittedly her legal heirs claiming the said amount. This claim was resisted by the employer (respondent 1) who contended that as Pathumma died, the compensation money was liable to be refunded to him. The Commissioner was inclined to the view that by operation of Cl. 4 of S. 8 and S. 9, the amount is liable to be refunded to the employer, but however as he was not quite sure about that view, he has made this reference under S. 27 of the Act.

It seems to us that the view of the Commissioner is not sound. Under Cl. 4 of S. 8, the right of the employer to get a refund only arises when a workman dies without any dependant and the Commissioner at the time of the distribution knows that he has left no dependant within the meaning of the Act. But if the workman leaves a dependant and the claim of that dependant is recognized by the Commissioner as the person entitled to receive the

compensation, any claim on the part of the employer for a refund can no longer arise under that clause. S. 9 also has no bearing on the facts of this particular case. The first part of that section provides that no lump sum or half monthly payment payable under the Act is capable of being alienated or subjected to attachment. This is for the purpose of securing the benefit which the Workmen's Compensation Act is intended to provide for the workman or the dependants of the workman. This part of the section has therefore no application to the present case. The other part of the section in S. 9 is that no lump sum or half yearly payment shall pass to any person other than the workman. This contemplates that the compensation is payable to a workman and cannot be claimed by any person by operation of law. Therefore before that clause can come into operation there must be an existing workman to whom it is payable and it has no application to a case where the workman died before the award of compensation. In the case of a workman who is alive and to whom the compensation is payable, the Act says that it must be paid to him and it should not go to any other person, for example, if he becomes an insolvent, his trustee in bankruptcy cannot claim the sum for the benefit of his creditors. This section therefore has no application to this case where the money has been allotted to Pathumma, the mother of the workman, who is a dependant under the Act. It has become her property; it has been recognized to be her property by the said compensation money being invested in the Post Office Savings Bank by the order dated 26th September 1936. We are therefore of the opinion that the sons of Pathumma are entitled to be paid the amount due and payable under the order dated 26th September 1936 and we answer the reference accordingly. We see no reason to make any order as to costs.

C.R.K./B.D. *Answer accordingly.*

*** A. I. R. 1938 Madras 403**

BURN AND MOCKETT JJ.

In re Rahiman Khan Sahib—Prisoner.

Referred Trial No. 140 and Criminal Appeal No. 556 of 1937, Decided on 1st December 1937, referred by Court of Session, North Arcot Divison, D/- 5th October 1937.

*** Criminal Trial—Evidence—Statements of witnesses accused in counter-case are admissible as evidence.**

The dictum that the statements of witnesses are not admissible as evidence merely because they happen to be the statements of persons who are accused of the same offence in a counter-case is clearly wrong: *(1937) M W N Cr 244, Dissent.* [P 405 C 2]

V. T. Rangaswamy Ayengar — *for Prisoner.*

Public Prosecutor — *for the Crown.*

Burn J.—The appellant has been convicted of murder and sentenced to death by the learned Sessions Judge, North Arcot. The appellant was tried along with six other Mahomedans for offences of rioting and murder. The appellant alone was charged under S. 148, I. P. C. for rioting armed with a deadly weapon and for murder. The other accused were charged under S. 147. The learned Sessions Judge found that no common object had been established and therefore the charges under Ss. 147 and 148 fell to the ground. But with regard to the charge of murder the learned Sessions Judge found it proved that the appellant caused the death of an Adi-dravida named Nondi by stabbing him in the chest with a spear or some such weapon.

The death of Nondi was caused in the course of a riot, using the word in a popular sense, which occurred on the night of 23rd May 1937 near the Adi-dravida quarters in the village of Kottaicheri. Accused 7 was employing an old Adi-dravida woman (P. W. 4) to be in charge of his sheep and the sheep were being taken out for grazing by an Adi-dravida boy (P. W. 3). On the evening of the 23rd May, when this young shepherd brought the sheep back, one kid was missing. He was reproved by P. W. 4 and when he said that he was not responsible P. W. 4 gave him a slap on the cheek. Then the boy ran and fetched his father (P. W. 5) who came and remonstrated with P. W. 4 and there was a quarrel between them. P. W. 4 then went to the village of Sathgar where the Mahomedans live, and fetched accused 7. Up to this point, as the learned Sessions Judge observes, the story told by the prosecution agrees with that told by the defence, but at this point the accounts diverge. According to the prosecution, accused 7 beat P. W. 5, according to P. W. 6, with a stick but, according to P. W. 5 himself, only with his hands

and fists. While accused 7 was beating P. W. 5, Nondi (the deceased) is said to have run up and suggested that as it was dark the matter might be left over till the morning for discussion. Then accused 7 is said to have taken umbrage at Nondi's interference and to have beaten him with a stick and Nondi is alleged to have beaten accused 7 with the stick, snatching it from his hand. At this point accused 1 (the present appellant) is alleged to have stabbed Nondi in the chest with a spear (barji).

Several Adi-dravidas were examined on the side of the prosecution. P. Ws. 3 and 4 did not pretend to know anything about the stabbing of Nondi. P. W. 5, the father of P. W. 3, told the story which has already been outlined and to very much the same effect is the evidence of P. Ws. 6 to 9. The learned Sessions Judge has left out of consideration the evidence of P. Ws. 5 and 7 for reasons which he has given and which are weighty. It is urged before us that the evidence of P. Ws. 6, 8 and 9 is not any more worthy of credence than that of P. Ws. 5 and 7. We agree with the learned counsel for the appellant that the evidence of the prosecution witnesses was of an unsatisfactory character. It was proved that all the accused excepting the 6th had injuries upon their person. Accused 7 was quite severely hurt. He had an arm broken and also had an incised wound on his forehead and three cuts on his head as well as other more trivial injuries. None of the prosecution witnesses will admit any knowledge of the manner in which these injuries came to be inflicted upon the accused. The appellant himself had a lacerated wound on the top of his head towards the right side; and a contusion on his left arm and on his right thumb. The evidence of these witnesses cannot however be wholly discredited merely because they refuse to say how the opposite party came by their injuries. That is a common feature of riotng cases. It has been brought to our notice that P. Ws. 5, 7, 8 and 9 and three others, Adi-dravidas, were accused in a counter case tried by the same learned Sessions Judge in which judgment was delivered on the same day as in the case with which we are dealing. In that case four of the Adi-dravidas were convicted of offences under Ss. 323, 324 and 325, I. P. C., and were sentenced to imprisonment ranging from two to three years.

Tho name of the appellant as the person who had inflicted the fatal wound upon Nondi was given to the village munsif (P. W. 10) by P. W. 8 at about 10-30 the same night. Ex. E is the report of the village munsif to the police in which he reports that accused 1, 2, 3, 4, 5 and 7 had quarrelled with Adi-dravidas (P.Ws. 5, 7, 8 and 9 and two others) and that the appellant had stabbed Nondi in the chest with a spear and that Nondi was dead as a result thereof. The actual statement of P. W. 8 was not taken down by the village munsif in writing but he reported the substance of it after he had been to the scene of the crime and had seen the corpse. It was pointed out that P. W. 8 in his evidence before the committing Magistrate had stated that he had not given the names of the accused to the village munsif. Also before the committing Magistrate, P. W. 8 said that the appellant stabbed Nondi with a bichuva. In the Sessions Court, P. W. 8 said that he had not told the committing Magistrate that he had not given the names of the accused to the Monigar and he said that he had always described the weapon used by the appellant as a barji and not a bichuva. There seems to be no reason to doubt that in the committing Magistrate's Court he did say that he had not given the names of the accused to the village munsif. But in saying so he was clearly wrong, because he had given the names of all the accused (excepting the 6th) to the village munsif. Nobody suggests that the village munsif had any motive to prepare a false report in this case, or any reason to take sides with the Adi-dravidas against the Mahomedans.

The names of all these accused are recorded in Ex. E and there is not the slightest reason for disbelieving the village munsif when he says that he got the names from P. W. 8. As to the description of the weapon, it is quite clear that P. W. 8 has no very definite ideas about the difference between a bichuva and a barji and a knife. In the committing Magistrate's Court after saying that accused 1 stabbed Nondi with a bichuva, he apparently went on to say that that was the barji that he referred to, and in another place he said that accused 1 was the only person with a knife. He stated that the bichuva was a span long and two fingers broad. Whether he was referring to the whole of the weapon or only to the blade is not clear. Since in his evidence he alleged that accused 1 at first struck

Nondi with the handle of the weapon, holding the blade in his hand, it would seem likely that when he said the bichuva was one span long he must have been referring only to the blade. We are asked to discredit the evidence of P. Ws. 6, 8 and 9 because P. Ws. 6 and 8 alleged that accused 6 was there whereas accused 6 has been acquitted by the learned Sessions Judge. Now the learned Sessions Judge has acquitted accused 6 not as the result of a definite finding that he was not present, but mainly for two reasons (1) that his name was not found in Ex. E, i. e. his name was not given by P. W. 8 to the village munsif at the earliest opportunity, and (2) because P. W. 9 did not see him at the scene of the offence. We do not think that P. Ws. 6 and 8 can be discredited merely because they say that accused 6 was there and accused 6 took part. It is not impossible that accused 6 may have been there and may have taken part. He has only been acquitted because the learned Sessions Judge found the evidence against him insufficient.

All the assessors found the appellant guilty of the offence of murder with which he was charged, and in spite of the unsatisfactory nature of the evidence to which we have referred, we do not think that they could have come to any other conclusion. It is certain that all the accused except the 6th were there. The appellant is not a particularly prominent man amongst the Mahomedans and there is no reason suggested why he should have been singled out as the person who stabbed the deceased if it were not the truth. He has been mentioned as the actual stabber since the very first. We therefore think the learned Sessions Judge was right in agreeing with the assessors and finding the appellant guilty of murder. We cannot however agree with the learned Sessions Judge that there are no extenuating circumstances in this case. On the contrary we think that this is undoubtedly not a case for the infliction of the capital sentence. It is quite clear that this stab was dealt by the appellant in the heat of passion in a fight ensuing upon a sudden quarrel. Almost all the elements of Excep. IV to S. 300, I. P. C. appear from the prosecution evidence. It does not however appear that the appellant did not take undue advantage and did not act in a cruel or unusual manner and therefore we are unable to say that Excep. IV to S. 300, I. P. C. applies. We are however able to say that the offence having been committed in these circumstances, the proper sentence is one of transportation for life. Further we think that this is a case in which the Local Government may well be moved to remit some portion of the sentence of transportation for life. Since the offence is one of murder, we cannot do more for the appellant than to reduce his sentence. We accordingly confirm the conviction for murder, set aside the sentence of death and substitute a sentence of transportation for life.

Our attention has been drawn to a judgment of Newsam J. in *Sanna Basya* v. *Emperor*,[1] which we think needs some comment. The learned Judge was dealing with the appeal of six persons who had been convicted of rioting and constructively of culpable homicide not amounting to murder. The learned Judge says that there was a free fight and apparently, as in the case before us, both parties had been charged and put on their trial. The learned Judge says :

> The prosecution witnesses in this case were mostly accused in the other case. Their statements do not amount to evidence because they are the statements of persons who were themselves accused of the same offence in this very affray or free fight and also because they have admittedly not stated the whole truth.

With all respect to the learned Judge this dictum is clearly wrong. We think it was probably uttered in a hasty moment and that the learned Judge had no idea that it would be reported, as it has been in (1937) M W N Cr 244.[1] We think it necessary to mention this because it will be disastrous if the lower Courts proceed to act upon the principle that the statements of witnesses are not evidence merely because they happen to be the statements of persons who are accused in a counter-case.

C.R.K./D.S. *Sentence reduced.*

1. (1937) M W N 1196=(1937) M W N Cr 244.

---

* A. I. R. 1938 Madras 405

VENKATASUBBA RAO AND NEWSAM JJ.

Suppan Chettiar, s/o Adaikalam Chettiar — Appellant.

v.

Rangan Chetty and others — Respondents.

Appeal No. 36 of 1928, Decided on 16th August 1937, against decree of Sub-Judge, Tanjore, D/- 12th September 1937.

*** (a) Transfer of Property Act (1882), Ss. 83, 103—Mortgagee minor — Deposit is effective only from date when he is properly represented by guardian.**

The deposit under S. 83 is only a form of tender and a tender to be effective must be made to an adult, so that where the mortgagee happens to be a minor, the tender will be bad, unless made to his guardian. And a deposit into Court becomes effective only from the date when he is properly represented by a guardian : *27 Bom 23; A I R 1922 All 355; A I R 1926 All 665 and A I R 1925 Mad 1017, Rel. on.* [P 408 C 2]

*** (b) Mortgage — Redemption — Clog — Right of redemption to accrue after certain period— If right not exercised on such date, mortgagor subsequently to have right to redeem in any succeeding year only on a particular day of the year— Latter clause held clog.**

It was provided in a mortgage deed that the right of redemption will accrue after 10 years from the date of mortgage. There was a further stipulation that if the mortgagor did not redeem the property on that date, thereafter he was entitled to redeem in any succeeding year only on a particular day of the year :

Held that latter stipulation was a clog on the equity of redemption : *A I R 1922 P C 17, Ref.* [P 409 C 1]

(c) Civil P. C. (1908), S. 100 — Question of law on construction of document can be raised in appeal.

Where a question of law is raised for the first time, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. Hence the question as to whether a stipulation in a mortgage deed amounts to a clog or not can be raised for the first time in appeal as it is unnecessary to go into any question of fact : *(1892) A C 473; (1922) 2 A C 541 and A I R 1934 P C 213, Rel. on.* [P 410 C 1, 2]

*** (d) Civil P. C. (1908), O. 34, Rr. 7, 10— General account regarding amount payable to mortgagee is complete and final — Subsequent claim for mesne profits up to date of redemption decree is barred — But claim for mesne profits from date of such decree to date of recovering possession is maintainable.**

In a redemption suit, the account to be taken is of the amount due on the date fixed for redemption and not merely up to the date of the suit. O. 34, Rr. 7 and 10 enact so in express terms. They provide that an account shall be taken, first of the amount due to the mortgagee up to the preliminary decree and secondly, of the charges and expenses properly incurred by him from the date of that decree to the date fixed for redemption. The language of O. 34, R. 10 is significant for what it contemplates is the final adjustment of the amount payable to the mortgagee, that is to say a general account has to be taken, which is to be complete and final. Hence a subsequent claim for mesne profits up to the date of redemption decree is barred by res judicata : *34 Cal 223; 31 Bom 527 and 30 All 225, Rel. on.* [P 411 C 1]

But as regards the profits due subsequent to such decree till recovery of possession, the position is different. After payment to the mortgagee of the money payable to him under the decree, he is bound to surrender the property and if he fails to do so, his possession is wrongful. A suit for subsequent mesne profits is maintainable as in respect of such suit no question of res judicata can arise : *14 C W N 1001, Rel. on.* [P 411 C 1]

*** (e) Mortgage—Redemption — Puisne mortgagee in redeeming prior mortgage, becoming entitled to mesne profits — He cannot tack on such mesne profits to sum due under his mortgage in redemption by subsequent mortgagee merely because prior mortgagee's rights had vested in subsequent mortgagee — Liability of original mortgagor if any for such mesne profits held only equity available against him personally but not covenant running with land.**

A property was mortgaged to *X* usufructuarily. The owner was entitled to redeem after a certain period. It was subsequently mortgaged to *Y* entitling him to redeem it from *X* and he was to have it for another fixed period. A third mortgage was similarly created in favour of *Z* who too was entitled to redeem from *Y* after his period. As soon as *Y* became entitled to redeem the property, he did not do so. Thereupon *Z* redeemed the first mortgage. Subsequently *Y* sued for redemption and got a decree but got possession only through Court. On the expiry of his (*Y*'s) term *Z* applied for redemption by depositing the mortgage amount in Court but as *Y* did not accept the amount sued for redemption. Thereupon *Y* contended that the deposit was insufficient as the mesne profits between date of his redemption decree and recovery of possession was not deposited with the mortgage amount and in any event sought to enforce it against *Z* as covenant running with the land :

Held that *Y* could not tack on the mesne profits due to him from the first mortgage to the sum due to him under his mortgage merely because *Z* happened to have redeemed the first mortgage. In respect of that, other remedies might be open to him. [P 412 C 1]

Held further that granting that the amount could be claimed from the orginal mortgagor, it could not be enforced against *Z* as it was not a covenant running with the land but only an equity available against the owner personally : *A I R 1921 Mad 183, Rel. on.* [P 412 C 1]

*** (f) Transfer of Property Act (1882 before amendment of 1929), S. 84 — Mortgage with possession — Deposit made under S. 83 withdrawn and mortgagor not able to produce amount even at time of redemption — He is entitled to mesne profits only for period when deposit was in Court.**

The assignee of a mortgagor who had mortgaged his property with possession deposited the amount under S. 83. The amount was not accepted by the mortgagee. Subsequently the assignee withdrew the amount from the Court and it was found that he was not able to produce the amount even at the time of the suit for redemption :

Held that he was entitled to mesne profits only during the period the amount was in Court deposit but not subsequently : *A I R 1926 Mad 601, Applied.* [P 413 C 1]

B. Sitarama Rao and S. R. Muthuswamy Aiyer —*for Appellant.*

K. S. Sankara Aiyer and T. L. Venkatarama Iyer — *for Respondents.*

Venkatasubba Rao J. — This appeal raises some important questions of law, and has been fully argued on both sides. The suit was filed by the plaintiff for redemption in 1921. He became entitled to redeem the suit mortgage on 1st July of that year and made the statutory deposit in Court under S. 83, T. P. Act, on 5th July. Defendants 3 to 5, to whom the mortgage had, by then, been assigned, refused to accept the deposit as valid and thereupon the present suit for redemption was filed on 16th September 1921. The parties have employed their ingenuity to protect it till now, i. e. for over 15 years and during the greater part of this period the mortgage amount, namely Rs. 14,000 remained in deposit in Court without carrying interest. For a proper appreciation of the points raised, it will be necessary to set out the facts of this case in some detail.

The village of Virakudi, the suit property, belonged to the zamindar of Neduvasal, who granted a usufructuary mortgage in respect of it, by Ex. A, dated 2nd April 1899, to one Oppilamani Chetty, to secure the repayment of Rs. 11,000 and it was stipulated by the deed, that the mortgagee was to be in possession till 30th June 1911 and that the mortgage would become redeemable on 1st July of that year. Then on 29th June 1901, the zamindar created a second mortgage (Ex. A) in favour of three brothers, of whom we are concerned with defendants 1 and 2. The mortgage amount was Rs. 14,000 out of which Rs. 3000 was paid in cash to the mortgagor and the balance, namely Rs. 11,000 was reserved with the mortgagees to be paid to Oppilamani Chetty when his mortgage became redeemable. As regards the duration of this mortgage, the deed contained the following covenants which have given rise to a good deal of controversy :

> You will enjoy in lieu of interest for ten years after the expiration of the period fixed in the othi deed of Oppilamani Chetty, all the profits accruing from the village . . . I shall pay the principal sum of Rs. 14,000 on the expiry of the due date and redeem the mortgage . . . If in any year after the stipulated period I pay the amount, I shall pay it on the 30th of Ani, and redeem the mortgage and take back this othi deed.

The ten years mentioned in this clause would expire on 30th June 1921: but there is a further stipulation that if the mortgage is not redeemed on the due date, i. e. on 1st July 1921, it can be redeemed in any succeeding year, only on the 30th Ani. Whether this stipulation is valid and, if so, in the events that have happened, what is its effect—are some of the questions raised in the present appeal. To continue the narrative, the zamindar next granted in favour of the plaintiff on 16th December 1910, two usufructuary mortgages for about Rs. 86,000 evidenced by Exs. C and C-1, which together may be taken as constituting the third mortgage for the purposes of this appeal. By Ex. C, the plaintiff was directed to redeem the two earlier mortgages mentioned above, namely those dated 2nd April 1899 and 29th June 1901. Defendants 1 and 2, the second mortgagees (mortgagees under Ex. B), failed to redeem the first mortgage on 1st July 1911, but it was, however, redeemed by the plaintiff, who paid Rs. 11,000 due to Oppilamani Chetty on 30th August 1911. The plaintiff, it will thus be seen, became in virtue of this transaction the assignee of the first mortgage.

Then defendants 1 and 2 asserted their right to redeem the plaintiff and on 24th July 1913, deposited in Court the sum of Rs. 11,000. On the plaintiff refusing to receive the amount, they filed O. S. No. 40 of 1913 to enforce their right of redemption, obtained a decree on 15th July 1914, and in execution thereof got possession of the village through Court on 21st September of the same year. It was now the turn of the plaintiff, the third mortgagee, to claim the right to redeem the prior mortgage, Ex. B, in favour of defendants 1 and 2. As already stated, the term of that mortgage expired on 30th June 1921. The plaintiff immediately took action by depositing into Court Rs. 14,000 on 5th July 1921, but having proved of no avail, he commenced the present suit, as mentioned above on 16th September 1921. In the mean time defendants 1 and 2 transferred their mortgaged interest to defendants 3 to 5, by Ex. I, dated 17th June 1921 and that is why they have been impleaded.

Several defences were raised and one of them was that the mortgagees were entitled in computing the ten years fixed in Ex. B, to exclude the period from 24th June 1913 to 21st September 1914 that is about 15 months. They pleaded, putting forward that contention, that the suit was premature and the Subordinate Judge, who tried the suit in the first instance, gave effect to the objection in limine and dismissed the suit in November 1922,

Against this decision the plaintiff filed an appeal and the High Court (Krishnan and Venkatasubba Rao JJ.) on 27th August 1926, reversed the decree of the Subordinate Judge and remitted the suit for disposal on the merits. The case has accordinlgy been heard by the lower Court and the present decree of the Subordinate Judge which bears the date 12th September 1927, runs thus :

In the result, there will be a preliminary decree for redemption to be effected on 14th July 1928, before which date the plaintiff may either deposit Rs. 14,000 to the credit of defendants 3 to 5 or get the deposit in O. P. No. 25 of 1921 to be transferred to the credit of this suit. If that is done, defendants 3 to 5 may draw the amount and should deliver up the mortgaged property and all documents in their possession or power to the plaintiff.

It will be observed that under the above decree, the deposit made in Court on 5th July 1921, is held to be effective only from 14th July 1928, on which date the mortgagee-defendants 3 to 5 have been directed to deliver up the mortgaged property. The plaintiff attacks this decree and has filed the present appeal ; a memorandum of objections has been filed by defendants 3 to 5, who also contend that the decree is in certain respects erroneous.

These briefly are the facts that have led up to the present appeal, and the first question that arises is whether the deposit made on 5th July 1921 is in view of the terms of Ex. B, valid. A few further facts bearing directly on this point may be here stated. The period of the mortgage was due to expire on 30th July 1921 and the plaintiff by his notice (Ex. P), given two months in advance, informed defendants 1 and 2 that they should receive the amount of Rs. 14,000 on 30th June and give up possession of the village. To this they replied by Ex. M, dated 18th June 1921, stating that on the previous day the mortgage had been assigned to defendants 3 to 5. It has not been suggested that the motives of the parties in entering into this transaction have a bearing on the question, but the fact remains that the transfer was made after the plaintiff's notice and one day before the reply was sent. It may be noted that it is by reason of this transfer, complications have ensued and that the resulting situation has enabled defendants 3 to 5 to put forward their main defence. On 4th July 1911 the plaintiff by Ex. F, informed both the transferors and the transferees that he would deposit the amount in Court on 5th July. The transferees (defendants 3 to 5) being minors, two notices were sent on that date, one to their mother and guardian Meenakshi Achi and the other to her authorized agent Ranga Aiyangar. Then on 5th July the plaintiff deposited into Court, Rs. 14,000 and the statutory notice under S. 83 was issued on the 6th and served on Ranga Ayyangar on the 9th. It was not till 27th July that the mother of the minors was appointed their guardian ad litem, but this delay, it may be observed, as the case diary shows, is not attributable to the plaintiff. On 16th August, Meenakshi filed an affidavit in Court, containing two objections, first, "that the amount has not been paid or deposited in time to enable redemption within the month of Ani," and secondly, that the amount deposited was not sufficient. It was after this refusal to receive the amount, that the plaintiff filed the present suit.

It is urged for the plaintiff that the second stipulation in the deed referring to 30th Ani clogs the equity of redemption and is therefore void. But Mr. Sitarama Rao's further contention (with which we shall first deal) is, that the plaintiff by making the deposit on 5th July fulfilled the requirement even of this condition. The deposit under S. 83 is only a form of tender and, there can be no doubt that a tender to be effective must be made to an adult, so that where the mortgagee happens to be a minor, the tender will be bad, unless made to his guardian. The due date under this stipulation was 30th Ani or 14th July 1921. Although the deposit had been made on 5th July, there was not until 27th July a guardian capable of giving a valid discharge. Under S. 84, (the appeal has been argued on the footing that the sections as they stood previous to the recent amendment apply) interest ceases to run as soon as the mortgagor "has done all that has to be done by him", to enable the mortgagee to take the amount out of Court. S. 103, enacts inter alia that where a deposit is to be accepted by "any person incompetent to contract" an application may be made to the Court to appoint a guardian ad litem for the purpose of "taking out of Court such deposit" and for the performance of all consequential acts. It is thus perfectly clear that a deposit into Court (which, as stated above, is equivalent to a tender) becomes effective where the person concerned is a minor, only from the date when he is properly represented by a guardian.

This view has been taken in several decisions, 27 Bom 23,[1] 44 All 64,[2] 48 All 611[3] and 49 M L J 327[4] and we must therefore proceed upon the footing that till 27th July, there was no valid deposit. Mr. Sitarama Rao, however, contends that assuming that the deposit was inoperative for the year then in question, it should in any event be held to be effective from 30th Ani of the following year. The plaintiff's petition, which accompanied the deposit, has been destroyed and is therefore not available but there can be no question that what he desired and insisted upon, was that the amount be received and the property delivered up immediately. The notices that preceded the deposit are quite clear on the matter, for, they contain no trace of any intention that the delivery should be postponed to the year following. Moreover, as Mr. T. L. Venkatarama Aiyer, for the respondents, rightly points out, the plaintiff's conduct, in filing the plaint long before the due date in the following year arrived, shows that this contention is untenable.

But the contention that the stipulation in question is a clog on the equity of redemption, ought, in our opinion, to prevail. If the first provision in Ex. B, stood alone, the right to redeem would accrue on 1st July 1921, and could be exercised at any time thereafter. But what is the effect of the added clause? Redemption is by reason of the 10 year term prevented till 1st July. On that date and not till then does the right for the first time accrue; but the moment it accrues, the further clause seeks to impede and hamper that right. If the mortgagor is for some reason unable to redeem or prevented from redeeming on 1st July, the right vanishes for the time being, and although it accrues periodically again, it remains in force for a single day in each year, so that if the mortgagor forgets the due date, he does so at his peril. His right is thus ever in jeopardy, being liable to be defeated by his own fault or omission, or by the mortgagee's cunning or evasion. In 49 I A 60[5] the property was mortgaged on 9th June 1908 by a deed which provided that "after five years at the end of Jeth 1320 fasli, in the following season" the mortgagor was to redeem the property, that in default the mortgagee was to have the option of taking possession and that for 12 years from his doing so, the mortgagor was not to be entitled to redeem. At the stipulated time, the mortgage money was not paid and the mortgagee on 14th February 1915, obtained possession. On 18th June 1915 the suit for redemption was instituted. Their Lordships after referring to the fact that the mortgage was expressly stated to be for five years and after that period the principal money became payable, observe :

> This under S. 60, Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

Then they go on to say :

> The section is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their natural force and effect. In this view the mortgagor's right to redeem must be affirmed.

It is unncessary to decide whether S. 60 forbids any limitation whatsoever, irrespective of its nature, being placed upon the mortgagor's right to redeem "after the principal money has become due". Under the English law, a mortgagor may be precluded from redeeming for a reasonable fixed period, such as five or seven years, (Snell's Equity (1934) Edn. 21, p. 295), but the limitation, however, on his right to redeem must be reasonable and not result in making the possibility of redemption a mere pretence : ibid pp. 295 and 296. In India, no doubt, longer terms of redemption have been allowed, but Mr. Sitarama Rao contends that once a period is fixed, no provision, whatever its nature, curtailing the mortgagor's right to redeem after the expiry of the fixed term, should be held to be valid. This according to him, is the result of the express words of S. 60; whether this be so or not, in this particular case there can be no doubt that the stipulation is oppressive and unreasonable and is in the nature of a clog. The suggestion that the mortgagor may safeguard his position by paying the mortgage money at any time before the due date, but defer claiming possession till that date arrives, is obviously without force, for, is the mortgagor expected to part with his money in the hope of getting his property at some later date? In some cases, it seems to

1. Pandurang v. Mahadaji, (1903) 27 Bom 23=4 Bom L R 714.
2. Sheo Saran v. Ram Lagan Das, (1922) 9 A I R All 355=64 I C 418=44 All 64=19 A L J 852.
3. Gokul Kalwar v. Chandar Sekhar, (1926) 13 A I R All 665=96 I C 1=48 All 611=24 A L J 769.
4. Appa Pai v. Somu, (1925) 12 A I R Mad 1017 =90 I C 754=49 M L J 327.
5. Mohammed Sher Khan v. Seth Swami Dayal, (1922) 9 A I R P C 17=66 I C 853=49 I A 60=44 All 185=25 O C 8 (P C).

have been held, that where even after the due date, the mortgagor is prevented from redeeming excepting in the month of Ani or Jeth, as the case may be, such a provision is not a clog on the equity of redemption, the idea being that the intention is that there should be no redemption when the crops are on the land. Here, the mortgagor could exercise his right at any time during a full month and the hardship to which we have adverted, does not arise. But in the present case, the condition not only restricts but even imperils the mortgagor's right to redeem and is so unfair and unreasonable as to amount to a clog. We therefore hold that the mortgagor was entitled to redeem on 27th July 1921, on which date alone, as above stated, he should be deemed to have made a valid deposit in Court.

Mr. Venkatarama Aiyer for the respondents, however, maintains that the point was not taken in the lower Court and ought not to be allowed to be raised for the first time here. We cannot agree with this contention. In the notices that preceded the suit as also in the plaint (see paras. 3, 7, 8 and 10) the right that was asserted, was the right to redeem on the expiry of the fixed term of ten years; that assertion necessarily implies that any condition inconsistent with the exercise of that right is unenforceable. Defendants 3 to 5 denied the right to redeem in para. 4 of their written statement and appropriate issue was raised. The fact that in para. 12 of the plaint there is a reference to 14th July 1921, the alternative date, can make no difference. Although therefore in the lower Court no express reliance was placed on the doctrine of the clog on equity, it cannot be said that the point was not involved in the contentions actually raised. Moreover, as observed by Lord Watson in (1892) A C 473,[6]

> even where a question of law is raised for the first time, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea, (page 480).

To decide whether the stipulation referred to amounts to a clog or not, it is unnecessary to go into any question of fact. (*See also* (1922) 2 A C 541[7] at p. 554 and 56 All 634[8] at p. 642.) In the present case, the interests of justice require that the point should be allowed to be taken even granting that it had been raised here for the first time. The plaintiff, as has been shown above, acted with care and diligence, but the mortgagees resorted to trickery with a view to make redemption difficult. The objection therefore fails.

The defendants next object to the sufficiency of the deposit on two grounds. They claim first that a certain sum, alleged to have been expended by them on repairs, should have been included. This amount is claimed under S. 72 (b), T. P. Act, on the ground that the repairs became necessary for the preservation of the mortgaged property. It is extremely doubtful whether any repairs were effected at all before the date of the suit. Defendants 3 to 5 became entitled to the mortgage under Ex. I on 17th June 1921, and the repairs are alleged to have been made in December 1920. By that time they had not (it is admitted) even paid the consideration for the assignment although they profess to have obtained possession. It is further improbable that any repairs would have been effected just as the due date was approaching. The accounts produced, as a glance at them will show, were not maintained in the regular course and they cannot be acted upon. Moreover, granting that the repairs were in fact made, we agree with the learned trial Judge, that it has not been shown that they became necessary for the preservation of the property. This contention is therefore disallowed.

It is next contended that the mesne profits, of which defendants 1 and 2 had been deprived for the period between 24th June 1913 and 21st September 1914 ought to have been included. Regarding this amount two questions arise: first, are these profits legally recoverable from the plaintiff? and secondly, if they are, was he bound to include the value of these profits in the deposit he made? The mesne profits claimed fall into two periods: (a) from 24th June 1913 when Rs. 11,000 were deposited by defendants 1 and 2 into Court, to 15th July 1914, the date of the redemption decree passed in O. S. No. 40 of 1913 and (b) from 15th July 1914, the last mentioned date, to 21st September 1914 when defendants 1 and 2 obtained posses-

6. Connecticut Fire Insurance Co. v. Kavanagh, (1892) A C 473=61 L J P C 50=67 L T 508 =57 J P 21.

7. Yorkshire Insurance Co. v. Craine, (1922) 2 A C 541=91 L J P C 226=66 S J 708=38 TLR 845=1922 W C & I Rep 316=128 L T 77.

8. Bisheshwar Pratap Sahi v. Parath Nath, (1934) 21 A I R P C 213=151 I C 41=61 I A 378=56 All 634 (P C).

sion through Court. As to the profits due for the first of the two periods we entertain no doubt that the claim is barred by res judicata. In a redemption suit, the account to be taken is of the amount due on the date fixed for redemption and not merely up to the date of the suit. O. 34, Rr. 7 and 10 enact so in express terms. They provide that an account shall be taken, first of the amount due to the mortgagee up to the preliminary decree and secondly, of the charges and expenses properly incurred by him from the date of that decree to the date fixed for redemption. The language of O. 34, R. 10 is significant, for, what it contemplates is the final adjustment of the amount payable to the mortgagee, that is to say a general account has to be taken, which is to be complete and final. This view receives support from 34 Cal 223[9] and 31 Bom 527[10] where the question has been discussed at length. (*See also* 30 All 225.[11])

Then as regards the profits due for the second period, the position is different. After payment to the mortgagee of the money payable to him under the decree, he is bound to surrender the property and if he fails to do so, his possession is wrongful. A suit for subsequent mesne profits is maintainable, for, in respect of such suit, no question of res judicata can arise: 14 C W N 1001.[12] The result then is, that defendants 1 and 2 could have recovered from the plaintiff in a subsequent action, the mesne profits, if any, due for the short period of about 2 months between 15th July 1914 and 21st September 1914. Let it be granted that this amount was payable by the plaintiff to the mortgagees on the date of his deposit in Court; but we fail to see under what right the latter could have insisted upon this amount being tacked on to the sum due under the mortgage. The plaintiff owed no duty to them in respect of the suit mortgage; that is the all important fact which the defendants' argument has overlooked. When the plaintiff withheld possession from defendants 1 and 2, he was acting in his capacity of the first mortgagee; in the present suit, in seeking to redeem the property, the right that he asserts is that of the third mortgagee. That these two rights have vested in one and the same individual, the plaintiff, is but an accident. Let us suppose that Oppilamani's mortgage had never been redeemed by the plaintiff and that the person, whose conduct prejudiced defendants 1 and 2 was Oppilamani himself; in that case could the defendants have put forward the present claim? Again, let us suppose that the third mortgagee was not the plaintiff but someone else; in that case could the defendants have raised the present contention? In respect of the amount due from the plaintiff other remedies may be open to the mortgagees; but it is impossible to uphold the contention that the deposit was insufficient by reason of those sums not having been included.

But then it is contended that the plaintiff, who represents the mortgagor, is bound in that capacity to make good the loss sustained by the mortgagees (defendants 1 and 2). This contention is unsustainable. The mortgagor is by the terms of Ex. B relieved from the duty of giving possession, as the mortgagees themselves undertook to redeem the property and reduce it into possession by payment on the due date. It recites:

> I have directed you to pay the said othi amount at the period fixed in the othi deed and redeem the mortgage.

That they entered into such a contract, is not surprising, for, what does the bargain in essence amount to? The sum of Rs. 3000 which the mortgagees paid, was to yield no return until the arrival of the due date in 1911. Such profits as they were to get were to be only from the date of the redemption, which means that from 1901 to 1911 they were to get no interest on the sum of Rs. 3000 with which they immediately parted. On the due date again, without reference to the mortgagor, they were to redeem the property and enjoy its profits till 1921. There is no rate of interest specified, no estimate made of the rents and profits and all that the deed provides is, that in lieu of interest on Rs. 14,000, the profits were to be enjoyed from 1911 to 1921, though as already observed, Rs. 3000 out of this amount was paid on the date of the deed itself in 1901. The whole scheme of Ex. B appears to negative the notion of any duty on the part of the mortgagor to give possession; he was to be paid Rs. 3000 immediately and the mortgagees were to obtain possession at the end of ten years

9. Satyabadi Behara v. Mt. Hira Bati, (1907) 34 Cal 228=5 C L J. 192.
10. Rukhmini Bai v. Venkatesh, (1907) 31 Bom 527=9 Bom L R 958.
11. Ram Din v. Bhup Singh, (1908) 30 All 225 = 1908 A W N 96=5 A L J 192.
12. Sahari Dutt v. Sheikh Ainuddy, (1910) 14 C W N 1001=6 I C 336.

and enjoy the profits for a further period of ten years, commencing from the due date. Moreover such loss, if any, sustained by defendants 1 and 2 was attributable to their own fault. In the first place they committed default by offering to redeem the property not on the due date but two years later and secondly, they could have recovered, as pointed out above, the alleged loss, the bulk, if not the whole, of it (it is more than doubtful if any loss was really sustained for the short period between 15th July 1914 to 21st September 1914), in the redemption suit itself by claiming it there. There was good reason for the mortgagor not having assumed the responsibility at the time of Ex. B, for one might well assume that the parties were quite alive to the fact that, should any delay or default occur, the remedy lay in the hands of the mortgagees themselves, as it would be within their own power to set off any loss against the mortgage amount they were to pay. This being so, we must hold that this contention is untenable.

Further, granting that the loss can be claimed from the original mortgagor, that would be recoverable in an independent proceeding or by way of counterclaim, but it is difficult to see how the mortgagees would be entitled to have the loss tacked on to the mortgage amount. So far as defendants 3 to 5 are concerned, the rights under the mortgage are assigned to them by Ex. 1 (the deed of transfer) but the right to the alleged loss is not among such rights, not being annexed to the mortgage or binding on the land. So much for the benefit of the covenant, but there is a further difficulty, as the person against whom the covenant is now sought to be enforced, is not the original mortgagor but his assignee, the plaintiff (for being the third mortgagee he may be so regarded). The question is, whether the burden of the covenant can be enforced against him. The original mortgagor may be under an obligation to recoup the loss and that may be an equity available against him personally, but there is no covenant running with the land, as already explained and the plaintiff cannot therefore in any event be bound : *see* 44 Mad 301[13] at page 318 and the cases referred to therein. Provision for payment of interest would be a covenant binding on the land, but it is difficult under the peculiar terms of Ex. B., to regard the right to the mesne profits as equivalent to right to interest. This does not mean that even if the case here was one of the interest, the mortgagor would have been held liable. So this contention cannot prevail.

The result then is, that every argument directed against the sufficiency of the deposit fails; the contention that the plaintiff was not entitled to redeem when the deposit was made, we have already overruled. From the date of the deposit (now that we have held to be valid) the plaintiff will be entitled to mesne profits and in regard to them, two questions arise; first, up to what date is he entitled? and secondly, at what rate? As already stated the deposit must be held to have been made on 27th July 1921. It would appear that somewhere about the year 1928 or 1929, the plaintiff withdrew the amount from Court. In our opinion he is not entitled to mesne profits from the date of the withdrawal and this would be in accordance with the proviso, recently added by way of amendment to S. 84, T. P. Act. It reads thus :

> Provided that where the mortgagor has deposited such amount without having made a previous tender thereof, and has subsequently withdrawn the same or any part thereof interest on the principal money shall be payable from the date of such withdrawal.

But the present case is governed by the Act as it stood before the recent amendment. Then the question arises, was the law, so far as our Court was concerned, laid down in a sense different from what is now enacted by the newly added proviso? In 49 Mad 609[14] the question was more or less treated as one of fact. Deposit in Court being only a form of tender, what seems to have been held is, that the same rules are applicable to both tender and deposit. In Fisher on Mortgages it is stated :

> Interest will cease to run upon the mortgage debt from the time at which a proper tender of the whole amount is shown to have been made. But it ought to appear that from the time of the tender the money was kept ready by the mortgagor and that no profit was afterwards made of it; upon proof to the contrary thereof, interest will run : Edn. 6, page 1851.

In the Full Bench case it is observed that the fact of the tender raises the presumption that the debtor continued to be ready and willing to pay, and that the burden is cast upon the creditor to show that he was either not willing or unable to pay because

13. Ramarayanimgar v. Maharajah of Venkatagiri, (1921) 8 A I R Mad 183=61 I C 612=44 Mad 301=40 M L J 286.

14. Ramabhadra Thevar v. Arunachalam Pillai, (1926) 13 A I R Mad 601=95 I C 108=49 Mad 609=50 M L J 468 (F B).

he had utilized the moneys for other purposes. It is unnecessary to consider the rule regarding the onus of proof. From the facts here, namely that the money was withdrawn about seven or eight years ago and has not been produced even during the hearing of this appeal the inference to be drawn should be against the plaintiff, applying the test laid down in the Full Bench case.[14] We must therefore hold that the plaintiff is entitled to mesne profit from the date of the deposit in Court to the date of the withdrawal. As regards the rate, the matter has not been properly gone into by the Subordinate Judge and his finding in para. 13 of the judgment, it is conceded, cannot stand. We have decided to call for a finding from the lower Court, on the evidence already on the record, in regard to the amount of mesne profits to which the plaintiff will under this judgment become entitled. If the actual date of the withdrawal is not shown, it is agreed that the accounts shall be taken on the footing that the amount was withdrawn on 20th September 1928, that being the date on which the High Court made an order staying the execution of the decree. The case is accordingly remitted to the lower Court, with a direction that a finding shall be returned before 30th November; objections to the finding, if any, may be filed in one week. The memorandum of objections fails and is dismissed. The question of costs both of the appeal and the memorandum of objections will be dealt with after the return of the finding.

C.R.K./K.S. *Case remitted.*

*** A. I. R. 1938 Madras 413**

PANDRANG ROW J.

Kannayalal—Appellant.

v.

S. Subbaraya Chetty and others —

Respondents.

Appeal No. 145 and Civil Revn. Petn. No. 1302 of 1935, Decided on 18th November 1937, against order of Dist. Court, North Arcot, D/- 8th March 1935.

*** Married Women's Property Act (1874), S. 6—Word used in policy of assignment leading to conclusion that policy is for benefit of wife—Policy will be deemed to be trust for benefit of wife according to S. 6—Creditor of assured cannot treat policy as being property of assured and claim assignment of it.**

Where the words used in a policy of insurance lead to the conclusion that the policy was for the benefit of the assured's wife, then according to S. 6 it shall be deemed to be a trust and enure as such so long as the wife is alive. The wife may not be entitled to claim anything under the policy unless the event referred to therein happens but the trust is brought into existence, the moment the policy is taken out for the benefit of the wife. The trust attaches itself to the policy from the very moment of its birth and the policy cannot thereafter be looked upon as available to the creditors of the assured regardless of the trust imposed upon it and it is not open to a creditor to treat the policy as being a property of his debtor and to require an assignment of it and to compel the insurance company to acknowledge such an assignment as valid and binding upon them.

[P 414 C 2]

Where, therefore, although the words "the policy is for the benefit of the wife" are not to be found in the policy but it is stated therein that the amount due on the policy should be paid to the assured at the expiry of a particular period, or to his wife on the death of the assured if earlier, there is a trust for the benefit of the wife and the creditor of the assured cannot claim an assignment of it : *A I R 1932 Mad 220, Rel. on ; A I R 1934 Bom 296, Ref.* [P 414 C 1 ; P 415 C 1]

P. Viswanatha Iyer—*for Appellant.*

V. S. Rangaswami Iyengar —

for Respondents.

Judgment. — The appellant in this second appeal and the petitioner in the Revision Petition are one and the same, the appeal and the Revision Petition being alternative remedies pursued for the same purpose, namely of getting the order of the District Judge of Vellore in C. M. A. No. 65 of 1934 set aside. That was an appeal from an order passed in an application by the creditor of an insolvent for the assignment of a policy of insurance taken out by the insolvent in his favour. Respondent 2 in the petition was the Life Insurance Company and respondent 3 was the wife of the insolvent debtor. The only question that had to be decided by the Courts below was whether the life policy in question, Ex. 1, contains a trust for the benefit of the wife, respondent 3. The *verba ipsissima* "the policy is for the benefit of the wife" are not to be found in the policy, but it is stated therein that the amount due on the policy should be paid to the assured, i. e. to respondent 1 at the expiry of the period of 15 years, or to his wife on the death of the assured if earlier. In these circumstances, the Subordinate Judge was of opinion that there was no trust for the benefit of the wife and allowed the petition.

On appeal the District Judge came to the contrary conclusion and allowed the appeal and dismissed the petition. Now

the question for me to decide is whether the District Judge's conclusion is right. The Subordinate Judge distinguished the case in 55 Mad 171,[1] by saying that in that case the question had arisen only after the death of the assured whereas in the case before him the assured was alive. He also distinguished the case in A I R 1934 Bom 296,[2] on the same ground. The District Judge was of opinion however that the Subordinate Judge was not right in distinguishing the present case from the earlier case. It was held by Madhavan Nair J. in that case that the actual words "for the benefit of the wife" need not be in the policy in order to attract the provisions of S. 6, Married Women's Property Act, to any particular policy, and that if on a reading of the words used in the policy it appears that the assured intended in the event of his death that the policy should enure for the benefit of his wife, then the policy may be deemed to be for her benefit and brought within the purview of S. 6; in the particular case before him the provision regarding payment was similar to the provision in the present case, and it was held that the policy fell within S. 6, Married Women's Property Act of 1874, as amended by the subsequent Act of 1923.

The only other decision which appears to take the opposite view is (1937) 1 M L J 735,[3] where the policy contained practically the same provision about payment to the wife in case she survived the insured before the policy became matured and it was held that there was no vested interest of the wife in the policy till the death happened and that the assignment of the policy made by the insured was valid. The decisions however which were relied upon, namely (1925) 1 Ch 403,[4] (1926) 1 Ch 48[5] and (1933) 1 Ch 126,[6] were all cases in which it was held that there was a trust in favour of the wife. Where there is a trust, the insured cannot deal with the policy as he likes. This is clear from the provisions of S. 6, Married Women's Property Act. Once it is found that a policy of insurance effected by a married man on his own life was for the benefit of his wife, then the section says that it shall be deemed to be a trust and enure for the benefit of the wife according to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate. The section also indicates the person to whom in such a case the sum secured by the policy has to be paid, namely the official trustee. The only way in which a policy of this kind can be attacked by a creditor is by proving that it was effected for the purpose of defrauding the creditors. No such attempt has been made in this case. I am of opinion that if the words found in the policy lead to the conclusion that the policy was for the benefit of the assured's wife, then according to S. 6, Married Women's Property Act, it shall be deemed to be a trust and enure as such so long as the wife is alive. This does not mean of course that the wife is entitled to claim anything by virtue of the above trust straightaway. The benefit which accrues to her under the trust will be subject to other conditions in the policy but the trust is impressed upon the policy from the moment the policy comes into existence, and it cannot in my opinion be said that the trust comes into existence for the first time only after the event which is to determine the payment under the policy takes place. In other words, the wife will not be entitled to claim anything under the policy unless the event referred to in the policy happens, but the trust is brought into existence the moment the policy is taken out for the benefit of the wife. That being the case, the trust attaches itself to the policy, from the very moment of its birth, and the policy cannot thereafter be looked upon as available to the creditors regardless of the trust imposed upon it. The position therefore in law is that there is a trust impressed on the policy in favour of the wife; at the same time it cannot be said that the insured has no interest in the policy because in a certain event, namely, after the expiry of 15 years from the date of the policy, the money thereunder is to be

1. Abhiramavalli Ammal v. Official Trustee of Madras, (1932) 19 A I R Mad 220=141 I C 680=55 Mad 171=62 M L J 111.
2. Dinbai Hormasji v. Bamansha Jamasji, (1934) 21 A I R Bom 296=152 I C 168=58 Bom 513 =36 Bom L R 608.
3. Lalithambal Ammal v. Guardian of India Insurance Co. Ltd., (1937) 24 A I R Mad 645 =169 I C 481=(1937) 1 M L J 735.
4. In re Ioakimidis' Policy Trusts; Ioakimidis v. Hartcup, (1925) 1 Ch 403=95 L J Ch 24= (1925) W C Ins Rep 273=133 L T 796=69 S J 662=41 T L R 486.
5. In re Fleatwood's Policy, (1926) 1 Ch 48=95 L J Ch 195=1926 W C & Ins Rep 1=135 L T 374.
6. Cousins v. Sun Life Assurance Society, (1933) 1 Ch 126=102 L J Ch 114=(1933) W C & Ins Rep 164=148 L T 101=49 T L R 12.

paid to him if he is then alive, and it is only in the event of his death within this period that the money could be paid to his widow if she is then alive. The policy thus constitutes property in which both the insured and his wife have an interest. It is not possible to say at present what that interest is because it is entirely dependent on the events above referred to. In these circumstances it is not open to the creditor to treat the policy as being the property of his debtor and to require an assignment of it and to compel the Insurance Company to acknowledge such an assignment, as valid and binding upon them. For these reasons I am of opinion that the order passed by the District Judge was right and that the application of the petitioner was rightly dismissed. The appeal and the revision petition are therefore dismissed with costs in the appeal. Leave to appeal is refused.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 415

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Alam Khan Sahib — Appellant.

v.

A. L. M. Karuppannaswami Nadan and others — Respondents.

Appeal No. 135 of 1931, Decided on 28th September 1937, against judgment and decree of Sub-Judge, Kumbakonam, D/- 19th August 1930.

(a) Religious Endowment — Right of alienation of trust property — Power of trustee is same as that of manager of infant heir.

Notwithstanding that property devoted to religious purposes is as a rule inalienable, a trustee has got power to incur debts and alienate the trust property to the same extent as the manager of an infant heir. His alienations can be justified by proof of necessity for the preservation of the endowment or institution : *A I R 1922 P C 123 and A I R 1936 P C 183, Rel. on.* [P 416 C 1]

(b) Religious Endowment—Alienation by trustee—Adverse possession when starts stated.

Where the disposition by the trustee is of the "math and its properties" (which apparently means the institution itself), it is wholly void and would in law pass no title, with the result that the possession of the assignee would be adverse from the moment of the attempted assignment. Where the assignment is of one or more of the properties of the mutt, as distinguished from the institution, adverse possession will commence to run from the cessation of the office of the alienating mahant. The reason is that though the grant purports to be for a longer period, it is good to the extent of the mahant's interests. so that no question of adverse possession can arise during the period when the grant is effective. If a suit by the predecessor is barred, his right is extinguished and the succeeding trustee is equally without title. When the disposition amounts to a negation of the trust, the statute would run from the very date of the alienation : *Case law referred.* [P 416 C 2]

(c) Possession — Presumption is of lawful origin in case of long and quiet enjoyment.

The presumption of a lawful origin in support of proprietary rights, long and quietly enjoyed, is not a branch of the law of evidence, but a presumption arising in law in the absence of evidence. It is the completion of a right to which circumstances clearly point, where time has obliterated any record of the original commencement. The question is independent of such factors as the length of time, the presence of recitals or the production of the deed, the doctrine being invoked where there is failure of evidence owing to lapse of time : *Case law referred.* [P 418 C 1, 2]

(d) Limitation Act (1908), Arts. 142, 144—Suit for ejectment—Plaintiff setting up title of landlord against defendant — Title of plaintiff found to be false — Article applicable is Art. 142 and not Art. 144.

Where in a suit for ejectment, the plaintiff sets up in his plaint the case that the defendant is his tenant, it is tantamount to saying that the defendant, when he repudiated his title as landlord, dispossessed him, so that there is in effect an assertion of possession and dispossession precisely what is contemplated under Art. 142. The mere fact that the recital in the plaint is false and the plaintiff was never in possession, but on the contrary strangers were in possession is not sufficient to attract Art. 144, for, it might mean that there was independent trespass not connected as of right : *20 M L J 306; 10 Cal 374 and A I R 1935 Lah 475 (F B), Rel. on; A I R 1925 Mad 834; A I R 1935 Mad 754; A I R 1927 Mad 287 and A I R 1927 Mad 1094, Dissent.* [P 419 C 1]

K. Rajah Ayyar and S. Nagaraja Ayyar — *for Appellants.*

S. Panchapakesa Sastry, K. R. Krishnaswamy Iyer, K. S. Desikan, A. S. Viswanatha Iyer and S. Muthiah Mudaliar — *for Respondents.*

Venkatasubba Rao J. — This appeal raises two important questions : first, as to limitation and adverse possession in suits by trustees of religious institutions and secondly, as to a presumption in support of titles from long enjoyment. The suit has been brought for the recovery of nearly 60 items of immovable property from about as many defendants. The plaintiff (the appellant) claims them as the present trustee of an institution known as the Bairam Khan Thaikkal. The lower Court has upheld the plaintiff's contention that there was a valid wakf and that the gift of the lands, by whomsoever made, was confirmed in 1865 after the inam inquiry

The original trustee was said to be a holy saint, an ancestor of the plaintiff, who may be called Bairam Khan I. Nothing is known of the subsequent history of the Thaikkal till the trusteeship was assumed by Bairam Khan II, the father of the plaintiff. He was a long-lived man, who after alienating the bulk of the trust property, died in the year 1914. The plaintiff brought this suit in 1926, i. e. just on the eve of the expiry of 12 years from his father's death. The suit lands, as the learned trial Judge points out in his careful judgment, fall under two groups: (1) the lands of those defendants who trace their title to Bairam Khan II and (2) those who held under alienations (mostly dating from a period anterior to him), made by persons whose connection with the Thaikkal has not been shown. The second group may be further sub-divided into (a) such of those defendants as gave positive evidence of their possession requisite under Art. 144 and (b) those in whose case this evidence was lacking, they having remained ex parte in the lower Court.

All the properties claimed fall under the one or the other of the categories mentioned above. The law governing the present case is, as it stood, before the recent amendment of the Lim. Act, which in 1929 enacted three new Articles 134-A to 134-C. It is unnecessary to show how the law was gradually developed by the decisions of the Judicial Committee, as it would quite suffice to state the principles which may now be taken as established by authority:

(1) Notwithstanding that property devoted to religious purposes is as a rule inalienable, it is well settled law that a trustee has got power to incur debts and to alienate the trust property to the same extent as the manager of an infant heir: *see* 48 I A 302[1] at pp. 324 and 325. His alienations can be justified by proof of necessity for the preservation of the endowment or institution: 63 I A 261[2] at p. 274. (2) Where the disposition by the trustee is of the "math and its properties" (which apparently means the institution itself), it is wholly void and would in law pass no title, with the result, that the possession of the assignee would be adverse from the moment of the attempted assignment: *see* 60 I A 124[3] at p. 129. (3) Where the assignment is of one or more of the properties of the mutt, as distinguished from the institution, adverse possession will commence to run from the cessation of the office of the alienating mahant. The reason is, that though the grant purports to be for a longer period, it is good to the extent of the mahant's interest, so that no question of adverse possession can arise during the period when the grant is effective. (See the same case, pp. 130 and 131.) This rule will be stated more fully later on. (4) If a suit by the predecessor is barred, his right is extinguished and the succeeding trustee is equally without title. This is definitely laid down in *Gnanasambanda Pandaram's case*[4] where the contention that there was a creation of successive life-estates was refuted on the ground that *Tagore* v. *Tagore*[4a] is as much "applicable to a hereditary office and endowment as well as to other immovable property". As observed by Banerjee J. in 23 Cal 536[5]:

> The succeeding shebaits form a continuing representation of the idol's property. To hold otherwise would lead to a most anomalous result; for, then it would follow .... the eleventh shebait—it may be after a hundred years or more — would still be in time to institute a suit for recovery of possession.

(*See also* 23 Mad 439[6] and Mitra on Limitation, Vol. 1, pages 215 and 216.) (5) When, unlike case No. 3, the disposition amounts to a negation of the trust, the statute would run from the very date of the alienation. The principle underlying this is that the disposition is not made by the trustee as such, but the property is treated as his private property and the act is adverse to the trust, with the result, that the period of limitation would commence from the date of the disposition. This is illustrated by 50 I A 295,[7] where the property was sold in execution, but the rule equally applies to a voluntary sale:

---

1. Vidya Varuthi Thirtha Swamigal v. Balluswami Ayyar, (1922) 9 A I R P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
2. Daivasikhamani Ponnambala Desikar v. Periyannan Chettiar, (1936) 23 A I R P C 183=162 I C 465=63 I A 261=59 Mad 809 (P C).
3. Ramcharan Das v. Naurangi Lal, (1933) 20 A I R P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).
4. Gnanasambanda Pandaram Sannadhi v. Velu Pandaram, (1900) 23 Mad 271=27 I A 69=7 Sar 671=10 M L J 29 (P C).
4a. (1872) I A Sup Vol 47=9 Beng L R 377=18 W R 359=2 Suther 692=3 Sar 82 (P C).
5. Nilmony Singh v. Jagabandhu Roy, (1896) 23 Cal 536.
6. Chidambaram Chetty v. Mina Ammal, (1900) 23 Mad 439=9 M L J 8.
7. Subbaiya Pandaram v. Mahomed Mustapha Maracayar, (1923) 10 A I R P C 175=74 I C 492=50 I A 295=46 Mad 751 (P C).

A I R 1930 Cal 673[8] at p. 677 and the judgment of Ramesam and Stone JJ. in appeal (not reported).[9] (6) These rules are not confined to madathipathis and mutwallis, but extend to other trustees as well, of religious institutions, such as dharmakarthas and shebaits of family idols : 63 I A 261[2] at pp. 274 and 276.

In regard to the operation of the principle embodied in propositions three and four above, two cases may be referred to in particular. In 48 I A 302,[1] the plaintiffs instituted the suit in 1913, basing their claim upon a permanent lease of 1891. The facts are these. The plaintiffs were let into possession by the mahant No. 1 under the lease aforesaid, which purported to be a permanent lease but which under the law could enure only during the latter's lifetime. With regard to the mahant No. 2, he was vested with power similarly limited. The receipt of rent by him was properly referable to a new tenancy created by himself. His administration lasted until 1906 and the plaintiffs' possession never became adverse until his death. It was therefore held that the plaintiffs had acquired no title and their suit was dismissed. Turning to the next case, 63 I A 261,[2] it illustrates the same principle, although the result was different. There, a perpetual cowle of the temple land was granted in 1865 to two Chetties. The suit was brought in ejectment in 1918 by the receiver appointed to manage the temple. The case is instructive, though the facts are somewhat complicated. The manager who granted the cowle died in 1875. There was a succession of dharmakarthas down to Arumuga, who died in 1893 and was succeeded by Thandavaraya, who died in 1902. From that time Nataraja was the de facto manager, until he was removed by a decree of the High Court in 1913. What happened between the death of the first manager in 1875 and the assumption by Nataraja in 1902 is not clear. But the Judicial Committee asks the question, "when Nataraja succeeded in 1902, what was the position?" It was open to him either to create a "new tenancy," as did mahant No. 2 in 48 I A 302[1] and accept the cowle-rent as payable under that tenancy, or to treat the permanent lease as binding and on that footing to receive the rent. It was the latter alternative that found favour with their Lordships. Granting then that each of the preceding managers created a tenancy which could enure for his period, so far as Nataraja was concerned, he did no such act, and the statute began to run from the date of his management. The title therefore of the cowledars became perfect and the receiver's suit brought in 1918 was dismissed.

These two cases bring out the principle very clearly. The alienation in each case, which purported to be for a longer period, would be effective only during the alienating trustee's tenure of office. It was competent to the succeeding trustee or trustees to make similar limited dispositions and these two cases recognize that when that has been done, the alienee's adverse possession commences under Art. 144 from the cessation of the office of the last of such trustees. In short, whether there is one trustee or a succession of trustees, the rule is the same, namely that possession will not be adverse during the continuance in office of the alienating trustee or trustees.

Now how do the facts stand here ? So far as the alienations made by Bairam Khan II, the preceding trustee, are concerned, the suit is clearly in time as the lower Court has held ; it has been brought as already stated by Bairam Khan's successor within 12 years of Bairam Khan's death. Then the question arises, were these alienations of Thaikkal property by Bairam Khan II made for purposes binding on the trust ? All of them were dispositions by way of sale and the learned Judge has upheld them, excepting two with which we shall presently deal, on the ground that necessity has been proved. He has done so notwithstanding that there was no direct evidence, applying the doctrine relating to ancient transactions, so repeatedly laid down. In the case of some alienations deeds were produced with the essential recitals and Mr. K. Rajah Iyer has stated that he does not press his case in regard to such items : 43 I A 249.[10] Even where the deeds produced did not contain the necessary recitals, the learned trial Judge applied the same rule. The

8. Debendra v. Nahar Mal, (1930) 17 A I R Cal 673=128 I C 195=34 C W N 498=51 C L J 547.

9. Venkatasubramaniya Ayyar v. Sivagurunatha Chettiar, *Since* reported in (1938) 25 A I R Mad 60.

10. Bangachandra Dhur v. Jagat Kishore, (1916) 3 A I R P C 110=36 I C 420=43 I A 249=44 Cal 186 (P C).

question then arises, does the principle cease to apply where first the deed produced does not contain the recital and secondly where no deed is forthcoming at all. In 49 I A 54[11] the validity of a permanent lease granted by a shebait came into question nearly 100 years after the grant. Although the lease deed was produced, there were no recitals which could be relied on and their Lordships observe that it became "completely impossible to ascertain what were the circumstances which caused the original grant to be made". They declare that it ought to be assumed that the grant was lawfully made, it being the policy, the Courts always adopt, to secure as far as possible quiet possession to people who are in apparent lawful holding of an estate.

In 57 I A 125[12] at p. 130, their Lordships refer to the above mentioned case and emphasize this particular aspect of it. This decision contains a very valuable exposition of this doctrine. The sanad appointing the mutawalli of the wakf prohibited the grant of permanent tenancies. Their Lordships observe that the prohibition in the sanad merely stated the rule of the Mahomedan law and did not abrogate the discretion of the Kazi to relax its operation. The question was whether or not the permission of the Kazi was to be presumed in the absence of any evidence. The principle is very succinctly stated by the Judicial Committee: the presumption of a lawful origin in support of proprietary rights, long and quietly enjoyed, is not a branch of the Law of Evidence, but a presumption arising in law in the absence of evidence. "It is the completion of a right," their Lordships go on to observe, "to which circumstances clearly point, where time has obliterated any record of the original commencement": (p. 130). In 47 I A 6,[13] the same presumption was applied by the Privy Council to support a sale by a Hindu widow, and in that case it is noticeable that no deed was forthcoming (*see* the argument of Mr. De Gryuther as reported in 43 Mad 541[13] at p. 544). Then again it is wrong to think that there is an inflexible rule as to the period that must elapse. Their Lordships point out in 57 I A 125[12] already quoted, that in one of the earlier decisions of the Judicial Committee, 44 I A 98,[14] where this doctrine was invoked, the interval between the impugned grant and the suit which challenged it, was only 25 years (p. 129). So the question is independent of such factors as the length of time, the presence of recitals or the production of the deed, the doctrine being invoked where there is failure of evidence owing to lapse of time. We may also refer to three decisions of our own Court where the principle under discussion has been fully explained: 48 M L J 224,[15] 36 M L W 186[16] and 38 M L W 843.[17] 70 M L J 225,[18] on which Mr. Rajah Ayyar relies does not in the least assist him. All that has been held there is that presumptions not to supplement but to contradict the evidence would be out of place (p. 228).

Paragraph 59 of the Lower Court's judgment deals with cases where the deeds contain the requisite recitals and para. 60, where no such recitals are to be found in the deeds produced. In both sets of cases the learned trial Judge has, for reasons which appear to us valid, confirmed the alienations. We entirely agree with his conclusion. Then as regards the two alienations to which we have referred, which the learned Subordidate Judge has refused to uphold (para. 61 of the judgment), we are unable to agree with his view. In making the sales, Bairam Khan dealt with the properties as his own and his act amounts to a repudiation of the trust. In such cases, the possession of the vendee, as already observed (see R. 5) would be adverse from the date of the alienation. One of the sales in question was made in 1897 and the other in 1912 and the suit having been filed in 1926, the plaintiff's claim in regard to these two items is barred. The lower Court's judgment to this extent is set aside. So much for the alienations that fall under

11. Bawa Magniram Sitaram v. Kasturbhai Manibhai, (1922) 9 A I R P C 163=66 I C 162=49 I A 54=46 Bom 481 (P C).
12. Mohammad Mazaffaral Musavi v. Jabeda Khatun, (1930) 17 A I R P C 103=123 I C 722=57 I A 125=57 Cal 1293 (P C).
13. Venkata Reddi v. Rani Saheba of Wadhwan, (1920) 7 A I R P C 64=55 I C 538=47 I A 6=43 Mad 541 (P C).
14. Murugesa Pillai v. Gnanasambandha Pandara Sannadhi, (1917) 4 A I R P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C).
15. Somayya v. Venkayya, (1925) 12 A I R Mad 673=86 I C 483=48 M L J 224.
16. Kumaraswami Mudaliar v. Narayanaswami, (1932) 19 A I R Mad 762 = 139 I C 766 = 36 M L W 186.
17. Raman Thirumumpu v. Karunakara Menon, (1933) 20 A I R Mad 852 = 147 I C 735 = 38 M L W 843.
18. Bhojraj v. Sitaram, (1936) 23 A I R P C 60 = 160 I C 45=70 M L J 225 (P C).

Group I, mentioned at the commencement of this judgment.

Next, under Group II the first set of alienations is those covered by sud-division (a). The defendants here have adduced, as already observed, positive evidence of their possession for the requisite period and the lower Court has in respect of these items disallowed the plaintiff's claim. Mr. Rajah Ayyar does not seriously contend that its view is wrong and the decision of the Court below is accordingly upheld. Then as to the sub-division (b) in Group II, the question has been raised whether Art. 142 or Art. 144 applies. As regards all the defendants, the case set up by the plaintiff in his plaint is that they were his tenants. The lower Court has found, and rightly, that the plaintiff has hopelessly failed in proving tenancy of any sort. The defendants with whom we are here concerned, as already observed, not having appeared, no evidence was adduced on their behalf. But even the plaintiff's witnesses depose that the suit properties were never to their knowledge in the possession of the Thaikkal (P. W. 3), but, on the contrary, strangers were in possession (P. W. 2). This evidence of course falls short of what would be requisite under Art. 144. That the plaintiff was out of possession, would not suffice ; the admission that strangers were in possession, would be equally insufficient, for, it might mean that there were independent trespasses not connected as of right.

But the cases cited by Mr. S. Panchapakesa Sastri in the admirable argument he has addressed to us in this appeal, show that Art. 142 is the right provision applicable and not Art. 144. It is unnecessary on the facts here to deal with the broad question, whether in a suit in ejectment, when the plaintiff's title is proved, there rests no further duty upon him and the burden shifts to the defendants to prove affirmatively adverse possession under Art. 144: *see* the observation of Sir John Edge in 25 M L J 95[19] at p. 100; *see also* the judgment of Phillips J. in 49 M L J 788;[20] *see further* 62 I C 1[21] and 57 All 278.[22] That broad question does not arise here, for, as above stated, the case set up by the plaintiff was one of tenancy. That is tantamount to saying that the defendants, when they repudiated his title as landlord, dispossessed him, so that here is in effect an assertion of possession and dispossession precisely what is contemplated under Art. 142. In 20 M L J 306[23] (decided by White C. J., and Miller J.), there was a false recital in the plaint that the defendant was the plaintiff's tenant (see the argument of Mr. C. R. Thiruvenkatachariar) and that was held not to exclude the application of Art. 142. The lower Court had there held that Art. 144 applied, but its decision was reversed. In 10 Cal 374[24] also (decided by Garth C. J. and Cunningham J.), the tenancy alleged in the plaint was found to be false and the case was treated as one for recovery of property as upon a dispossession. Garth C. J., referring to the false assertion regarding the letting, observes :

> If a mere allegation of the kind could relieve a plaintiff from the burden of proving that he or those under whom he claims, had been in possession within 12 years, that devise might always be resorted to for the purpose of evading the law of limitation.

To the same category belongs 16 Lah 442.[25] There too, the plaintiffs alleged that the defendant was put in possession as their tenant. From this assertion the necessary inference as the learned Judges point out, is that possession and dispossession is alleged. Mr. Rajah Ayyar for the appellants, however, relies on the following four cases, 21 M L W 398,[26] 42 M L W 593,[27] 25 M L W 127[28] and A I R 1927 Mad 1094,[29] of which the first two are decisions of the same single Judge; the third was also decided by a Judge sitting singly and the fourth contains no discussion of the principle involved. In 21

19. Dharani Kanta Lahiri v. Gabar Ali Khan, (1913) 25 M L J 95=18 I C 17 (P C).
20. Kuppuswami Mudaliar v. Chockalinga Mudaliar, (1926) 13 A I R Mad 181=91 I C 454=49 M L J 788.
21. Siva Prasad v. Hira Singh, (1921) 8 A I R Pat 287=62 IC 1=6 Pat LJ 478=2 PLT 487 (F B).
22. Bhindhyachal Chand v. Ram Gharib, (1934) 21 A I R All 993=152 I C 1=1934 A L J 973 =57 All 278 (F B).
23. Venkatarayudu v. Sankarayya, (1910) 20 M L J 306=6 I C 667.
24. Gopal Chunder Chukerbutty v. Nilmony Mitter, (1884) 10 Cal 374.
25. Behari Lal v. Narain Das, (1935) 22 A I R Lah 475=157 I C 686=16 Lah 442=37 P L R 743 (F B).
26. Periya Jeeyanagarswami v. Mahomed Esoof Sahib, (1925) 12 A I R Mad 834=87 I C 386 =21 M L W 398.
27. Sulaiman Rowther v. Dawood Khan Sahib, (1935) 22 A I R Mad 754=156 I C 581=42 M L W 593.
28. Ramanuja Chariar v. Sundarachariar, (1927) 14 A I R Mad 287=99 I C 312=25 M L W 127.
29. Kunhi Moidin v. Pakkar Kutty, (1927) 14 A I R Mad 1094=99 I C 971.

M L W 398,[26] the first of the aforesaid cases, though the lease set up was found against, it was held that Art. 144 applied, as the plaintiff could rely on his title and the onus of establishing adverse possession lay on the defendant under that Article. The learned Judge relies inter alia upon 41 All 669,[30] which, as pointed out in 16 Lah 442,[25] already referred to, has been dissented from in a later Full Bench decision of the same Court. Moreover, Phillips J. in 49 M L J 788,[20] already cited, doubts the correctness of 21 M L W 398,[26] which has also been dissented from in the Lahore decision quoted above, 16 Lah 442.[25] With great respect, we are unable to follow the four cases relied upon by the appellant. The lower Court's decision, disallowing this part of the plaintiff's case, is therefore correct.

The result is that the appeal is dismissed with costs of respondent 40 (one set), of respondents 30 to 32 (one set) and of respondents 5, 9, 20, 26, 28, 41, 64 and 65 (one set). As regards the memorandum of objections (which deals with the two excepted items considered above) that is allowed, with costs of respondent 1 which will include the out-fees paid for the purchase of the printed papers in the appeal. The appellant will pay the court-fee payable to the Government on the memorandum of appeal.

C.R.K./V.B.B. *Appeal dismissed.*

30. Jaichand v. Girwar Singh, (1919) 6 A I R All 403=52 I C 366=41 All 669=17 A L J 814.

* A. I. R. 1938 Madras 420
FULL BENCH

LEACH C. J., VARADACHARIAR AND PANDRANG ROW JJ.

Devulapalli Sabhanadri Sastrulu — Petitioner.

v.

Dorbala Nagaya Sastry and others — Respondents.

Civil Misc. Petition No. 4869 of 1937, Decided on 1st December 1937.

*** Insolvency — Vesting of estate — After-acquired property —Suit by insolvent's mother to recover certain property as sole heir of her father dismissed—Appeal by mother — On death of mother pending appeal, insolvent applying for leave to continue appeal in his own right and not as representative of his mother — Official Receiver previously applying for leave to continue appeal but withdrawing his application — Official Receiver having once intervened and withdrawn, application by insolvent held not maintainable.**

Once a receiver in insolvency intervenes in regard to an after-acquired property of an undischarged insolvent that property vests in him and he cannot by withdrawing his intervention, divest himself of the property and revest it in the insolvent. [P 421 C 1]

K instituted a suit for recovering possession of certain properties on the ground that she inherited them as the sole heir of her father. The suit was dismissed and *K* filed an appeal. On the death of *K* during the pendency of the appeal, *P* her son who had been adjudged an insolvent and was still an insolvent, applied to be allowed to continue the appeal in his own right and not as representative of his mother. The Official Receiver had applied previously for an order directing that he should be brought on the record in place of *K* but had subsequently withdrawn the application :

Held that the Official Receiver having once intervened and withdrawn, the application by the insolvent *P* was not maintainable : *(1917) 1 Ch 319, Foll. ; (1843) 5 Q B 965, Ref.* [P 421 C 1, 2]

P. V. Vallabhacharyulu — *for Petitioner.*

B. Somayya, M. S. Ramchandra Rao, D. P. Narayana Rao and A. Raghavayya — *for Respondents.*

Leach C. J. — The petitioner's mother Devulapalli Kanchamma, instituted O. S. No. 7 of 1934 in the Court of the Subordinate Judge of Guntur to recover possession of properties which she claimed constituted the estate of her deceased father, Dorbala Narasimha Sastri. Her mother had predeceased her father and she was the only issue of the marriage. She averred that her father had separated from his brothers and on this footing claimed the estate as the sole heir. The lower Court dismissed the suit and Kanchamma then appealed to this Court. During the pendency of the appeal she died and the petitioner applied to be allowed to continue the appeal. This petition is now before us and is opposed. The petitioner is an insolvent and was an insolvent when he filed the petition. He seeks to be allowed to continue the appeal because the Official Receiver has refused to become the appellant. The Official Receiver did apply to this Court on 12th July for an order directing that he should be brought on the record in the place of Kanchamma, but on 12th October he withdrew the application as he had not been placed in funds to meet the costs. The petitioner has relied on the rule in (1843) 5 Q B 965,[1] which allows a bankrupt to maintain a suit to recover after-acquired property in the hands of a stranger unless the trustee has intervened. This rule has frequently been applied in India, but the respondents say

1. Herbert v. Sayer, (1843) 5 Q B 965=2 D & L 49=13 L J Q B 209=8 Jur 812.

that as the result of the decision of their Lordships of the Privy Council in 54 Cal 595[2] it can no longer be applied. It is however not necessary to decide this question, because even if the decision in 54 Cal 595[2] has not the effect which the respondents maintain it has, (1843) 5 Q B 965[1] must now be read in the light of (1917) 1 Ch 319,[3] and when this is done it is clear that the present petition does not lie.

In (1917) 1 Ch 319,[3] it was decided that when once a trustee in bankruptcy has intervened in regard to after-acquired property of an undischarged bankrupt, that property vests in the trustee and he cannot by withdrawing his intervention divest himself of the property and revest it in the bankrupt. In that case a person had entered into an agreement with the bankrupt under which he had to make payments to the bankrupt and the trustee in bankruptcy gave notice requiring these payments to be made to him. For reasons which it is not necessary to go into, the trustee withdrew the notice. It was contended that as the result of the withdrawal, the original position was restored. The Court of Appeal, consisting of Lord Cozens Hardy M. R., Warrington L. J. and Lawrence J. held that this was not so. Once the trustee in bankruptcy had intervened, the property vested in him and remained with him in spite of the withdrawal of the notice. The property being in the trustee, nothing remained in the bankrupt. If the rule in (1843) 5 Q B 965[1] applies here, we must also apply the rule which has been added to it by (1917) 1 Ch 319.[3] There can be no doubt that the application by the Official Receiver to this Court for an order making him the appellant in the place of the petitioner's mother did constitute an intervention ; it was a far greater act of intervention than that in (1917) 1 Ch 319.[3] The Official Receiver having intervened, and being unable to withdraw, he alone could maintain the appeal. It has been suggested that the petitioner does not ask to have his name brought on the record as the owner of the property, but merely as the legal representative of his mother. But this is not the case. His right in the property in suit is based on the claim that he is the actual reversioner of the last male owner, his grandfather. Therefore he desires to continue the appeal in his own right, not through his mother. His rights in the property, whatever they are, have devolved on the Official Receiver and the law does not permit him to maintain the appeal. The application must therefore be dismissed with costs.

Varadachariar J.—I agree that the insolvent is not entitled to continue this appeal ; but I wish to make one reservation to avoid a possible misapprehension. I have felt some difficulty in this case, on account of the fact that the petitioner is certainly within the definition of the expression "legal representative" given in the Code of Civil Procedure, though in strict law he does not claim under his mother. As pointed by my Lord, the petitioner's claim is substantially for his own benefit and not for the benefit of his mother's estate. I wish to guard myself against being understood as deciding that the same principles as are laid down in this case will be applicable even to cases where a "legal representative" in the strict sense is applying to continue an appeal or a suit preferred or instituted by his predecessor-in-title. In such a case, the consideration applicable to a suit instituted by the insolvent himself will not apply in their entirety because so far as that particular litigation is concerned, the legal representative will only be taken to assert or safeguard the title of the original party. The decision in that case of a question like the present will depend upon the scope of the words in O. 22, R. 8, Civil P. C., namely, whether the proceedings which the legal representative who has been adjudged insolvent wishes to continue can be regarded as a proceeding which the assignee or receiver in the insolvency of the legal representative might maintain for the benefit of his creditors. I do not read the judgment in 54 Cal 595[2] as concluding this question.

Pandrang Row J. — I agree with my Lord the Chief Justice and I have only to add that whether the rule in (1843) 5 Q B 965[1] applies to mofussil insolvencies is not being decided by us, and that our decision rests mainly, if not entirely, on the decision in (1917) 1 Ch 319[3] by the Court of Appeal in England.

C.R.K./R.M. *Application dismissed.*

2. Kala Chand Banerjee v. Jagannath Marwari, (1927) 14 A I R P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

3. Hill v. Settle, (1917) 1 Ch 319=86 L J Ch 248=116 L T 263=1917 H B R 28=61 S J 217=33 T L R 168.

A. I. R. 1938 Madras 422

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

Gundla Venkamma — Appellant.

v.

Rao Sahib Kotla Sanyasayya —
Respondent.

Appeal No. 143 of 1932, Decided on 22nd October 1937, against decree of Sub-Judge, Vizagapatam, in O. S. No. 186 of 1928.

Principal and surety—Discharge of surety — Surety undertaking to pay any amount that may be decreed against two defendants in a suit—Compromise decree passed as against one defendant and suit as against other defendant dismissed—Surety is discharged.

In construing a guarantee, the principle to be remembered is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee. Before a creditor can enforce the liability given by a guarantor, he must satisfy that the conditions of the bond executed by him are fulfilled and that he is seeking to enforce the very liability which has been undertaken by the guarantor. A variation of the liability undertaken or a departure in the terms of the bond resulting from an act or omission of the creditor will discharge the surety from his obligation under the bond and it is immaterial whether the variation is substantial or material. [P 423 C 1, 2]

A surety undertook to pay any amount that might be decreed against two defendants in a suit and which might not be recovered from them. As a result of a compromise between the plaintiff and one of the defendants a compromise decree was passed only against one defendant and the suit as against the other was dismissed :

Held that the dismissal of the suit as against one of the defendants operated as a release of the surety : *33 Mad 308 and A I R 1932 Lah 419, Disting.* [P 423 C 2]

V. Govindarajachari and N. Vasudeva Rao — *for Appellant.*

T. Satyanarayana — *for Respondent.*

Venkataramana Rao J.—This is an appeal from the decree of the Agency Subordinate Judge of Vizagapatam dismissing the suit of the plaintiff for recovery of a sum of money on the basis of a security bond dated 18th January 1909 in favour of the husband of the plaintiff in O. S. No. 1 of 1907 on the file of the Court of the Government Agent, Godavari, Coconada. The said bond was executed under the following circumstances.

One Joga Venkataswami had dealings with the plaintiff's husband and he died in 1905 without having the account in respect of the said dealings settled. On the date of his death two persons claimed his property; one is his adopted son Joga Ramulu and the other Joga Sitaramulu, who is alleged to be his natural son. But the matters in dispute between these parties appear to have been settled by an arrangement in and by which each took half the property left by Joga Venkataswami. The plaintiff's husband filed a suit (O. S. No. 1 of 1907) against both Joga Ramulu and Joga Sitaramulu and one Joga Achamma, the widow of Joga Venkataswami, for an account in respect of the dealings had with the said Joga Venkataswami and for recovery of a sum of Rs. 11,000 odd which according to the plaintiff would be found due on a taking of the said account. By an order dated 13th July 1907, Joga Achamma was exonerated from the suit as not being a necessary party. Immediately after the institution of the suit, Joga Ramulu died and his widow Joga Kondamma was brought on record as his legal representative. After Kondamma was brought on record, the plaintiff's husband filed an application for an injunction restraining the defendants on record from alienating certain property and the Court passed an order that if the defendants were to give proper security, injunction would not be granted and that the temporary injunction which was granted on the said application would be dissolved. The present defendant offered himself as security for the claim in O. S. No. 1 of 1907 and the Court on the strength of the security bond executed by him seemed to have discharged the injunction. The security bond was executed on 18th January 1909 and the material terms of the bond run thus :

> The plaintiff having accepted my personal security, I hereby agree and bind myself to pay to the plaintiff or his legal representatives and assignees any amount that may be decreed in his favour in the said suit against the defendants in case the same is not recovered from the defendants.

It will be noticed that the defendants referred to therein are Joga Kondamma and Joga Sitaramulu. Sometime after the said order, the plaintiff in the said suit, that is the plaintiff's husband, entered into a compromise with only Joga Sitaramulu as a result of which Joga Sitaramulu suffered a decree to be passed against him for the amount claimed in the plaint, without reference to Joga Kondamma who was contesting the claim. A preliminary decree was passed in that suit directing an account to be taken so far as defendants other than Joga Sitaramulu were concerned, i. e. defendant 4, Joga Kondamma. The Commissioner, who was appointed in that

suit, submitted his report showing that instead of the defendants owing anything to the plaintiff, the plaintiff would be indebted to the defendants in the sum of over Rs. 3000. Objections were filed to the Commissioner's report and before the final decree was passed, the plaintiff's husband died. Nothing seems to have been done for three years after his death and on objection being taken by Kondamma, the suit was dismissed as against her so that no decree was passed against Kondamma in respect of the suit claim. This plaintiff however brought herself on record and executed the compromise decree against Joga Sitaramulu and his property.

The suit has been instituted on 5th December 1927, alleging that all the property which Joga Sitaramulu died possessed of, had been sold, that there was no other property wherefrom the amount could be recovered and therefore she was entitled to realize the balance still due on the strength of the security bond executed by the defendant. Various defences were raised, one of which was limitation and the other was that he was discharged from the liability under the said bond by reason of the dismissal of the suit against Kondamma. The learned Subordinate Judge accepted the pleas raised by the defendant and dismissed the suit. It is against this decree that this appeal has been preferred by the plaintiff.

Several questions of fact and law were raised in this appeal but we do not think it necessary to go into all of them, as we think the appeal can be disposed of on the ground that the defendant was discharged from his obligation on the bond by reason of the dismissal of the suit against Kondamma. In construing a guarantee, the principle to be remembered is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee. Therefore, before a creditor can enforce the liability given by a guarantor, he must satisfy that the conditions of the bond executed by him are fulfilled and that he is seeking the very liability which has been undertaken by the guarantor under the bond. On a construction of the bond in the light of the surrounding circumstances, it is fairly clear that the obligation was undertaken by the defendant on behalf of both the defendants in the said suit, namely Joga Kondamma and Joga Sitaramulu; and two conditions have to be fulfilled by the creditor (plaintiff) before she can enforce the liability under the bond, namely (1) there must be a decree against both the defendants in the said suit and (2) there must be a failure to recover the money from both the said defendants or their property. Where therefore as a result of an act or omission of the creditor, there is a variation of the liability undertaken or a departure in the terms of the bond, the surety will be discharged from his obligation thereunder, and it is immaterial whether the variation is substantial or material, because the contract ceases to be one which he has undertaken to fulfil. A compromise decree against one of the defendants cannot be held to be a decree against 'the defendants' within the meaning of the surety bond and the plaintiff cannot be heard to say that she has failed to recover the amount from the defendants.

The matter might be looked at in another way so far as this case is concerned. As aforesaid, the undertaking was on the joint behalf of both the defendants and the dismissal of the suit against Kondamma prevented the accrual of any obligation against Kondamma. Therefore it operated as a complete release of the said Kondamma. A release of one of the persons who is jointly bound as principals will discharge the surety. Under S. 139, Contract Act

> if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

In this case before the obligation can accrue in favour of the creditor, there must be a decree debt against both the defendants. By reason of the dismissal of the suit, the eventual remedy of the surety to proceed against one of the principal debtors has been impaired. There can be no doubt that the intention of the parties was that all the defendants should be held bound by the decree because under the arrangement entered into between Joga Ramulu and Joga Sitaramulu each became entitled to a half of the property left by Joga Venkataswami and if a decree is obtained against one of them, it would be impossible for the creditor to proceed against the property of the other or for the surety to enforce the implied promise against that other in case the surety was

compelled to make the payment which the defendants were liable to pay under the decree. Mr. Govindarajachari relied on 33 Mad 308,[1] wherein it was held that the omission to sue the principal debtor would not discharge the surety. The ground of that discharge was that though the remedy was barred, the debt was not discharged; but in this case there is an extinction of debt by reason of the dismissal of the suit. He also relied on a case, 13 Lah 817,[2] which was also decided on the same principle. In that case it was held that the abatement of a suit as against the principal debtor does not discharge the sureties from their liability; the reason given by Sir Shadi Lal at p. 819 is that "the remedy of the creditor against the principal debtor is gone, but the debt due to him is not extinguished". But in the present case there is no debt at all as the suit was dismissed against Kondamma.

We are therefore of the opinion that the dismissal of the suit against Kondamma operated as a release of the surety under the bond executed by him. We think that the view taken by the learned Subordinate Judge is therefore correct. In this view we think it unnecessary to go into the other questions raised in this appeal. In the result, the appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

1. Subramania Iyer v. Gopala Iyer, (1910) 33 Mad 308=7 I C 898=20 M L J 633.
2. Nur Din v. Allah Ditta, (1932) 19 A I R Lah 419=138 I C 305=13 Lah 817=33 P L R 668.

A. I. R. 1938 Madras 424

LEACH C. J. AND MADHAVAN NAIR J.

K. N. Ramakrishna Ayyar and another — Appellants.

v.

Parameswara Iyer and others — Respondents.

Appeal No. 419 of 1931, Decided on 6th October 1937, against decree of Sub-Judge, South Malabar, in O. S. No. 47 of 1919.

Hindu Law—Partition—Accounts—Interest in certain cases may be allowed on mesne profits—Interest on mesne profits held was correctly awarded in the circumstances of the case.

In an ordinary case interest should not be allowed on the mesne profits claimed in a suit for partition of joint family properties. But in certain cases the circumstances may be such that the Court is entitled to award interest. The circumstances mentioned in A I R 1923 Mad 147 are not exhaustive. [P 425 C 1]

The suit for partition of joint family properties in which mesne profits was claimed was filed in 1919. The claim of the plaintiff to share in the family properties was strenuously resisted by the appellants on the ground that the plaintiff had assigned his interest in them. The plaintiff got a decree in his favour for partition after the appellants had unsuccessfully contested the claim in each of the Courts upto and inclusive of the Privy Council. During all the period of 13 years he was kept out of the enjoyment of his share of the family properties and the appellants had enjoyed the income. The appellants had from the first to last placed every obstacle in the way of the plaintiff obtaining his rights :

Held that in these circumstances it was only right and proper that the appellants should make full restitution and such full restitution could not be made unless they paid interest on these monies and that therefore the interest on the mesne profits was correctly awarded : *A I R 1923 Mad 147, Expl.* [P 425 C 2]

T. M. Krishnaswamy Iyer and C. K. Viswanatha Iyer — *for Appellants.*

B. Sitarama Rao and P. S. Narayanaswamy Iyer — *for Respondents.*

Leach C. J.—The two appellants were defendants 2 and 3 in the Court below. The appeal was filed by appellant 1, but as he did not press it respondent 3 was made a co-appellant, and he has alone supported it. The suit was filed by respondent 1, who is the father of respondent 2, for partition of the family properties. Defendant 1 was the father of the appellants and respondent 1, but he died during the pendency of the litigation. The suit was filed on 1st September 1919 and on 31st December 1926 a preliminary decree was passed in favour of respondent 1. The final decree was passed on 31st March 1931, and the appeal is concerned with this decree. The first question which arises relates to the provision to be made for the marriage of the sister of the appellants and respondents 1 and 4, defendant 37. The learned trial Judge has held that the expenses of this marriage should be borne by the appellants and their brother, respondent 4. After respondent 1 separated from the family, the family consisted of the father, the appellants and respondent 4. The learned Judge was wrong in ordering the appellants and respondent 4 to bear the expenses alone and this is properly conceded by the learned advocate who appears for respondents 1 and 2. The law was stated by this Court in 53 Mad 84.[1] Moreover there was a provision in the

1. Subbayya v. Ananda Ramayya, (1929) 16 A I R Mad 586=121 I C 113=53 Mad 84=57 M L J 826 (F B).

preliminary decree that respondent 1 should bear his share of the expenses. The final decree will, therefore, be varied in this respect and respondent 1 will bear one-fifth of the expenses of the marriage. It is agreed that on this basis respondents 1 and 2 will be made liable for Rs. 1000.

Four other points were then taken namely: (1) that the appellants are not liable to pay interest on the mesne profits awarded to respondent 1; (2) that the rate of interest fixed, namely, 7½ per cent, is in any event too high; (3) that no allowance has been made for the payment by the appellants of the land revenue; and (4) that the learned trial Judge has calculated the mesne profits at paddy prices higher than those claimed by respondent 1. The learned advocate for appellant 2 has relied on the decision of this Court in 46 Mad 47,[2] in support of his contention that the trial Court erred in law in allowing interest on mesne profits. In that case it was held that a co-owner who was awarded profits in a partition suit against another co-owner in possession was not entitled to interest on such profits in the absence of proof of fraud or inefficiency in the realization of the profits. We accept the contention that in an ordinary case interest should not be allowed, but in certain cases the circumstances may be such that the Court is entitled to award interest. The circumstances mentioned in the case referred to are not exhaustive and we think that the circumstances here are such as to justify the decision of the learned trial Judge. I have mentioned that the suit out of which this appeal arises was filed in 1919. The claim of respondent 1 to share in the family properties was strenuously resisted by the appellants on the ground that respondent 1 had assigned his interest in them. After proceedings which lasted for seven years this contention was held to be without foundation, and the preliminary decree sought by respondent 1 was passed. The appellants appealed to this Court and maintained before this Court the attitude which they adopted in the lower Court. This Court, however, agreed with the trial Court. Still the appellants were not satisfied and appealed to the Privy Council. That appeal also failed, being dismissed by the Judicial Committee on 5th March 1935.

During the period the appeal was pending before the Privy Council, all proceedings were stayed at the instance of the appellants. It follows that respondent 1 has been kept out of the enjoyment of his share of the family properties for a period of 13 years during which time the appellants have enjoyed the income. Moreover, they adopted an obstructive attitude when the Commissioners were dealing with the question of the amounts received by them as rents. They have from first to last placed every obstacle in the way of respondent 1 obtaining his rights, and as a consequence have kept him out of moneys which he was entitled to and have utilized them for themselves. In these circumstances we consider that it is only right and proper that the appellants should make full restitution and they cannot make full restitution unless they pay interest on these moneys. The award of interest will therefore stand.

The learned advocate for appellant 2 has not pressed the contention that they rate of interest, 7½ per cent. allowed by the learned trial Judge is too high, the learned Judge having given a sound reason for fixing the interest at this rate. With regard to the claim that the appellants should be allowed to deduct the amounts paid by them for land revenue, all that needs to be said is that they have not shown that they paid anything by way of land revenue. The failure to do so is no doubt due to the obstructive attitude which they adopted when the case was before the Commissioners, but the responsibility is theirs and no allowance can be made without proof of payment, which is not forthcoming. The learned trial Judge has based the amount of mesne profits payable by the appellants on the prices of paddy ruling in the various years. It is said that for the years 1918 and 1919 a higher value was allowed than that claimed by respondent 1. Evidence was given as to the prices ruling in the various years and no objection was raised to proof being given of the prices for the years 1918 and 1919. We consider that in these circumstances respondent 1 is entitled to have the mesne profits assessed on the actual values proved. If on this basis he receives more than what is estimated by him in the plaint he will have to pay a higher court-fee before he can enforce his decree.

Appellant 2 also contends that the learned trial Judge is wrong in giving

2. Ramaswami Iyer v. Subramania Aiyer, (1923) 10 A I R Mad 147=74 I C 804=46 Mad 47=43 M L J 406.

to respondent 1, a one-fifth share in a debt due to the family at the time of separation. It is said that this debt was collected by the father. That the debt existed is not denied and if it was collected by the father the proceeds would go to swell the assets of the joint family. It is not said that it was not collected. We can see no reason here to disturb the finding of the lower Court that respondent 1 is entitled to a one-fifth share. It follows that except as regards the provision for the marriage expenses the appeal fails and will therefore be dismissed. The appellants will receive costs on that part of the appeal which has succeeded, namely on the question of the marriage expenses, but will pay costs on the questions which have been decided against them. Appellant 2 as the receiver will pay the balance due in respect of the printing charges.

C.R.K./V.B.B. *Order accordingly.*

A. I. R. 1938 Madras 426

MOCKETT AND HORWILL JJ.

Santhappa Rai and others — Appellants.

v.

Santhiraja alias Kanthu Shetty and others — Respondents.

Appeal No. 347 of 1932, Decided on 29th October 1937, against decree of Dist. Court, South Kanara, in O. S. No. 4 of 1932.

(a) Contract—Undue influence — Recitals in deed that executant is incapable of managing his business or is not in sound mental condition cannot be availed of to defeat his subsequent contract with other persons on ground of undue influence.

Recitals in a deed of contract that the executant is incapable to manage his own affairs or that he was *non compos mentis*, etc. are of no evidentiary value and cannot be taken advantage of to defeat his subsequent contracts with other persons on the ground of undue influence. [P 428 C 1]

(b) Contract — Construction — Contracts clearly expressed — Judge should not interfere on ground that he knows business of parties better.

Where contracts are clearly expressed, the Judges should resist the temptation of interfering with them on the ground that they know the business of the people making the contract better than the people know it themselves : *(1882) 21 Ch D 243, Rel. on.* [P 428 C 1]

(c) Contract—Undue influence—Inadequacy of consideration, unless very gross, cannot be ground for holding that contract was influenced by undue influence.

Inadequacy of consideration alone is not a ground for holding that a contract was influenced by fraud or undue influence unless the inadequacy is so gross as to raise a presumption that the party either did not understand what he was doing or was the victim of some imposition : *(1870) 2 H L Scot App 6, Rel. on.* [P 428 C 1, 2]

(d) Contract Act (1872), S. 16—Essentials to establish undue influence stated.

An error would arise if the positions to be ascertained in cases of undue influence are put in the wrong order. The first thing to be found is whether the party who is said to have induced a contract was in a position to dominate the will of the other. After that the question arises, has the contract been so induced ? On the second consideration arises the question of burden of proof : *A I R 1924 P C 60, Rel. on.* [P 428 C 2]

It is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice. It must be shown that the influence was undue : *A I R 1920 P C 65, Rel. on.* [P 428 C 2]

B. Sitarama Rao, T. S. Raghavachariar and M. K. Devaraj — *for Appellants.*

K. Y. Adiga — *for Respondents.*

Mockett J. — This is an appeal from the judgment and decree of the learned District Judge of South Kanara. The suit by the plaintiffs prayed for an order to set aside two documents executed by plaintiff 1, Exs. E and F, both of which were executed on 9th June 1928. In their plaint they alleged that the execution of these documents was obtained by coercion, undue influence and fraud on the part of defendant 1. The coercion was abandoned. We are unable to find any finding with regard to fraud by the learned trial Judge and it would appear that the only ground on which he has decreed this suit is based on undue influence of defendant 1 over plaintiff 1.

These persons are related. Plaintiff 1 married twice and defendants 1 and 2 are relations by his first wife. His second wife died in 1918. She had a daughter who died in May 1928. It may be mentioned that all the children by the first marriage also died. So the immediate relatives of plaintiff 1 because he has no brothers and sisters living, are the relatives of his first wife and the relatives of his second wife. It is alleged in this case that this suit has been instigated by one Kumara Rai who is a relative of the first wife.

There is a long history of documents in this case and it is necessary to deal with them because they unquestionably bear upon the facts. The first document brought to our notice was Ex. A, dated 18th Sep-

tember 1918, described as a deed of settlement. That document was executed by plaintiff 1 and his mother and maternal aunt. It is a curious document but the most important part of it provides that the parties should be protected from the property being lost on account of their foolishness. It goes on to state that the parties thereto shall not alienate the property and they appoint one Manjappa as the manager. On the same day there was a deed of partition, Ex. V, entered into between these persons by which the suit properties were given to plaintiff 1 and his mother and aunt. It is stated in evidence that on 8th May 1926, Manjappa leased a portion of the suit properties to defendant 1. On 11th June 1926 and 13th June 1937, two promissory notes were executed, Exs. I and II respectively, by P. W. 1 to defendant 1 and by P. W. 1 to defendant 1's father-in-law's nephew. Money was advanced under these two promissory notes and it has so been found by the learned trial Judge. That is important because plaintiff 1 denied consideration and alleged that these documents were not executed on the dates they purport to be executed but on 9th June 1928, the date of Exs. E and F, which are sought to be set aside in this suit. On 15th June 1927, by Ex. III, plaintiff 1 wrote to defendant 1 asking for Rs. 275 which money was paid. By Ex. 4 dated 21st August 1927, plaintiff 1 again wrote to defendant 1 asking for Rs. 150. On 12th April 1927, by Ex. B, a registered deed of settlement was executed by plaintiff 1 in favour of his daughter. In that deed of settlement, it is alleged that the deed of partition to which it refers was brought about fraudulently and the alienations made by Manjappa are stated to be void. Later in that document however the present plaintiff admits the deed of partition. On 12th April 1927, i. e. the same day, there was a mortgage by Manjappa to plaintiff 1 of some other properties and on 30th May by Ex. D, plaintiff 1 assigned the mortgage.

These documents have been mentioned in some detail for this reason that plaintiff 1 put himself forward and succeeded in impressing the learned Judge with the view that he was a simpleton unable to look after his affairs. The indications from these documents are entirely the other way. He seems to have been very competent in the management of his affairs; he executes documents, borrows money and when convenient, he repudiates the document although in the same document he reaffirms. On 9th June 1928 Exs. E and F were executed. Plaintiff 1's story about that is that he then being 62 and being weak-minded and suffering from great grief owing to the death of his daughter decided to go on a pilgrimage to sacred places in northern India and that defendant 1, a shrewd man, took advantage of his mental state, said that he would go on a pilgrimage also, induced plaintiff 1 to start with him and brought him to Mangalore and kept him in a temple for a couple of days without any access to others and induced him to execute the documents Exs. E and F. He states in his plaint that defendant 1 induced him to do so by saying that a suit was being contemplated in respect of his properties and that it was necessary to have some documents executed in order to prevent people intending to sue from taking unlawful possession and in consequence of this representation plaintiff 1 was induced to execute Exs. E and F and a will and two promissory notes. The learned Judge has found that suits were actually brought later on, though unsuccessfully, by certain claimants to the property. Apart from that allegation, there is to be found in the plaint no other allegation of undue influence.

Plaintiff 1 in his evidence—and he was his only witness—agreed that he read over the documents before he signed them, that the fair copies were read over to him at the registration office and that he took no objection on either occasion. His evidence is not that he was brought to Mangalore but he went there and his allegation that he was shut up and unable to have access to others was not proved. The writers and attestors to the documents were not called. No evidence of his family or of his legal or medical advisers with regard to his mental state was called. As has been said before, the only witness was himself. But the learned Judge decreed the suit resting his decision apparently on the following ground. He took the view that plaintiff 1 was "a foolish fellow". He held that he could read and write Kanarese fairly well and that he thoroughly understood what he was doing. He was much impressed with the recitals in Exs. A and V, which he says attest the business capacity of plaintiff 1 in the management of his own affairs beyond any doubt. The recitals in Exs. A and V amount to this: that plain-

tiff 1 was incurring debts unnecessarily. It is legitimate comment that if that is to be the standard on which a man's capability to conduct his affairs is to be based, then a very large number of mankind will come into that category.

But it is a strange proposition that a man can utilize recitals of this sort to his own advantage. If that be so, it would be only necessary for an individual to enter into a contract with some third party reciting that he was unable to manage his own affairs, that he was *non compos mentis*, etc., to enable him later on to defeat his subsequent contracts with other persons. Recitals of this sort have no evidential value. What really influenced the learned Judge apparently was that these transactions were entered into in a hurry and for an inadequate consideration. He says :

> Plaintiff 1 who is a stupid fellow comparatively speaking and who was afflicted with sorrow at the time, entered into the transactions in a hurry and when there was absolutely no necessity for his doing so.

It seems to me that that is directly in conflict with the warning given by Lord Jessel M. R. in (1882) 21 Ch D 243[1] at p. 266 which is that where contracts are clearly expressed, the Judges should resist the temptation of interfering with them on the ground that they know the business of the people making the contracts better than the people know it themselves. It has been held with utmost clearness that inadequacy of consideration alone is not a ground for holding that a contract was induced by fraud or undue influence. In (1870) 2 H L Scot App 6[2] Lord Westbury stated the law as follows :

> The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

That dictum of Lord Westbury was approved and applied by the Judicial Committee in 3 Cal 192[3] at p. 196. In this case it cannot be said that the considerations for Exs. E and F were themselves so grossly inadequate as to raise a presumption that plaintiff 1 did not know what he was doing or that he was the victim of some imposition. The learned Judge does not seem to take into consideration in this case that there was a definite cloud on the title. Ex. B had been executed and although it is true that the daughter is dead, that document was still in existence. He has found that in fact other persons did bring suits claiming this property. The title is by no means clear. These circumstances alone are enough to explain any difference between the actual consideration and an estimate of what should be the maximum consideration.

But apart from that it would seem that the learned Judge has fallen into a further error. In construing S. 16, Contract Act, it has been held by the Judicial Committee in 46 M L J 610,[4] that an error would arise if the positions to be ascertained in cases of undue influence are put in the wrong order. They emphasize that the first thing to be found is whether the party who is said to have induced a contract was in a position to dominate the will of the other. After that the question arises, has the contract been so induced? On the second consideration arises the question of burden of proof. In this case, in my view, there is no evidence whatever that defendant 1 was in a position to dominate the will of plaintiff 1. Who is he? He appears to have been a wife's relation. There is nothing whatever on record in any way to suggest close intimacy with plaintiff 1. All we know is that this transaction took place and nothing else.

The learned Judge however finds undue influence but it would seem from a consideration of his judgment that he fell into the very error concerning which Lord Shaw issues a warning in the case above cited. In 43 Mad 546[5] at p. 548, it is pointed out again by the Judicial Committee that :

> It is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice.

Lord Shaw goes on to state that it had got to be shown that that influence was undue. I mention this to show the very high degree of evidence that is required because in the case now under appeal there is no evidence of any relationship at all between

1. Wallis v. Smith, (1882) 21 Ch D 243=47 L T 389=52 L J Ch 145=31 W R 214.
2. Tennent v. Tennents, (1870) 2 H L Scot App 6.
3. Administrator-General of Bengal v. Juggeswar Roy, (1877) 3 Cal 192=1 C L R 107=3 Suther 455=3 Sar 760=1 Ind Jur 640 (P C).
4. Raghunath Prasad v. Sarju Prasad, (1924) 11 A I R P C 60=82 I C 817=3 Pat 279=51 I A 101=46 M L J 610 (P C).
5. Poosathurai v. Kannappa Chettiar, (1920) 7 A I R P C 65=55 I C 447=47 I A 1=43 Mad 546 (P C).

the parties except the slight relationship by marriage. There is no evidence that the one was able to dominate the will of the other.

The whole case is based on the fact that the learned Judge took the view that this was an improvident contract. He believed plaintiff 1 so far as important issues in the case were concerned and disbelieved defendant 1. That is curious because plaintiff 1 who after all was relying on his own evidence in order to prove his case came to Court with some very important statements which were found to be untrue. Rs. 1400 was paid to plaintiff 1 in cash as part consideration of this document. He alleged that that money was taken back by defendant 1. That has been found to be untrue. The promissory notes, Exs. 1 and 2, he stated, were brought into existence on 9th June, that no consideration passed. That has also been found to be untrue. It is therefore curious that the learned Judge thought fit to rely on this man's evidence in any shape or form.

But it is not necessary to disbelieve his evidence which personally I do disbelieve —because I think it is sufficient to say that on his evidence there is no case of undue influence made out. The only case made out is that he executed the transfer and the lease which may not be to his advantage. On the other hand, in view of the litigation which threatens these documents, they may well be to the disadvantage of the transferee. That is sufficient to dispose of this case. I would only add that, from both the documents and the evidence, so far from holding that plaintiff 1 is a simple person, I take the view that he is the exact opposite. He seems to have been very well able to look after himself. It should be observed that two months after the execution of Exs. E and F, he made a voluntary settlement of the same properties to plaintiffs 2 and 3 and generally comported himself throughout in a manner which suggests that he may easily have been trying to overreach defendant 1 instead of defendant 1 overreaching him. For the reasons that I have given I consider that this appeal should be allowed with costs throughout.

Horwill J.—I agree.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 429

GENTLE J.

T. K. Balasubramania Chettiar —
Plaintiff.

v.

A. M. Manickam Chettiar and another —
Defendants.

C. S. No. 318 of 1933, Decided on 16th September 1937.

(a) Mortgage—Construction—Plaintiff though possessing executable money decree, entering into mortgage with judgment-debtor for lesser amount in full satisfaction of decretal amount —Mortgage amount made payable 'on demand' —Mortgage held only a security and amount payable only on demand.

Ordinarily the words 'on demand' mean forthwith, and in order to ascertain whether those words shall have imported to them the meaning, which prima facie they bear, the tenor of the whole document itself must be considered.

[P 431 C 1]

The plaintiff was possessed of a decree for money, which he could have executed at any moment. But instead he entered into a mortgage with the judgment-debtor under which he accepted a lesser amount than the decretal amount in satisfaction of the money decree. The amount stated was made payable 'on demand'. The deed also contained the words "to secure the payment of the amount which will be due to the mortgagee under the said decree":

Held that by the mortgage deed the decreeholder obtained a security, which he had none before, with the object of giving time and of adopting the position that the money was not then immediately payable, but payable when demanded according to the conditions in the deed and not before : *A I R 1923 Mad 667, Ref.*

[P 431 C 1]

(b) Acknowledgment—Mortgage deed reciting debt due—Admission before Registrar of its execution—Acknowledgment of liability is sufficient to save limitation.

When a document is presented for registration the executants not only admit the fact of its execution but admit the contents of the document, namely their liability upon it. Hence if a person admitted before the Registrar execution of a mortgage bond which recites the debt due, his acknowledgment of liability is implied and sufficient to save limitation : *A I R 1933 Mad 713 and A I R 1923 Lah 369, Rel. on.* [P 432 C 2]

K. V. Ramachandra Aiyar —
for Plaintiff.

N. Rajagopalan, M. A. Venkatarama Naidu and P. Muthukumaraswamy Mudaliar — *for Defendants.*

Judgment. — In this suit the plaintiff is seeking a decree for some Rs. 16,000 odd against two defendants. The two defendants are father and son and are a joint family. Mr. Rajagopalan has appeared for defendant 1, the father, and, if I may say so, has most ably argued all

matters arising on behalf of his client and with refreshing brevity. The defence is now so far as both defendants are concerned one of limitation and limitation only. At one time it was on behalf of defendant 2 suggested that debt was incurred by his father, defendant 1, in matters arising out of speculation and wagering. That was dissipated very quickly when the evidence which was called on behalf of defendant 2 was given from the witness box.

It is necessary for me to refer to a number of dates and circumstances going back prior to the year 1917. Defendant 1 carried on business as a yarn merchant and the plaintiff had an interest in that business of four annas. The profits therefrom at one period were very large amounting to, I was told, some lakh or more rupees a year although the amount invested to commence the business was small but by the year 1917 apparently the business was not as flourishing as before. There was a suit, C. S. No. 95 of 1917, brought by the present plaintiff against defendant 1 for taking of partnership accounts, the result of which was a decree in favour of the plaintiff for approximately Rupees 1,10,000. By the year 1925 there had been paid something over Rs. 80,000 in respect of that decree and there was then remaining due Rs. 42,000 odd.

This decree was against defendant 1 alone. Defendant 2 was of very tender years in 1917 and at the time of the circumstances I am about to refer to, namely 1925, he was still a minor. On 23rd December 1925, there was executed by defendant 1 for himself and on behalf of his infant son, defendant 2 an indenture of mortgage. In this deed there are a number of recitals to which I propose not to refer in detail but the effect is that the plaintiff forewent over Rs. 17,000 and thereby the debt due amounted to the round figure of Rs. 25,000. In the abovementioned deed it is recited that this was at the instigation and through the intercession of mutual friends. It must be remembered that at this time the plaintiff was possessed of a decree which he could execute in any way available to him, to reap the fruits of the decree. The indenture of mortgage provides that defendants 1 and 2, defendant 2 becoming a party to this deed, undertook and agreed to pay to the plaintiff on demand the sum of Rs. 25,000 and the mortgage deed charged in favour of the plaintiff four immovable properties and certain moveable properties mentioned in the schedule.

In regard to the immovable properties another mortgagee had a first mortgage existing. The plaintiff upon the execution of the mortgage—and it was made a condition of that deed—was required to enter up in this Court, from which the decree in C. S. No. 95 of 1917 was then existing, that there had been full satisfaction which in course of evidence, I was informed, had been done. The indenture proceeds to provide that the plaintiff will not execute any decree which he might obtain in respect of this mortgage deed by the arrest and detention in prison of either of the defendants and then it proceeds to provide that if the plaintiff was unable to receive as much as Rs. 20,000 under the mortgage deed he should be entitled to recover the deficit plus an amount due in respect of interest by the institution of legal proceedings and taking steps in execution for the attachment of the properties which were then owned by defendants 1 and 2 except the trade assets and stock-in-trade of these parties in any business carried on by them and also in regard to their moveable properties but not to obtain an order for the arrest or detention of the defendants. There was a proviso which declares that after the expiration of three years from the date of the mortgage deed the plaintiff should be entitled to have recourse to and proceed against their assets and stock-in-trade and moveable property of defendant 1 for the purpose of recovering any balance due to the plaintiff up to Rs. 20,000. And the document declared that the debt was binding upon defendant 2. As I said, at that time the plaintiff was possessed of a decree which he could have executed at any moment. But instead of doing so, he enters into this mortgage deed with the two defendants and the question which I have to decide in regard to this deed is whether the amount payable thereunder, viz. Rupees 25,000, became payable forthwith upon execution of the deed or whether that amount became payable upon the happening of the contingency viz. the demand by the plaintiff upon the defendants to pay him that sum or any sum outstanding. The words "on demand" are used in the deed at page 3 and the deed says

> and the mortgagors covenant with the mortgagee that they, the mortgagors will pay the mortgagee on demand the said sum of Rs. 25,000.

It is conceded that ordinarily the words "on demand" mean forthwith and in order to ascertain whether those words shall have imported to them the meaning which prima facie they bear, this must depend upon the tenor of the whole document itself. In 46 Mad 259[1] Sir Walter Schwabe C. J. at 289 says :

> The question to be considered is whether the words "on demand" are mere words, or whether looking at the whole document it is really intended that the demand should be made before the liability to pay arises.

As I pointed out, the words "on demand" are used. Also in an earlier part of the deed there appears this

> subject to the terms and conditions hereinafter stated in order to secure the payment of the amount which will be due to the mortgagee under the said decree,

the decree of course referring to the decree I mentioned. The words "will be" to my mind import the future and not the present. And then when later on the document says,

> that in consideration of the said sum of Rs. 25,000 due as aforesaid (that is to say, will be due from the defendants) and pursuant to the agreement and in consideration thereof the mortgagors agree and covenant with the mortgagee that they, the mortgagors will pay the mortgagee on demand the said sum of Rs. 25,000,

to my mind reading these together it seems that the money which is payable in future is covenanted to be payable when demanded of them and not before. Although the plaintiff at that time was the holder of a decree he had not then any security in respect of the assets of either defendant 1 against whom the decree was made or of course defendant 2 who was not a party to that earlier suit. By this mortgage deed he obtained security, although it may not have been of the highest value it was security, and it does seem to me, looking at the circumstances and considering the document as a whole that when a person such as the plaintiff being in the position immediately to execute under a decree accepts this deed in discharge of the decree and in the deed he receives security, the object to my mind was to give time and by giving time to adopt the position that the money was not then to be immediately payable but was to be paid according to the conditions set out in the deed, viz. when demand was made upon the defendant to pay. It is necessary for me to refer also to matter that transpired in 1927. As I have said the plaintiff obtained a second mortgage upon four immovable properties. In 1927 there was no doubt negotiations. However an arrangement between all the parties seems to have come about by which first of all the first mortgagee took three of the properties to which I have referred free of all encumbrances and the plaintiff took the remaining fourth property also free of all encumbrances; this fourth property was conveyed to him by a sale deed dated 29th April 1927. The property was valued at Rs. 9000 and this sale deed conveyed the fourth property to the plaintiff and at page 2 of the deed I find this :

> As part payment towards the aforesaid principal amount due to you, we have agreed to sell the properties described in the undermentioned schedule to you for Rs. 9000. We have this day sold to you the aforesaid property for Rs. 9000 and endorsed the payment of the aforesaid entire sale amount of Rs. 9000 as part payment towards the aforesaid principal amount due to you and have also taken a receipt from you.

That document was registered on 22nd August 1927, and at the registration the plaintiff and defendant 1 were present and appeared before the Registrar. Defendant 1 signed on behalf of himself and defendant 2 on the back of the first page of the sale deed and acknowledged that the sale deed itself had been executed by him. Mr. Rajagopalan has admitted if I may say so quite properly and thereby saving a lot of time, the signature of his client, defendant 1, at the back of that sale deed. One further fact to which I desire to refer is the letter or notice which was sent by the plaintiff's legal adviser to the two defendants on 4th August 1933. That is a notice calling upon the defendants to pay the amount to the plaintiff which was outstanding under the mortgage deed of 23rd December 1925, in other words demanding the amount payable under the mortgage deed. With regard to those two notices I am perfectly satisfied they reached the hands of the defendants. They were sent to each defendant, two copies, one by registered post and one by ordinary post to defendant 1's address with whom was living defendant 2. The registered letters were both refused but the unregistered letters of which I have seen the certificate of posting were never returned through the Dead Letter Office. As I have said at the outset, the defence now is only one of limitation and it is conceded that the period of limitation which applies in this suit is one of six years. The suit was filed on 14th August 1933. The mortgage

1. Secy. of State v. Radhika Prasad Bapuli, (1923) 10 A I R Mad 667=74 I C 785=46 Mad 259=44 M L J 685.

deed being dated 23rd December 1925 more than six years had elapsed from its execution to the initiation of the suit and if the moneys payable had been payable forthwith, it is obvious that the period of limitation under the Limitation Act would have run which will have prevented the plaintiff succeeding. Firstly, as I have already indicated, in my view that mortgage deed was one which was not forthwith payable, the principal moneys payable by the deed to the plaintiff were not payable unless and until demand was made. Demand not having been made until 4th August 1933 by the letter to which I have already referred, it was not until that date that the principal moneys became payable and the suit having been filed on 14th August for this reason in my view the plea of limitation does not avail.

It is further contended by and on behalf of the plaintiff that the matter is saved further from the plea of limitation in this way. In the sale deed of 29th April 1927 there appears this: "As security for the sum of Rs. 20,000 due to you out of the amount due under a Decree No. 95 of 1927". That is a deed, to which both defendants were parties, addressed to the plaintiff and it is said that it is an acknowledgment on that date of the amount due to the plaintiff under the mortgage deed. That sale deed having been registered on 22nd August 1927 and there was made by defendant 1 the admission of execution to which I have already referred, it is said that such admission of execution i. e. admitting the signature to the deed itself and the deed itself acknowledging the debt due under the mortgage deed, the admission of execution which is made on 22nd August 1927 is an acknowledgment taking the matter out of the Limitation Act and preventing the plea of limitation availing. Mr. Rajagopalan contended that the acknowledgment before the learned Registrar was merely one of execution only and nothing should be inferred from such an acknowledgment, save that there was the acknowledgment of the execution of the deed sufficient to justify the learned Registrar registering the deed in accordance with the Registration Act. In his usual fair way, as Mr. Rajagopalan always is, he placed before me all the authorities. One is the decision in 76 I C 751[2] in the Lahore High Court the headnote of which is this:

> An endorsement on a mortgage deed by a Sub-Registrar signed by the mortgagor in which the latter admits the receipt of consideration for the mortgage amounts to an acknowledgment of liability within the meaning of S. 19, Lim. Act.

The other is the case in this Court reported in 65 M L J 380,[3] a decision of Ramesam and Cornish JJ. The same point was before those learned Judges and the decision is embodied in the headnote:

> Where a person executed a mortgage bond and registered it on 9th Septempber 1909 for himself and on behalf of a minor as guardian and made an endorsement on 18th July 1915 of some payment on the document, when the minor had not attained majority, his acknowledgment was proper as he certainly was a person authorized under S. 21, Lim. Act. Therefore his acknowledgment of 1915 was binding on the person on whose behalf he acknowledged and a decree against him could be given.
>
> When a document is presented for registration, the executants not only admit the fact of its execution but admit the contents of the document, namely their liability upon it. Hence if a person admitted before the Sub-Registrar execution of a mortgage bond which recites that old accounts had been looked into and the sum arrived at had remained due, his acknowledgment of liability was implied.

It is true as Mr. Rajagopalan points out that Ramesam J. says in the course of his judgment at p. 383:

> It is not necessary to deal with possible cases where there may be some difficulty in making such an implication.

The implication being acknowledgment of liability. But turning to the facts of this case, defendant 1, one of the makers of the sale deed of 29th April 1927 was a party not only on his own behalf but on behalf of his infant son, appeared before the Registrar and acknowledged the proper execution of the sale deed the previous April and thereby in my view he admitted not only the execution but all the matters set out in the deed itself. And that acknowledgment in writing on 22nd August is an acknowledgment which takes this case out of the provisions of the Limitation Act preventing a decree being given in favour of the plaintiff. Another contention was placed before me on behalf of the plaintiff in regard to the saving of this suit from the effects of the Limitation Act, but as I have already indicated the two contentions put forward with which I have dealt are sufficient to save this suit from the provisions of the Limitation Act. I do not propose to deal with the third contention. The result is the only defence admitted by the learned

2. Labha Mal v. Imam Din, (1923) 10 A I R Lah 369=76 I C 751.

3. Rosayya v. Pitchayya, (1933) 20 A I R Mad 713=145 I C 654=57 Mad 43=65 M L J 380.

counsel on behalf of defendant 2 now being one of limitation that there will be a decree in favour of the plaintiff for a sum of Rs. 16,772-8-0 and costs and interest upon the principal amount at the rate of six per cent. from 14th August 1933 to date and upon the principal sum and costs and interest at the same rate until payment subject to the restrictions set out in the mortgage deed dated 23rd December 1925. So far as the decree against defendant 2 is concerned, it will be in respect only of the joint family property.

C.R.K./V.B.B. *Order accordingly.*

A. I. R. 1938 Madras 433

LEACH C. J. AND PANDRANG ROW J.

Chembrolu Ramamurthy — Appellant.

v.

Chembrolu Bhimasankara Rao and others — Respondents.

Appeal No. 39 of 1933, Decided on 22nd November 1937, against decree of Sub-Judge, Rajahmundry, in O. S. No. 54 of 1930.

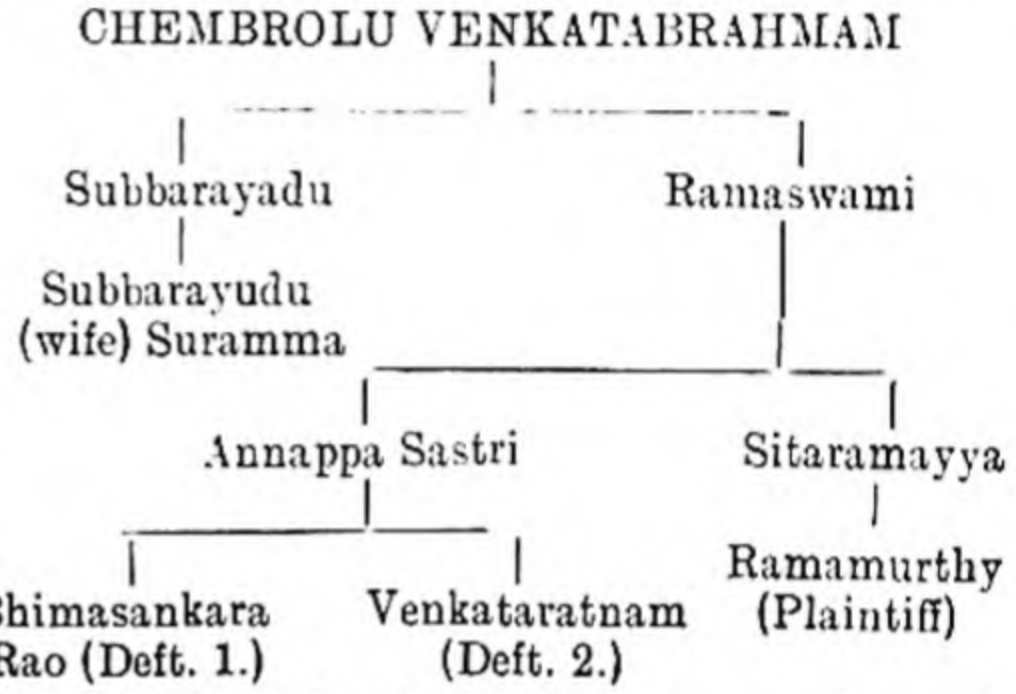
Hindu Law — Alienation—Widow— Alienation by widow consented to by presumptive reversioners—Consent merely raises presumption of necessity—Actual reversioners, although descendants of presumptive reversioners giving consent, are not estopped from disputing alienations.

An alienation by a Hindu widow of her deceased husband's property with the consent of the nearest reversioners does not in itself create an indefeasible title and the actual reversioners are not bound absolutely by the action of the presumptive reversioners. The consent of the presumptive reversioner to an alienation merely gives rise to a presumption that the transaction was one which was occasioned by necessity, but it is open to the actual reversioners to rebut the presumption if they can. Even if the presumptive reversioners giving consent to the alienations happen to be the paternal ancestors of the actual reversioners, they cannot bind the latter under the transactions entered into by the widow, and the actual reversioners are not estopped from disputing the alienations : *A I R 1918 P C 196; A I R 1936 P C 304; A I R 1919 Cal 603 and AIR 1933 Mad 637, Rel. on; Case law discussed.* [P 433 C 2; P 435 C 1, 2]

P. Somasundaram and K. Bhimasankaram — *for Appellant.*

A. Venkatachalam, C. Rama Rao, K. Kameswara Rao and T. Satyanarayana — *for Respondents.*

Leach C. J. — This appeal arises out of a suit filed in the Court of the Subordinate Judge of Rajahmundry by the appellant for the partition of the estate of his uncle Subbarayudu. He claimed that he and respondents 1 and 2 (defendants 1 and 2) were entitled to the estate as reversioners. There were 65 defendants, the other defendants being sued as alienees. Subbarayudu died about 60 years ago leaving a widow, Suramma, but no children. Suramma died on 3rd July 1928. The judgment of the lower Court contains a genealogical tree showing the relationship between the appellant, respondents 1 and 2 and Subbarayudu, and it will be convenient to reproduce it here.



On 6th April 1904, Annappa Sastri and Sitaramayya entered into an arrangement with Suramma under which they were to divide between them the estate as it then existed, the widow taking one-half and Annappa Sastri and Sitaramayya taking the other half absolutely. The arrangement was embodied in two deeds which were duly executed and registered. At the same time Annappa Sastri and Sitaramayya agreed to divide equally the properties which fell to their share under this arrangement. Before her death the widow disposed of the properties which she had obtained as the result of the settlement of the dispute and Annappa Sastri and Sitaramayya did the same. The appellant seeks to set aside all the alienations. The learned Subordinate Judge considered that the sons of Annappa Sastri and Sitaramayya were estopped from attacking the validity of the deeds under which their fathers had acquired property from which they had also benefited. He accordingly dismissed the suit without going into the merits. We do not share the opinion of the learned Subordinate Judge that the doctrine of estoppel applies in this case. In holding that it did apply the learned Subordinate Judge relied on the decision of the Privy Council in 30 All 1[1] and on the decision of a Full

1. Bajrangi Singh v. Manokarnika Baksh Singh, (1908) 30 All 1=35 I A 1=11 O C 78=5 A L J 1 (P C).

Bench of this Court in 31 Mad 366,[2] which was based on the judgment in the former case. But these cases require to be read in the light of later cases and this was not appreciated by the lower Court.

In 30 All 1,[1] the Judicial Committee had to consider the conflicting opinions expressed by the Allahabad and the Calcutta High Courts on the question of the effect of the consent of presumptive reversioners to an alienation by a Hindu widow. The Allahabad opinion was that even if all the presumptive reversioners had consented to the widow alienating the property, the actual reversioners could, when the succession opened, sue to set aside the alienation and have it set aside unless it were shown that the alienation had taken place as the result of necessity. Whatever consent was given, it would not obviate the requirement imposed by Hindu law of proving that there was need for the alienation. The opinion of the Calcutta High Court was that where the presumptive reversioners had consented to an alienation, a presumption arose that the alienation was the result of necessity. The presumption could be rebutted, but unless it were rebutted the alienation would bind the actual reversioners. Their Lordships decided that the better opinion was that of the Calcutta High Court, but as they concluded their judgment with the words

> the appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers,

it was also thought that their Lordships intended to hold that a father as a presumptive reversioner could bind his son. This was the reading of the judgment by White C. J. and Wallis and Sankaran Nair JJ., who composed the Full Bench which decided 31 Mad 366.[2] The learned Chief Justice in the course of the judgment did point out that there might be a difficulty in reconciling this decision of the Privy Council with the decision of their Lordships in 24 All 94,[3] but in view of the words used in the concluding portion of the judgment in 30 All 1,[1] the Full Bench felt constrained to hold that where a widow and her nearest reversioners had executed a document by which such reversioners, bona fide, and, in consideration of the widow conveying to them a portion of the property inherited by her from her husband, gave up all their rights to the remaining properties and consented to the widow dealing with such properties as she chose, the actual reversioners after the widow's death were bound by such consent and were estopped from questioning the alienations made by the widow after the agreement had been entered into. The same difficulty presented itself to the Calcutta High Court in 40 Cal 721,[4] but as the Privy Council had said in 30 All 1,[1] that they would be unwilling to extend the widow's power of alienation beyond its present limit, it was thought that their Lordships had not intended to lay down any new doctrine. After a discussion of all the authorities, Jenkins C. J. observed :

> The result then of the authorities binding on us appears to me to be this :
>
> To uphold an alienation by a widow of her deceased husband's estate where she is his heir, it should be shown (1) that there was legal necessity, or (2) that the alienee, after reasonable inquiry as to the necessity, acted honestly in the belief, that it existed, or (3) that there was such consent of the next heirs as would raise a presumption either of the existence of necessity or of reasonable inquiry and honest belief as to its existence, or (4) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and the consequent acceleration of the interest of the consenting heirs. Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estate, but where the fourth alone is proved, then the alienation must be of the whole.

The Calcutta High Court accordingly answered the reference made to it in this sense. Their Lordships of the Privy Council were called upon to reconsider the question in 42 Mad 523,[5] and they explained their decision in 30 All 1.[1] They observed that while it was true that the concluding words of the judgment in 30 All 1[1] as to the sons being bound by the consent of the fathers could be read as indicating that consent operated *proprio vigore*, two remarks fell to be made. First the idea of an eventual reversioner claiming through any one who went before him was opposed both to principle and authority. It was opposed to principle because there is no vested right until death. It was opposed to the authority in 24 All 94.[3] Secondly, there was no hint in the judgment in 30

2. Rangappa Naick v. Kamti Naik, (1908) 31 Mad 366=18 M L J 309 (F B).

3. Bahadur Singh v. Mohar Singh, (1902) 24 All 94=29 I A 1=8 Sar 152 (P C).

4. Debi Prasad Chowdhury v. Golab Bhagat, (1913) 40 Cal 721=19 I C 273=17 C W N 701 =17 C L J 499 (F B).

5. Rangaswami Gounden v. Nachiappa Gounden, (1918) 5 A I R P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).

All 1,[1] that their Lordships proposed to lay down a new doctrine which would render quite immaterial most of the cases quoted. They here added :

It seems therefore much safer to conclude that the judgment was only meant to settle the point at issue, viz. the comparative merits of the Allahabad and the Calcutta rules, leaving the operation of consent to stand on the perfectly logical grounds of the authorities quoted, than to hold that a new and illogical extension of the law was introduced, and to find consolation in the fact as stated by Sadasiva Ayyar J. that Lord Halsbury once said that law was not a logical science.

Having made these observations their Lordships proceeded to state the law in the following terms :

The result of the consideration of the decided cases may be summarised thus : (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins C. J. and Mookerjee J. in 40 Cal 721.[4] It follows that their Lordships cannot agree with a good deal of what was said in 31 Mad 366.[2]

There is a further decision of the Judicial Committee which has a bearing on the question of law under consideration. It is the case in 44 M L W 546,[6] where it was pointed out that the presumptive reversioner although the paternal ancestor of the actual reversioners is not a person from whom the actual reversioner takes his title to the estate. He takes his title direct from the last full owner. In this case their Lordships also held that even if the presumptive reversioner were the guardian of the actual reversioner, he could not bind the latter under transactions entered into by the widow in respect of the estate properties. They consequently rejected the plea that the actual reversioner was estopped from disputing alienations made by the widow. These decisions make it quite clear that actual reversioners are not bound absolutely by the action of presumptive reversioners. The consent of the presumptive reversioners to an alienation merely gives rise to a presumption that the transaction was one which was occasioned by necessity, but it is open to the actual reversioners to rebut the presumption if they can. To adopt the wording in the headnote in 30 C L J 56,[7] a conveyance of a portion of an estate by a Hindu widow jointly with the nearest reversioner does not in itself create an indefeasible title. The decision was followed by a Bench of this Court (Curgenven and Sundaram Chetty JJ.) in 65 M L J 282.[8]

In the present case no opportunity was given to the appellant to prove that the transactions in question were contrary to Hindu law. The learned Judge held that the appellant was governed by the actions of his father Sitaramayya and therefore he was not in law entitled to institute the present suit. This decision is clearly wrong on the authorities. The appeal will be allowed and the case will be remitted to the Subordinate Judge to try and decide according to law. The appellant is entitled to costs which will be paid by the opposing respondents in proportion to the value of their interests in the estate properties. The appellant has appealed as a pauper. As there is a remand for retrial he would have been entitled to a refund of the court-fee had he paid it. In the circumstances there is no necessity to make any order for payment by the appellant to Government of the court-fee on the memorandum of appeal.

C.R.K./R.M. *Case remanded.*

6. Mt. Bindakuer v. Lalita Prasad Chowdhury, (1936) 23 A I R P C 304=164 I C 340=44 M L W 546 (P C).

7. Rameschandra Chakrabarti v. Sasi Bhusan Upadhya, (1919) 6 A I R Cal 603=53 I C 654 =30 C L J 56=23 C W N 1025.

8. Satyanarayana v. Venkanna, (1933) 20 A I R Mad 637=147 I C 862=65 M L J 282.

---

* * A. I. R. 1938 Madras 435

FULL BENCH

LEACH C. J., VARADACHARIAR, BURN, KING AND VENKATARAMANA RAO JJ.

Dhanukodi Nayakkar and others — Appellants.

Second Appeal No. 393 of 1937, Decided on 15th November 1937, against decree of District Court, Madura, in A. S. No. 169 of 1932.

*** * (a) Court-fees Act (1870), S. 7 (iv) (f)— Suit for accounts—Defendant appealing against**

final decree should pay court-fee on amount of decree passed against him—Similarly defendant appealing against preliminary decree should stamp his memorandum according to plaintiff's valuation : *56 Mad 705=A I R 1933 Mad 330=141 I C 602, Overruled.*

Section 7 gives great freedom to plaintiff appellants, but it does not give the same freedom to defendant-appellants. When a defendant-appellant appeals against a final decree he knows exactly the value of his relief, and he should pay a court-fee on the amount of the decree passed against him except in cases where he appealed only against a portion of the decree. Similarly a defendant appealing from a preliminary decree for an account has ordinarily to stamp his memorandum according to the plaintiff's valuation. It cannot be said that in compelling a defendant to follow a plaintiff's valuation hardship is likely to result as a plaintiff is never anxious to pay more than is necessary in court-fees: *A I R 1917 Mad 668 (F B) and 23 Mad 490, Approved ; A I R 1925 All 787, Dissent. ; A I R 1929 P C 147, Disting. ; 56 Mad 705=A I R 1933 Mad 330=141 I C 602,* **Overruled.** [P 438 C 1]

(b) Practice—Court should not depart from long established practice unless it is contrary to law.

A Court is naturally reluctant to depart from a long established practice and should only do so when it is clear that the practice is contrary to law. [P 438 C 1]

K. Rajah Ayyar — *for Appellants.*

Leach C. J. — This reference raises the much discussed question of the bearing of S. 7 (iv) (f), Court-fees Act of 1870 when the defendant is the appellant. In a suit for recovery of possession of immovable property and for an account filed in the Court of the Subordinate Judge of Madura the plaintiff valued his relief, so far as it concerned his claim for an account, at Rs. 3000. He obtained a preliminary decree which was followed in due course by a final decree, by which he was declared to be entitled to recover a total sum of Rs. 32,000. The preliminary decree was challenged on appeal to the District Court of Madura, but this appeal had not been decided at the time of the passing of the final decree by the trial Court. An appeal against the final decree was also filed, and the District Court heard the two appeals together. The result was that the decree of the trial Court, so far as it directed the payment of money was varied, it being held that the plaintiff was only entitled to recover Rs. 6554-5-2. The defendants concerned then appealed to this Court and valued their relief at Rs. 100, paying the court-fee of Rs. 11-3-0 thereon. This valuation was accepted by the office, as it was in accordance with the decision of this Court (Ramesam and Mockett JJ.) in the case in 56 Mad 705,[1] but when the appeal came before Burn J. for admission my learned brother questioned the right of the appellants to make an arbitrary valuation and suggested that 56 Mad 705[1] should be reconsidered as it appeared to go beyond the decision of the Privy Council in 56 I A 232=10 Lah 737=31 Bom L R 841=57 M L J 281,[2] on which Ramesam and Mockett JJ. had relied. This Bench has consequently been constituted to consider the whole question of the stamping of appeals by defendants in suits for accounts, as it is important for the legal profession and necessary for the guidance of the officials of the Court whose duty it is to check the stamping of memoranda of appeal that there should be a clear statement of the practice to be followed as regards both preliminary and final decrees.

The Courts of India have always regarded S. 7 (iv) (f), Court-fees Act as applying to appeals by defendants as well as to appeals by plaintiffs, but whether there is justification for including defendants is open to question. Certainly support can be found for the contention that the Legislature did not intend it to apply to appeals by defendants. In the first place the Act was passed when the Civil Procedure Code of 1859 was in force and that Code did not contemplate an appeal from a preliminary decree in a suit for an account. In the second place, S. 11 which was inserted to prevent a litigant escaping payment of the proper court-fee only applies to plaintiffs. There is no corresponding provision to meet the case of a defendant who appeals and undervalues his relief. Then Cl. (iv) (f) itself only mentions the plaintiff. It states that in suits falling within the clause, the amount of fee payable shall be computed according to the amount at which the relief is valued in the plaint or memoranda and concludes with these words: "In all such suits, the plaintiff shall state the amount at which he values the relief." Although the memorandum of appeal is included, the emphasis is on the plaintiff. It is he who must value the relief. The wording of the clause and of S. 11 read in the light of the history of the section certainly does suggest

1. In re Venkatanadham, (1933) 20 A I R Mad 330=141 I C 602=64 M L J 122=56 Mad 705.
2. Faizulla Khan v. Mauladad Khan, (1929) 16 A I R P C 147=117 I C 493=56 I A 232=10 Lah 737=31 Bom L R 841=57 M L J 281 (P C).

that the defendant was not within the contemplation of those who were responsible for the drafting of the Act. Assuming this to be in fact the case, it would not follow that a defendant-appellant would escape payment of a court-fee. S. 4 or S. 6 read with Art. 1 of Sch. 1 could be called in aid to prevent this, and a defendant-appellant would here find no loophole for placing an arbitrary value on his relief.

In view of the unanimity of previous opinion, we will accept the contention that Cl. (iv) (f) does apply to appeals by a defendant and discuss the matter from that standpoint. The case of an appeal from a preliminary decree will be taken first. The question was considered by this Court in 1889, when Shepherd and Subramania Ayyar JJ. in 23 Mad 490,[3] held that the valuation given by the plaintiff was the valuation to be accepted, except when the appeal did not comprise the entire subject matter of the suit. The question was raised again in 1915 in 39 Mad 725,[4] which was decided by a Full Bench consisting of Wallis C. J., Sadasiva Iyer and Srinivasa Iyengar JJ. who concurred in the opinion expressed in 23 Mad 490.[3] This decision has governed the practice in the Madras Presidency ever since. Therefore for nearly 40 years a defendant appealing from a preliminary decree for an account has ordinarily had to stamp his memorandum according to the plaintiff's valuation. The decision has however not found general acceptance and some High Courts consider that when a defendant appeals from a preliminary decree in a suit for an account he is at liberty to value his appeal at whatever amount may seem to him to be approximately correct. The reasoning which challenges the correctness of the decision in 39 Mad 725[4] will be gathered from the judgments delivered by Sulaiman and Boys JJ. in 47 All 756,[5] and may be summed up in very few words. Cl. (iv) (f) allows the plaintiff to state his own valuation and as it does not compel the defendant to accept the plaintiff's valuation, it is just to read it as placing the defendant-appellant on the same basis as the plaintiff-appellant. Sulaiman J. frankly acknowledged that this interpretation of the section will be unsatisfactory in some cases and may lead to inconvenience. It ignores the fact that S. 11 only applies to the plaintiff and that there is no corresponding section so far as the defendant is concerned.

Before deciding whether the practice laid down in 39 Mad 725[4] should continue to be followed, it is necessary to pause to consider the decision of the Judicial Committee in 10 Lah 737[2] which was an appeal by the plaintiffs in a suit for an account. They valued their relief in the plaint at Rs. 3000 but the trial Court passed a decree against them for Rs. 19,991. They appealed and valued their relief for the purpose of the appeal at Rs. 19,991, but they did not stamp the memorandum to include the Rs. 3000 which they claimed they were entitled to. The Appellate Court in remanding the matter for retrial ordered that they should not have a decree for any sum which might be due to them, as the court-fee paid did not cover that relief, and to that extent the appeal was barred by limitation. The Privy Council held that the court-fee paid on the sum of Rs. 19,991 was largely in excess of the true sum of relief at which a sound valuation could in the circumstances be said to reach and it covered the appeal as a whole including the sum of Rs. 19,991 on the one hand and the smaller sum of Rs. 3000 on the other. In the course of the arguments which are to be found reported in 57 M L J 281=31 Bom L R 841,[2] it was pointed out by Lord Tomlin that the scheme of the Act was that the plaintiff should be allowed to value his own relief, and the decision proceeded on this basis. Their Lordships were not called upon to consider the case of a defendant-appellant and consequently their decision cannot be taken as a guide when deciding whether 39 Mad 725[4] or 47 All 756[5] should be followed.

After careful consideration, we have come to the conclusion that the Full Bench decision of this Court in 39 Mad 725[4] should not be disturbed. By reason of its concluding sentence, Cl. (iv) (f) can be construed in the way it was construed in that case, but even if the decision means reading into the clause something which is not there, it does not read into it anything more than those who prefer the Allahabad opinion would read into it.

3. Samiya Mavali v. Minammal, (1900) 23 Mad 490.

4. Srinivasacharlu v. A. Perindevamma, (1917) 4 A I R Mad 668=33 I C 602=39 Mad 725=30 M L J 402 (F B).

5. Chunni Lal v. Sheo Charan Lal, (1925) 12 A I R All 787=89 I C 122=47 All 756=23 A L J 725.

There are however other reasons why the decision should stand. It cannot be said that in compelling a defendant to follow a plaintiff's valuation hardship is likely to result. A plaintiff is never anxious to pay more than is necessary in court-fees. A Court is naturally reluctant to depart from a long established practice and should only do so when it is clear that the practice is contrary to law, which is certainly not the case here. Moreover the Madras High Court does not stand alone. The decision in 39 Mad 725[4] found acceptance with the majority of the Court in 52 Bom 904[6] and in 14 Pat 658.[7] The decision in 39 Mad 725[4] will therefore continue to govern the practice in this presidency with regard to appeals by defendants from preliminary decrees in suits for account.

Until the decision in 56 Mad 705,[1] it was never questioned in the High Courts of India that a defendant appealing against a final decree should pay a court-fee on the amount of the decree passed against him — except in cases where he appealed only against a portion of the decree — and we are unable to concur in the opinion that 10 Lah 737[2] has put a different construction on the section. *Faizulla Khan's case*,[2] as I have already indicated, only dealt with the case of a plaintiff-appellant. The section gives great freedom to plaintiff-appellants, but we do not consider that it gives the same freedom to defendant-appellants. When a defendant-appellant appeals against a final decree he knows exactly the value of his relief. It follows that we consider that 56 Mad 705[1] was wrongly decided and therefore should not be followed.

In the present case according to the heading of the memorandum of appeal, the appeal relates only to the preliminary decree for an account, but at the end of the memorandum there is the note :

> The appeal is from a combined preliminary and final decree passed by the Appellate Court in a suit for taking of accounts and hence it is impossible to state accurately what the net liability of the appellants will be on a proper taking of the accounts, accepting the contention raised in the memorandum of grounds.

In the course of his arguments, the learned advocate for the appellants intimated that the intention was to limit the appeal to the preliminary decree, because if that was set aside the final decree would also fail. We see no objection to the appellants treating their appeal as an appeal against the preliminary decree, if they so desire, but they will have to value their relief in accordance with the valuation in the plaint.

C.R.K./V.B.B. *Reference answered.*

6. Potchalal Ranchhod v. Umedram Kalidas, (1928) 15 A I R Bom 476 = 115 I C 391 = 52 Bom 904=30 Bom L R 1284.
7. Deoji Goa v. Tricumji Jivan Das, (1935) 22 A I R Pat 396=159 I C 4 = 14 Pat 658 = 16 P L T 433 (S B).

---

* * A. I. R. 1938 Madras 438

FULL BENCH

LEACH C. J., MADHAVAN NAIR, VARADACHARIAR, LAKSHMANA RAO AND STODART JJ.

Bademian Saheb and another — Petitioners.

v.

P. M. Jankan Saheb — Respondent.

Civil Revn. Petn. No. 1192 of 1934, Decided on 17th January 1938, to revise order of Dist. Munsif, Dharmapuri, D/- 10th February 1934.

*** * Civil P. C. (1908), S. 157—Madras Civil Rules of Practice (framed under 1882 Code)—Rules not re-enacted and published under Part 10 and inconsistent with rules of First Schedule are invalid :** *37 Mad 17=A I R 1914 Mad 652=20 I C 775 (F B), Overruled.*

The Madras Civil Rules of Practice made under the Code of 1882, but not re-enacted and published in accordance with the procedure prescribed in Part 10 of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules of the First Schedule of later Code : *37 Mad 17= A I R 1914 Mad 652=20 I C 775 (F B),* **Overruled.** [P 441 C 1]

C. S. Swaminathan — *for Petitioners.*

N. C. Vijiaraghavachariar and V. C. Viraraghavan — *for Respondent.*

Order of Reference

Beasley C. J. and Venkataramana Rao J.—The question raised in this revision petition relates to the validity of certain Civil Rules of Practice made under the Code of Civil Procedure 1882, but not re-enacted in accordance with the procedure laid down in Part 10 of the Code of 1908, and which are inconsistent with the rules in the First Schedule of the latter Code. The relevant provision on this matter is S. 157 of the Code of 1908 in and by which the rules framed under the Code of 1882 so far as they are consistent with this Code (1908), have the same force and effect as if they have been made under this Code and by the authority empowered thereby in this behalf.

In 37 Mad 17,[1] a Full Bench had to consider this question. The particular matter for consideration before them was whether the rules made by the Local Government under S. 269 of the Code of 1882 though inconsistent with O. 21, R. 43 of the Code of 1908 have any legal effect. They were of the opinion that the said rules not being inconsistent with the Code, as distinguished from the orders in the First Schedule to the Code, were in force. The learned Judges seem to interpret "the Code" in S. 157 as meaning "the body of the Code". It is desirable to point out that Code has been defined in S. 2 as including rules; and S. 121 enacts

that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of this Part (Part 10).

The Legislature, when it desires to draw a distinction between the body of the Code and the rules in the First Schedule, expressly makes mention of the "body of the Code". (See Ss. 121 and 128.) In the Full Bench decision, there is no discussion of the provisions of the new Code here adverted to by us, and the learned Chief Justice who delivered the leading judgment observed that the point was not free from doubt. Since this decision, whenever the question came up for decision learned Judges who had to deal with it expressed a contrary view. In 44 Mad 100[2] at p. 110, Sadasiva Ayyar J. observed that the Rules 179 and 180 of the Civil Rules of Practice which were found inconsistent with the rules of the First Schedule were ultra vires

as not having been framed in the manner and by the authority prescribed by the new Code for the making of valid new rules and for altering existing rules.

These have been since re-enacted in accordance with the procedure prescribed by the new Code. In 29 M L W 823=A I R 1929 Mad 641,[3] Thiruvenkatachariar J. held that R. 184 of the Civil Rules of Practice was ultra vires as being inconsistent with O. 21, R. 53, Civil P. C. We may here mention that in 58 Mad 285,[4] a Division Bench (Madhavan Nair and Cornish JJ.) was of the opinion that Rule 184 would be ultra vires but for S. 51 of the Code. In a recent decision reported in 42 M L W 564,[5] Venkatasubba Rao J. held that R. 199 of the Civil Rules of Practice, to the extent to which it is opposed to and inconsistent with the provisions of Sch. 1, cannot take effect. He was of the opinion that 37 Mad 17[1] did not lay down any general rule. It seems doubtful if 37 Mad 17[1] can be distinguished on this ground. As the matter is one of considerable importance, affecting as it does the practice in the presidency and we feel doubts as to the correctness of the decision in 37 Mad 17,[1] we refer for the decision of a Full Bench the following question:

"Are Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part 10 of the Code of 1908 and inconsistent with any of the rules of Sch. 1 of the latter Code valid and have they any legal effect?"

OPINION

Leach C. J.—The petitioner filed a suit in the Court of the District Munsif of Dharmapuri for the taking of accounts of a partnership. A preliminary decree was passed on 9th October 1933 and the District Munsif appointed a Commissioner to take the accounts. The plaint contained no allegation of irregularity or fraud, but during the taking of the accounts, the petitioner wished to urge that certain transactions had been suppressed by the respondent and consequently asked that these matters should be inquired into. On objection being raised to this course, the petitioner applied to the Court for an order directing the Commissioner to inquire into the alleged irregularities. By an order dated 10th February 1934, the District Munsif held that it was beyond the province of the Commissioner or the Court to embark on an inquiry into these allegations. He considered that it was then too late. The petitioner had had an opportunity of inspecting the accounts and as no objection had been raised before the passing of the preliminary decree, the petitioner must be deemed to have waived all objection. The petitioner thereupon applied to this Court for revision of the order. The matter came before Beasley C. J. and

1. In re District Munsif of Tiruvallur, (1914) 1 A I R Mad 652=20 I C 775=37 Mad 17=24 M L J 637 (F B).
2. Viswanadhan Chetty v. Arunachalam Chetty, (1921) 8 A I R Mad 218=60 I C 302=44 Mad 100=39 M L J 608 (F B).
3. Dhanaraju v. Motilal Daga, (1929) 16 A I R Mad 641=116 I C 343=52 Mad 563=29 M L W 823=57 M L J 264 (F B).
4. Venkataswami v. Venkataramana Rao, (1934) 21 A I R Mad 692=152 I C 789=58 Mad 285 =67 M L J 669.
5. Murugappa Chettiar v. Ramasami Chettiar, (1935) 22 A I R Mad 893=159 I C 228=42 M L W 564=59 Mad 342.

Venkataramana Rao J. on 8th February 1937. Feeling some doubt as to the correctness of the decision of the Full Bench of this Court in 37 Mad 17,[1] the following question was referred to a Full Bench of five Judges:

Are Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part 10 of the Code of 1908 and inconsistent with any of the rules of Sch. 1 of the latter Code valid and have they any legal effect?

The Court as now constituted is called upon to give the answer. The Civil Rules of Practice relating to suits for the dissolution of partnership and the taking of accounts are inconsistent with O. 20, R. 17, Civil P. C., and it is this fact which has given rise to the question now under discussion. The Civil Rules of Practice require questions of irregularity or fraud to be raised and determined before the case is remitted to the Commissioner for the taking of the accounts. O. 20, R. 17, Civil P. C. however states that the Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised. Therefore the Code allows questions of irregularity and fraud to be raised before the Commissioner if the Court considers that this should be done. It is to be observed that the Civil Rules of Practice were framed under the Code of 1882, which did not contemplate a preliminary decree in a partnership suit.

In order to answer the question referred, it is necessary to examine certain provisions of the Code of 1908. S. 2 (1) makes it clear that the Code includes the rules in Sch. 1. Therefore O. 20, R. 17 is as much a part of the Code as the sections forming the body of the Act. S. 121 states that the rules in Sch. 1 shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part 10, which comprises Ss. 121 to 131. Under S. 122, High Courts established under the Indian High Courts Act 1861, or the Government of India Act 1915, may, from time to time, after previous publication, make rules regulating their own procedure, and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in Sch. 1. S. 123 gives power to constitute a Rule Committee of the High Court and states how the Committee shall be composed. S. 124 requires the Committee to report to the High Court on any proposal to annul, alter or add to the rules in Sch. 1 or to make new rules and states that before making any rules under S. 122 the High Court shall take such report into consideration. S. 126 says that the rules made under Part 10 shall be subject to the previous approval of the authority prescribed by the Proviso to S. 107, Government of India Act 1915. So far as this Court is concerned, the authority is the Local Government. S. 127 provides that the rules so made and approved shall be published in the Gazette of India or in the local Official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in Sch. 1.

Section 157 stipulates that the rules made under the Code of 1882 shall, so far as they are consistent with the Code of 1908, have the same force and effect as if they had been made under the new Code, but such rules must not be inconsistent with the new Code. If they are inconsistent the old rules cease to have validity. When the Code of 1908 was enacted, the Civil Rules of Practice then in force were not re-enacted and published in accordance with the provisions of Part 10. No steps were taken under this Part and the validity of the present rules therefore depends entirely on the provisions of S. 157. As that section limits the validity of the old rules to such rules as are consistent with the present Code, it follows that rules which insist on questions of irregularity and fraud being decided before the preliminary decree is passed in a partnership suit are invalid.

As I have indicated, this reference has been necessitated as the result of the decision in 37 Mad 17.[1] That case was decided by Arnold White C. J. and Munro and Sankaran Nair JJ. The question there was whether the rules made by Government under S. 269 of the Code of 1882 remained in force until rules were framed

by the High Court under the new Code, though they might be inconsistent with O. 21 R. 43, of the new Code. The Court held that they did remain in force; and the reasoning given can be gathered from the following passage in the judgment of the learned Chief Justice at p. 20 of the report :

There is nothing in the Code of 1908, as distinguished from the Orders in Sch. 1 to the Code, which is inconsistent with the rules issued under S. 269, though there is an inconsistency between the rules and O. 21, R. 43. But the High Court has power to alter the rules in Sch. 1. This being so, I do not think it follows that, because the rules made under the old section are inconsistent with the rules in the schedule, they are not consistent with this Code within the meaning of S. 157. The point is not free from doubt, but until rules are made by the High Court, I think the rules made by Government under S. 269 of the old Code are in force. S.157 is an enabling, not a repealing section. The rules have never been expressly repealed and I do not think we are bound to hold they are implicitly repealed by virtue of the words "so far as they are consistent with this Code", which occur in S. 157.

The learned Judges obviously overlooked the fact that by virtue of S. 2 (1) the rules in Sch. 1 of the Code of 1908 are as much a part of the Code as the sections themselves and it follows that if there is inconsistency between the old rules and the rules of the new Code the old rules must go.

It is not necessary to refer in detail to the other cases mentioned in the Order of Reference. They have been sufficiently dealt with there. It is quite clear that 37 Mad 17[1] was wrongly decided and must be overruled. We accordingly answer the question referred in this way. The Civil Rules of Practice made under the Code of 1882, but not re-enacted and published in accordance with the procedure prescribed in Part 10 of the Code of 1908, are invalid if and in so far as they are inconsistent with any of the rules of Sch. 1 of the latter Code.

C.R.K./V.B.B. *Reference answered in the affirmative.*

*** A. I. R. 1938 Madras 441**

FULL BENCH

LEACH C. J., VARADACHARIAR AND MOCKETT JJ.

Manubolu Rangareddi—Appellant.

v.

Maramreddi Dasaradharami Reddi and others—Respondents.

Second Appeal No. 208 of 1933, Decided on 16th December 1937.

***(a) Madras Hereditary Village Offices Act (3 of 1895), Ss. 6, 13, 21—Direction in S. 6 is mandatory — Choosing of new office-bearer — Claims of old family possessing office should be considered—Right to office can be enforced by civil suit :** *View of Napier J. in 9 M L W 90= A I R 1919 Mad 312=50 I C 185 ; 54 M L J 357 =A I R 1928 Mad 497=109 I C 661 and 12 M L W 767=A I R 1920 Mad 556=54 I C 816, Overruled.*

The direction in S. 6 (1) is mandatory. The Collector shall select the person best qualified from among the members of the family and if there is a person in the family who does not suffer from any of the disqualifications referred to in S. 10 (1), he is bound to select that person. If there are several persons he is bound to choose the one he considers most suitable. The office of village headman has always been regarded as a hereditary office and one of the objects of the Act is to preserve the hereditary character of such office. Therefore when an old office is abolished and a new one is created in its place, the new office shall be filled from the family connected with the old office, provided there is a member of the family possessing the necessary qualifications. Such right can be enforced by a civil suit and Ss. 13 and 21 do not exclude the Civil Court entertaining suits of this nature : *A I R 1922 P C 96, Expl. ; View of Napier J.* in *9 M L W 90=A I R 1919 Mad 312=50 I C 185 ; 54 M L J 357=A I R 1928 Mad 497=109 I C 661 and 12 M L W 767= A I R 1920 Mad 556=54 I C 816,* **Overruled ;** *A I R 1920 Mad 484 and A I R 1932 Mad 724, Rel. on.* [P 443 C 2 ; P 444 C 2 ; P 445 C 1]

(b) Madras Hereditary Village Offices Act (3 of 1895 as amended in 1930), S. 6 (3) — Subs. (3) is not retrospective.

The Preamble does not govern the plain provisions in the body of the Act and where it is clear that the Amending Act is more than declaratory, it cannot be given retrospective effect. Hence sub-s. 3 of S. 6 added by the Amending Act of 1930 is not retrospective. [P 445 C 1, 2]

Ch. Raghava Rao and S. Rajaraman—*for Appellant.*

M. S. Ramachandra Rao for B. Somayya and S. Sitarama Ayyar—*for Respondents.*

Judgment.—Respondent 1 instituted a suit in the Court of the District Munsif of Gudur for a declaration that he is the rightful holder of the office of headman either of the village of Gudur East or of Gudur West and that he is entitled to be appointed to one of these offices. These villages originally formed one village, but were converted into two in 1918. Before the division took place, Gudur consisted of Gudur proper and five hamlets, namely Vemulapalam, Veerareddipallee, Purittipallam, Puthupallam and Divipalam. The headman of Gudur had jurisdiction over Gudur itself and the hamlets of Vemulapallam and Veerareddipallee, but there was an assistant headman appointed in respect of Puritti-

pallam, Puthupallam and Divipalam. In 1903, respondent 1's father was appointed headman of Gudur, Vemulapalam and Veerareddipalli, and held this office until 1912, when he resigned. Respondent 1's name was then registered with the Collector with a view to respondent 1 being appointed in his father's place on coming of age and the appellant's father was appointed to discharge the duties of the office in the meantime. In 1905 respondent 2's father was appointed headman with jurisdiction over Puthupallam, Puritipallam and Divipalam. This was the position in 1918 when Gudur and the adjoining hamlets were formed into two villages and called Gudur East and Gudur West respectively. When this happened respondent 2's father was appointed headman of Gudur East and the appellant's father headman of Gudur West. Respondent 2 was the headman of Gudur East and the appellant was the headman of Gudur West at the time of the suit. The District Munsif held that respondent 1 had the right to hold the office of headman of Gudur West and therefore was entitled to be recognized in the place of the appellant. A declaration to this effect was accordingly granted. On appeal to the District Court of Nellore, it was held that the declaration should merely be that the appointment of the appellant is illegal and that respondent 1's family has a right to claim that the selection should be from the family.

The appellant contends that respondent 1 is not entitled to any declaration and that the suit should be dismissed for the following reasons: (1) the failure of the revenue authorities to appoint respondent 1 headman of one of the two villages did not give rise to a cause of action; (2) if the failure did constitute a cause of action, the Civil Court had no jurisdiction in the matter; and (3) respondent 1 was rightly passed over. Before discussing the questions involved in the appeal, it is necessary to examine the relevant sections in the Madras Hereditary Village Offices Act, 1895. S. 6 gives the Board of Revenue power to group or divide villages and provides that when this takes place the existing offices shall cease to exist and new offices which shall also be hereditary shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider best qualified from among the families of the last holders of the offices which have been abolished. By the Madras Village Offices Amendment Act of 1930, sub-s. (3) was added. This sub-section reads as follows:

> Notwithstanding anything contained in sub-s. (1) or sub-s. (2), no person shall be deemed to be ineligible for selection under sub-s. (1) or retention under sub-s. (2) by reason only of his being a minor. If a minor is selected under sub-s. (1) or retained under sub-s. (2), he shall be registered as the holder of the office and thereafter the procedure laid down in sub-s. (5) of S. 10 shall be adopted.

The addition of this sub-section was made long after the appellant and respondent 2 had received their orders of appointment. S. 10 states the rules to be observed by the Collector when filling a vacancy in any village office. Sub-s. (1) provides:

> No person shall be eligible for appointment who (a) is not of the male sex; (b) has not attained the age of majority; (c) is not physically and mentally capable of discharging the duties of the office; (d) has not qualified according to the educational test prescribed for the office in question by the Board of Revenue by rules made under S. 20; (e) has been convicted by a Criminal Court of any offence which, in the opinion of the Collector, disqualifies him for holding the office.

Sub-section 2 declares that the succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India. Sub-s. (3) states that where the next heir is not qualified under sub-s. (1), the Collector shall appoint the person next in order of succession who is so qualified, and, in the absence of any such person in the line of succession, may appoint any person duly qualified under sub-s. (1). Sub-s. (4) says that where an office has become vacant by the dismissal or suspension of the last holder, the Collector may direct that until the death or return to duty of such last holder the duties of the office shall be performed by some person who is not an undivided member of the family of the dismissed or suspended officer. Sub-s. (5) states the procedure to be adopted where the heir of the last holder is a minor. He is required to register the heir and to appoint a person to discharge the duties of the office until the heir comes of age. This procedure was followed when respondent 1's father resigned in 1912. Sub-s. (6) provides that if a vacancy is caused by the resignation, dismissal, removal or suspension of the holder of an office and the Collector does not give the direction referred to in sub-s. (4), he shall fill up the vacancy in accordance with the provisions of the

section as if it had been caused by the death of the holder of the office.

It is common ground that in making appointments under S. 6, the Revenue authorities have always regarded sub-s. (1) of S. 10 as being applicable and they are right in so doing. S. 10 deals with filling up of vacancies, but the word vacancy does not necessarily imply that there has been a previous incumbent in the office. On the amalgamation or division of villages, new offices are automatically created and until they are filled up they are vacant. It is also common ground that the Revenue authorities have never regarded sub-s. (5) as applying in such cases and here again the practice is in accordance with the wording of the sub-section. In sub-s. (5) the governing word is 'succeed' and there can be no succession to an office until it has once been filled. S. 13 states that any person may sue before the Collector for any of the village offices specified in S. 3 or for the recovery of the emoluments of any such office on the ground that he is entitled under sub-s. (2) or (3) of S. 10, Madras Proprietary Estates Village Service Act, 1894, or under sub-s. (2) or (3) of S. 10 or sub-s. (2) or (3) of S. 11 or S. 12 of this Act as the case may be, to hold such office and enjoy such emoluments; or, being a minor, may sue before the Collector to be registered as heir of the last holder of any such office. S. 13 stops here and therefore only deals with certain suits. The only other section dealing with jurisdiction, apart from S. 23 which has reference to appeals against orders and decrees of the Collector, is S. 21, which reads as follows :

> No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or except as provided in proviso (ii) to sub-s. (1) of S. 13, any claim to recover the emoluments of any such office.

It will be observed that the effect of this section is to take away the jurisdiction of the Civil Court in certain cases only. I will return to the effect of this section later and will now refer to certain of the cases quoted in argument. In 9 M L W 90,[1] Napier J. was of the opinion that no right of suit exists in a case of this nature. The reasoning was this. What the plaintiff seeks to do is to have it declared that he is the person eligible under the Act and therefore the appointment of any person who is not eligible under the Act is bad. The fact that a man is eligible does not confer upon him the right of appointment. This was a case for a declaration that the appointment of the defendant as a headman where two villages had been amalgamated under the Madras Proprietary Estates Village Service Act 1894 was illegal. That Act so far as the present appeal is concerned is on all fours with the Madras Hereditary Village Offices Act, 1895. The plaintiff there also sued for the recovery of emoluments of the office. Sadasiva Iyer J. who with Napier J. formed the Bench which heard the appeal, did not decide whether a suit would lie to enforce a claim based on S. 6 (1). Both the learned Judges were of the opinion that defendant 3 in the suit had been properly appointed. In 12 M L W 767,[2] Odgers J. agreed with the opinion of Napier J. as did Srinivasa Iyengar and Jackson JJ. in 54 M L J 357=27 M L W 606.[3] We consider that there is here a failure to give full weight to the words in S. 6 (1):

> In choosing persons to fill such new offices the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished.

This direction is mandatory. The Collector shall select the person best qualified from among the members of the family and if there is a person in the family who does not suffer from any of the disqualifications referred to in S. 10 (1), he is bound to select that person. If there are several persons he is bound to choose the one he considers most suitable. The office of village headman has always been regarded as a hereditary office and one of the objects of the Act is to preserve the hereditary character of such office. Therefore when the Legislature says that when an old office is abolished and a new one is created in its place the new office shall be filled from the family connected with the old office, it is difficult to understand the reasoning which says there is no enforcible right. Of course there must be a member of the family possessing the necessary

1. Krishnaswamy Naidu v. Akkulammal, (1919) 6 A I R Mad 812=50 I C 185=9 M L W 90.

2. Alagiasundaram Pillai v. Midnapore Zamindary Co. Ltd., (1920) 7 A I R Mad 556=54 I C 816=12 M L W 767.

3. Kanthavadivelu v. Ramaswami, (1928) 15 AIR Mad 497=109 I C 661=54 M L J 357=27 M L W 606.

qualifications. Great stress has been laid by the learned advocate for the appellant on 44 Mad 643,[4] a decision of the Privy Council. In that appeal the Judicial Committee was concerned with the question whether village lands which had been allocated to the karnam became his family property. At p. 650 of the report their Lordships observe:

It is accordingly clear that since that time in Madras (passing of the Acts of 1894 and 1895), the karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

At p. 655 appears this passage:

A hereditary right in a karnam or his family can only, at the utmost, be said to constitute a certain *spes*, among persons within the area of selection of those eligible for the office. But it is not, as has already been observed, even so limited. The power of selection rests with the administrative officials who alone are judges of the eligibility of the karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands follow the office, ex necessitate.

Their Lordships were far from considering the question whether on the creation of a new office under S. 6 (1) the members of the family of the last holder of the abolished office had the right to compel the Collector to carry out the duty cast upon him by the section and consequently we are unable to regard 44 Mad 643,[4] as confirming the opinion of Napier J.

In 56 Mad 134,[5] Reilly and Ananthakrishna Iyer JJ. held that S. 6 (1) does create a legal right in the family. The facts of that case were shortly these. In 1901 a village was made into two villages and in 1912 the two villages were converted into three villages. When the three villages were created in 1912, each of the two then incumbents received appointments, but as regards the third village the Collector selected a person who belonged to another family. Ananthakrishna Iyer J. expressly held that S. 6 (1) was of a mandatory character and in the course of his judgment observed:

Hereditary rights were well known to law as administered in this Presidency. The Legislature enacted that the new offices to be created for the new villages by that very Act should also be hereditary. As I read the Section, what has been done by the Legislature is this, hereditary rights existing in the family of the last holder have been recognized and preserved by the Legislature by S. 6. In my view, it is not a case of any right being 'created' for the first time in the family, but the case is one of recognition and preservation by the Legislature of a pre-existing legal right existing in the family. The law is familiar with (a) rights vested in an individual; (b) rights vested in a family; and (c) rights vested in the public. The present is a case of a 'right vested in a family', which was a well known right before the Act, being recognized and provided for by the Legislature. If the Legislature intended that such pre-existing rights should cease once for all and be no longer entitled to any sort of legal recognition or enforcement, it would surely have chosen other words than those that exist in the section to express its intention. It is a principle of law that existing legal rights should not be intended to be interfered with or taken away, except to the extent to which it is reasonably clear under the terms of a statute that they have been.

With these remarks we are in entire agreement and consequently hold that Section 6 (1) does create a right in the family which can be enforced by suit.

This brings me to the question whether Ss. 13 and 21 close the doors of the Civil Court. I have already referred to the wording of these sections. It is quite clear that S. 13 merely says that certain suits may be instituted in the Collector's Court and the suit out of which this appeal arises is not in the categories mentioned in that section. In S. 21 the important word is 'succeed'. This is not a case of succession. It is true that in 12 M L W 767[2] Bakewell J. expressed the opinion that the word 'succeed' in S. 21 is not used in the strict sense, but means a right to be appointed upon a vacancy in an office. We do not agree with this view. The word 'succeed' is used in S. 10 (5) which admittedly does not apply to the filling of new posts under S. 6 (1). Here the word 'succeed' is given its ordinary meaning. The word must be given the same meaning throughout and we can only give it its ordinary meaning in S. 21. Giving it its ordinary meaning, this section does not debar the present suit and this was the opinion of Ayling and Coutts-Trotter JJ. in 12 M L W 663.[6] The learned advocate for the appellant has here again relied on 44 Mad 643[4] because of this passage at p. 649:

Although in point of fact there might be even a long continuance of the office in a particular family, the right of the Government and the deci-

4. Venkata Jagannadha v. Veerabhadrayya, (1922) 9 A I R P C 96=61 I C 667=48 I A 244=44 Mad 643 (P C).

5. Ramakrishnayya v. Venkataranga Rao, (1932) 19 A I R Mad 724=139 I C 510=56 Mad 134 =63 M L J 577.

6. Kodandaramaya v. Ramalingayya, (1920) 7 A I R Mad 484=60 I C 650=12 M L W 663.

sion of the revenue authorities to remove a karnam from office and to appoint another, were not open to question in Courts of law.

The remarks applied to the other passages, quoted from this judgment apply here. Their Lordships were not considering whether the effect of Ss. 13 and 21 was to exclude Civil Courts entertaining suits of this nature. For the reasons indicated we consider that such suits are not excluded and that the District Munsif's Court and the District Courts had jurisdiction in the matter.

But the learned advocate for the appellant is on a firmer ground when dealing with his third point. His argument here is that inasmuch as S. 10 (5) does not apply to appointments under S. 6 (1) and as sub-s. (3) to S. 6 was not inserted in the Statute till 1930, the Collector was right in appointing the appellant as the headman of Gudur West. It appears that at the time the appointment was made, respondent 1's father was an invalid and respondent 1 who was the eldest son was still a minor and therefore was not eligible for appointment by reason of S. 10 (1). The fact that his name had been registered under S. 10 (5) carried with it no right. It was the duty of the Collector to select a person from the family of respondent 1's father who was qualified to hold the office, if there was such a person. There was no person qualified and the Collector had to go outside the family. In doing so, he committed no breach of duty; in fact it was the only course open to him. Therefore the appointment of the appellant was properly made and the lower Courts had no power to interfere with it. Consequently the suit should have been dismissed.

In conclusion I desire to state that, if the Act under discussion had been drafted better there would have been a great saving of money and judicial time, not only in this case but in others. The Courts in India have frequently had occasion to draw attention to faulty drafting in statutes. The principles which the Legislature had in mind may be apparent; but the Courts can only interpret statutes as they find them and cannot read into them provisions which have been omitted by faulty drafting. In this case it has been suggested that the Act of 1930 which inserted sub-s. 3 of S. 6 in the Madras Hereditary Village Offices Act, 1895, was a declaratory Act passed to clear up doubts and that the main Act should be read as if the sub-section had always been there. The answer is that the Preamble does not govern plain provisions in the body of the Act, and where it is clear that the Amending Act is more than declaratory it cannot be given retrospective effect. The appeal will be allowed and the suit dismissed with costs in this Court and in the Courts below. These costs will be payable by respondent 1.

C.R.K./B.D. *Appeal allowed.*

A. I. R. 1938 Madras 445

PANDRANG ROW AND HORWILL JJ.

Rajah Saheb Meharban I Dostan Sri Rajah Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu — Appellant.

v.

Secretary of State and others — Respondents.

Appeal No. 147 of 1931, Decided on 1st October 1937, against decree of Sub-Judge, Cocanada, D/- 24th September 1929.

(a) Grant — Village service inams granted before permanent settlement are resumable by Government and not by zamindar—Goldsmith and Kundanam service inams are village service inams and hence resumable by Government.

The grants of land made for village service prior to the permanent settlement would never have been included in the mal assets of the zamindari at the time of the permanent settlement and the Government have every right to resume the inams granted for such purposes while the zamindar has no such right: *A I R 1937 P C 209, Foll.* [P 446 C 2]

The economic theory on which these villages were constituted or established in the past was that all the necessary amenities for communal life in the village should be available in the village itself. Even if there were services not directly connected with agricultural operations, they were nevertheless regarded as necessary village services, necessary in the sense that the villagers could not live their lives in the absence of persons who could render them such services in the village itself. Hence it is that the village purohit, blacksmith, washerman, snake charmer and so on were regarded as village servants or servants of the community performing services which were necessary for the welfare and continuance of the village community. It is well known that the village goldsmith is a village servant and that in many villages there are goldsmith's service inams. Kundanam service is hardly distinguishable from goldsmith's service, the former service merely demanding more skill in the art than the latter. These inams therefore must be taken to have been granted for village service and not for purely personal and private services to the zamindar. Such inams if granted before settlement are resumable by the Government. [P 446 C 2; P 447 C 1]

(b) Inam—Suit by zamindar questioning Government's right to resume certain village service inams—Question whether Government

was entitled to resume shroff inams given up by Government before trial began—Government held could not do so, as it would prejudice rights of persons in possession of these inams.

In a suit by the zamindar questioning the right of the Government to resume certain village service inams and claiming reversion in the lands so resumed by the Government, the Government gave up the right as regards shroff inams before the trial began and the lower Court decreed the suit in respect of those lands in favour of the zamindar declaring that the lands were granted for services purely private and personal to the zamindar and that he must be put in possession :

Held in appeal that the abandonment by the Government would not and could not settle the question so far as the persons who were in possession of the lands were concerned and that as between those persons and the Government who gave them possession the Government could not be allowed to say that they had no right nor could they abandon their right to resume in such a way as to prejudice the rights of the persons concerned with those inams and that there must be a decision on the question. [P 448 C 1, 2]

Advocate-General — *for Appellant.*

Government Pleader, K. Bhimasankaran, P. V. Vallabhacharyulu, P. Satyanarayana Rao, K. Venkata Reddi, M. Subbaroya Iyer, T. V. Viswanatha Iyer and D. Narasaraju — *for Respondents.*

Pandrang Row J.—This is an appeal from the decree of the Additional Subordinate Judge of Cocanada dated 24th September 1929 in O. S. No. 41 of 1924, a suit instituted by the Maharaja of Pithapuram against the Secretary of State for India in Council and numerous other defendants over one hundred in number. The suit arose out of certain orders of the Government of Madras resuming certain village service inams in various villages situated within the plaintiff's zamindari. The resumptions were ordered as long ago as October 1911 and the suit was instituted only on 13th October 1923. The principal point of contention was whether the plaintiff was entitled to the reversion in the lands that had been resumed by the Government. This in turn depended on the question whether the lands had been granted before the settlement of 1802 for village service or were grants made subsequent to the settlement, and in connexion with these questions it has to be considered whether the lands were included in the mal assets of the zamindari at the time of the permanent settlement in 1802. These important questions were decided in the main against the plaintiff and the suit was dismissed by the Court below except as regards certain shroff service inams the right of resumption of which though exercised by the Government was given up by the Government Pleader before the trial began. In the case of these shroff service inams therefore the lower Court gave a declaration to the effect that those lands were granted for services purely personal and private to the zamindar and directed further that the plaintiff be put in possession of the lands. The present appeal is by the plaintiff and no appeal has been preferred by the defendants who were in possession of the shroff service inams.

This appeal can be disposed of without much difficulty in view of the recent pronouncement of their Lordships of the Judicial Committee in I L R (1937) Mad 862,[1] which makes it clear that grants of land made for village service prior to the settlement would never have been included in the mal assets of the zamindari at the time of the permanent settlement and that the Government have every right to resume the inams granted for such purposes, while the zamindar has no such right. The further question, whether all inams granted prior to permanent settlement by the Government are not resumable by the Government whatever the purpose of the grant or the services connected with the inams might have been, does not really fall to be decided in this appeal, because we are of opinion that even in the case of two kinds of inams which were brought prominently to notice by the learned Advocate-General in his arguments these inams must be taken to have been granted for village service and not for purely personal and private services to the zamindar. The two inams about which an argument was addressed by the learned Advocate-General are goldsmith and kundanam service inams in village Nos. 14 and 15 in the plaint schedule. There is nothing in the evidence from which it can be said that these inams were for services purely personal and private to the zamindar. They were granted in places far away from the zamindar's own head-quarters, and it is most improbable that these inams would have been given for services to the zamindar and not to the villagers as a whole.

It is well known that the village goldsmith is a village servant and that in many villages there are goldsmith's service inams. Kundanam service is hardly distinguish-

1. Secretary of State v. Sobhanadri Appa Rao, (1937) 24 A I R P C 209=168 I C 890=64 I A 227=I L R (1937) Mad 862.

able from goldsmith's service, the former service merely demanding more skill in the art than the latter. There is nothing in the documentary evidence or even in the oral evidence from which it can be inferred that these grants or inams were made for the purpose of enabling the zamindar to get purely personal service performed for his benefit. They are in our opinion correctly regarded by the Court below as belonging to village service inams. The economic theory on which these villages were constituted or established in the past was that all the necessary amenities for communal life in the village should be available in the village itself. Even if these were services not directly connected with agricultural operations, they were nevertheless regarded as necessary village services, necessary in the sense that the villagers could not live their lives in the absence of persons who could render them such services in the village itself. Hence it is that the village purohit, blacksmith, washerman, snake charmer and so on were regarded as village servants or servants of the community performing services which were necessary for the welfare and continuance of the village community.

So far as other inams are concerned, it was admitted in the Court below that all the grants except those in villages Nos. 2 and 19 were made prior to the settlement and the nature of the inams, whether it was for village service or for private service of the zamindar, has been pressed before us only as regards the two items referred to above, i. e. goldsmith and kundanam service in the two villages Nos. 14 and 15 in the plaint schedule. It follows therefore that all the grants made before the settlement, i. e. all except those which relate to villages Nos. 2 and 19, which are claimed to be post settlement, were rightly resumed by the Government and that the plaintiff has no right to question the resumption thereof by the Government and to that extent the plaintiff's suit was rightly dismissed. Coming to the two grants in the two villages Nos. 2 and 19 which are alleged to have been made after the settlement there is no evidence sufficient to support the plaintiff's case. Some documents have been filed but it has not been shown that these documents are entries relating to the inams actually resumed by the Government and which are concerned in the present suit. So far as village No. 2, Gopalapatnam, is concerned, it is now argued that a mistake was made in relating the suit inams to items 9 and 10 in the account, Ex. B, and that the reference must be really to some other item in the account, and an application has been made also to admit additional evidence in order to establish this connexion between the suit inam and the other entry, namely entry No. 8 in the account. This is an application which we cannot possibly allow, because it is an attempt to adduce additional evidence for the purpose of supporting a new case set up for the first time in appeal, which is inconsistent with the case as set up in the trial Court. There can be no doubt that the finding of the learned Subordinate Judge is correct. The entries in the accounts that were relied upon throw no sufficient light on the question of identity, and it is impossible therefore to say that the entries in question have really anything to do with the inams that have been actually resumed in this village.

As regards the grant in the suit village No. 19, Panasapadu, the same difficulty exists though in this case there is no suggestion of any mistake and no attempt to put forward a new case. Here also, so far as two of the documents, Exs. S and S-1 are concerned, one of them is subsequent to the resumption by the Government and the other is fairly recent being only a few years before resumption. The old accounts are Exs. S-2, S-3 and S-4. Of these, S-2 does not help the plaintiff in the least. It does not show that any of the items therein were granted after the settlement. As regards Ex. S-3 the same remark has to be made. It is only in S-4 which purports to be the account of darimila inams that one finds a particular item 11 against which the name shown is Addala Subba Bathudu and others. It is impossible from this entry to say that the entry relates to the suit inam. It must therefore be said that the learned Subordinate Judge was perfectly justified in saying that the plaintiff had failed to discharge the burden which lay upon him to show that these grants were made after the settlement by his predecessors. No grant has been produced and the plaintiff is not even in a position to say when the grants were made or why. It is not usual for such grants to be made in modern times in respect of villages already existing and which are already provided with all the village services that are required; it is only in the case of newly established villages that it may be necessary to grant fresh inams,

and it is not anybody's case that these two villages were newly established villages which did not exist at the time of the permanent settlement. In short the plaintiff has failed to prove his case that these particular grants were made after the settlement. The plaintiff's appeal fails altogether and is accordingly dismissed with costs of respondent 1, (i. e.) the Secretary of State.

We cannot leave this case with a mere dismissal of the appeal because of the fact that the decree passed by the Court below so fas as shroff service inams are concerned cannot be allowed to remain as it is without determination of two questions, namely (1) whether this suit for declaration and for recovery of possession is barred by limitation and (2) whether Government is entitled to resume the shroff service inams. As regards the first, the point is raised definitely in the form of an issue, but the learned Subordinate Judge for no reason that is apparent was of opinion that it was not necessary to give a finding on several issues one of which was this issue of limitation. It is impossible to understand how it can be unnecessary to decide the question of limitation when a decree after all is going to be passed in favour of the plaintiff though for only a part of what he claimed. The action of the learned Subordinate Judge in passing a decree in favour of the plaintiff without tackling the question of limitation which had been definitely raised as an issue cannot be justified, and the decree cannot therefore be regarded as being in accordance with law to the extent it is in favour of the plaintiff-appellant, as there was no decision to the effect that the claim for declaration and for possession is in time.

The second point is no doubt one that was given up by the Secretary of State in the course of the trial or rather before the trial actually began in the trial Court, but this abandonment as regards these inams by the Government will not and cannot settle the question so far as the defendants who are in possession of these inams are concerned. As between these defendants and the Government who gave them possession Government cannot be allowed to say that they had no right to resume, nor can the Government abandon their right to resume in such a way as to prejudice these defendants' rights. There must be a decision therefore by the Court below apart from the concession or abandonment made on behalf of the Secretary of State of the right of the Government to resume these inams. The question of limitation cannot be said to be so clear that no decision was necessary. It is enough in this connexion to refer to the decision reported in 58 Mad 141[2] and an unreported but elaborate judgment in a batch of second appeals, namely 648 to 832 of 1927. We consider that we are indeed bound, having regard to the ends of justice, not to let things remain as they are in these circumstances. It is enough to refer to 53 Mad 881[3] and 6 Rang 29[4] in this connexion. We therefore set aside the decree of the lower Court to the extent it is in favour of the plaintiff and gives him a declaration and possession in respect of shroff service inams, and direct that the Court below should restore the suit to its file and dispose of the suit afresh so far only as it relates to the shroff service inams in the light of the observations contained in this judgment. It is unnecessary to emphasize that the Secretary of State is not entitled to resile from the abandonment of his right in respect of those inams, and that he would not be entitled to defend the suit any longer, because the suit is now limited only to shroff service inams.

C.R.K./D.S. *Case remanded.*

2. Parthasarathi Appa Rao v. Secy. of State, (1936) 23 A I R Mad 313=162 I C 661=58 Mad 141=68 M L J 409.

3. Subramanian Chettiar v. Sinnammal, (1930) 17 A I R Mad 801=127 I C 624=53 Mad 881 =59 M L J 634 (F B).

4. Chokalingam Chetty v. Seethai Ache, (1927) 14 A I R P C 252=107 I C 237=55 I A 7=6 Rang 29 (P C).

A. I. R. 1938 Madras 448

HORWILL J.

In re Mana — Petitioner.

Criminal Revn. Case No. 248 and Petn. No. 232 of 1937, Decided on 11th November 1937, from order of Sessions Court, South Kanara, D/- 22nd December 1936.

Criminal P. C. (1898), S. 110—Man owning land and house can be dangerous.

A man cannot be said to be any the less dangerous to the community because he lives in a house and owns lands and is leader of a local faction. [P 449 C 1]

K. Srinivasa Rao and T. Krishna Rao — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—There is abundant evidence on the record that the petitioner and his rival used to arm themselves and their supporters and attempt to settle their disputes by force with the result that breaches of the peace often resulted and were still more frequently threatened. Of the 19 express charges, the Appellate Court found that the petitioner was guilty only of eight; but he accepted also the general evidence that the petitioner, i. e. Mana, led local factions responsible for constant threat and bullying. It is argued that S. 110 (e) and (f), Criminal P. C. do not apply to factious leaders of this type ; but I cannot see that a man is any the less dangerous to the community because he lives in a house and owns lands. The petition is dismissed.

C.R.K./B.D. *Petition dismissed.*

---

* A. I. R. 1938 Madras 449

BURN AND MOCKETT JJ.

Bachu Mallikarjuna Rao — Appellant.

v.

Official Receiver, Kistna and others — Respondents.

Appeal No. 341 of 1936, Decided on 17th December 1937, against order of Sub-Judge, Bezwada, D/- 5th August 1936.

*** (a) Provincial Insolvency Act (1920), Ss. 28 and 51 (3) — S. 51 (3) does not operate in cases of sales held after adjudication — Sale therefore by executing Court of debtor's property after adjudication is inoperative.**

Section 51 (3) can only refer to all cases of execution sales held before adjudication. It cannot operate in cases of sales held after adjudication for the two reasons, viz. (1) that S. 51 comes in the Insolvency Act amongst a set of provisions dealing with the effect of insolvency (i. e. adjudication) on antecedent transactions, and (2) that after adjudication the debtor has no property which can be sold in execution. Hence a Court executing a decree has no power to sell a judgment-debtor's property after the judgment-debtor has been adjudicated insolvent. Such sale is inoperative and the fact that the Official Receiver was given a notice in the execution proceedings in such case does not make him bound by the sale. That is a question of procedure only : *Case law discussed.*

[P 452 C 2 ; P 453 C 1]

(b) Insolvency—Words "debtor" and "insolvent"—Difference between.

A debtor and an insolvent are strictly speaking different persons. An insolvent under the Insolvency Act means a person against whom an order of adjudication has been made and a debtor is a person who has made himself amenable to adjudication but has not yet been adjudicated.

[P 453 C 1, 2]

(c) Interpretation of Statutes — Value of headings in interpreting sections under them.

In different parts of an Act there are to be found classes of enactments applicable to some special object. Such enactments are in many instances preceded by a heading, special no doubt in one sense, as addressed to the object or purpose, but where not otherwise provided for, general in its application to the enactments passed to accomplish the object. These various headings are not to be treated as if they were marginal notes or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read not only as explaining the sections which immediately follow them as a preamble to a statute may be looked to, to explain its enactments, but as affording a better key to the construction of the sections which follow than might be afforded by a mere preamble. [P 454 C 1]

P. Satyanarayana Rao — *for Appellant.*

V. Govindarajachari — *for Respondents.*

Burn J. — The facts in this case are quite simple. The appellant is the purchaser at a sale held in execution on 10th December 1935. The decree was passed on 16th April 1935 and the execution petition was put in on the next day. An order for sale was passed on 21st October 1935 but four days before that, namely on 17th October 1935, one of the judgment-debtors (defendant 3 in the suit) had been adjudicated insolvent in I. P. No. 15 of 1935. It was the property of defendant 3 that had been attached in E. P. No. 87 of 1935 and proclaimed for sale in the order passed on 21st October 1935. On 19th November 1935 one of the creditors of the insolvent judgment-debtor put in an application in which he informed the executing Court of the adjudication of defendant 3, but the learned Subordinate Judge refused to stay the sale. On 4th December 1935 the Official Receiver was impleaded in the execution petition. He did not appear on 9th December, the date fixed for sale, but in response to the notice served upon him on 4th December he replied to the executing Court that the property of the 3rd judgment-debtor had vested in him upon adjudication, and he requested that the property of the third judgment-debtor might be handed over to him.

The learned Subordinate Judge allowed the sale to proceed, and the present appellant purchased what was put up for sale as the property of the 3rd judgment-debtor for Rs. 5000 odd. The Official Receiver applied under S. 47 and O. 21, R. 90, Civil P. C., to have the sale set aside, alleging that after the adjudication of the 3rd judgment-debtor the Court had no jurisdiction to sell his properties in execution, and that the sale after adjudication was a material

irregularity in the conduct of the sale. The learned Subordinate Judge who disposed of this application was the successor of the Subordinate Judge who ordered the sale to proceed. He held that the sale was invalid on the ground that the property of the 3rd judgment-debtor had vested in the Official Receiver under S. 28 (2), Provincial Insolvency Act and that therefore no Court had power to proceed to sell the property. The purchaser in execution has preferred this appeal.

The question for consideration therefore is whether a Court executing a decree has power to sell a judgment-debtor's property after the judgment-debtor has been adjudicated insolvent. The case for the Official Receiver (respondent) is, as stated by the learned Subordinate Judge, that upon adjudication the judgment-debtor's property vested at once in the Official Receiver, and that therefore the executing Court had no power to sell. The case of the appellant is based upon S. 51 (3), Provincial Insolvency Act, which declares that :

> A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

Mr. Satyanarayana Rao who argued the case for the appellant points to the wide terms of S. 51 (3) and relies very strongly upon the case in 59 Mad 928.[1] He relies also upon the case in A I R 1927 Mad 983,[2] 62 Cal 457,[3] 35 I C 643,[4] 49 M L J 616[5] and 47 Mad 288.[6] Mr. Govindarajachariar, who appears for the Official Receiver, contends that since immediately upon adjudication the property of the third judgment-debtor vested in the Official Receiver, there was nothing left for the executing Court to sell in execution and he relies upon the Privy Council case in 42 Cal 727[7] followed in this Court in 30 M L J 611,[8] some observations of Odgers J. in A I R 1929 Mad 609[9] and certain observations of Waller J. in 55 Mad 316.[10]

Now there is no doubt about the all-embracing character of the words in S. 51 (3), Provincial Insolvency Act. It does expressly say that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title against the receiver. But it must be borne in mind that S. 51, Provincial Insolvency Act, comes under the heading : "Effect of insolvency on antecedent transactions" and although it has been pointed out by Waller J. in 55 Mad 316,[10] that S. 52 in its present form is entirely out of place under that heading, it has never been suggested that S. 51 is out of place. It would seem to follow that S. 51 can only govern transactions prior to insolvency, i.e. prior to adjudication. If that is so, the words "in all cases" in S. 51 (3) can only mean in all cases prior to adjudication, for no part of this section can have any bearing upon transactions subsequent to adjudication. This aspect of the matter has been more fully discussed by my learned brother whose judgment I have had the advantage of reading, and with whom I am in agreement.

Again it must be noticed that S. 51 (3) deals with purchase of the "property of a debtor". Now upon adjudication the property of an insolvent vests immediately in the Official Receiver, i. e. the property passes to the Official Receiver and in so far as the judgment-debtor is concerned, there is no property of his which can be sold by the executing Court. This was very clearly stated by their Lordships of the Privy Council in 42 Cal 72.[7] The judgment of Lord Parker states that in their Lordships' opinion the sale in that case was altogether "irregular and inoperative". His Lordship goes on to state three grounds for this opinion :

> In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second

1. Muthan Chettiar v. Venkatuswami Naicken, (1936) 23 A I R Mad 819=170 I C 510=59 Mad 928=71 M L J 170.
2. Ramanatha Mudaliar v. Vijayaraghavalu Naidu, (1927) 14 A I R Mad 983=106 I C 34.
3. Dineshchandra Roy Chaudhuri v. Jahanali Biswas, (1935) 22 A I R Cal 503=157 I C 862=62 Cal 457=39 C W N 424.
4. Madhu Sudan Pal v. Parbati Sundari, (1917) 4 A I R Cal 606=35 I C 643.
5. Sankaralinga Mudaliar v. Official Receiver, Tinnevelly, (1926) 13 A I R Mad 72=92 I C 504=49 M L J 616.
6. Rajagopala Ayyar v. Ramanuja Chariar, (1924) 11 A I R Mad 431=80 I C 92=47 Mad 288 =46 M L J 104 (F B).
7. Raghunatha Das v. Sundar Das Kaithri, (1914) 1 A I R P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).
8. Anantarama Aiyar v. K. Kovilamma, (1917) 4 A I R Mad 924=34 I C 829=30 M L J 611.
9. Nainar Rowthen v. Pichai Rowthen, (1929) 16 A I R Mad 609=120 I C 889.
10. Sivaswami Udayar v. Subramania Ayyar, (1932) 19 A I R Mad 95=136 I C 338=55 Mad 316=62 M L J 68.

place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

It will be seen that the first two grounds stated by Lord Parker relate to matters of procedure, viz. (1) the sale ought not to have been allowed to go on, and (2) that sale should certainly not have been allowed to go on without notice to the Official Assignee. These clearly are the grounds on which their Lordships held the sale to be "irregular". The third ground however is a matter of substantive right. The right, title and interest of the judgment-debtor having passed to the Official Assignee there was nothing left for the Court to sell in execution. That is why their Lordships say that the sale, besides being irregular, was "inoperative".

The decision of their Lordships of the Privy Council is in my judgment, conclusive. It has been referred to on many occasions, and in some of the cases quoted by Mr. Satyanarayana Rao as those upon which he relies, but in none of those cases has any attempt been made to explain away the third ground for the decision of their Lordships of the Privy Council. For example, beginning with the earliest case in 35 I C 643[4] the learned Judges rely upon S. 34 (3), Provincial Insolvency Act of 1907 corresponding to S. 51 (3) of the Act of 1920, but they make no reference whatever to the decision of the Privy Council in 42 Cal 72.[7] The case in 47 Mad 288[6] was not a case in insolvency. The question referred to the Full Bench in that case was one of limitation; and the Full Bench held that a sale held in execution without notice to the legal representative of the judgment-debtor under O. 21, R. 22, Civil P. C. was a nullity. The learned Chief Justice on p. 300 expressly relies upon the Privy Council case in 42 Cal 72[7] as authority for the proposition that a sale in execution without proper notice under the section of the old Code, which corresponded to O. 21, R. 22, Civil P. C., was a nullity. The case in 49 M L J 616,[5] deals with an entirely different point, viz. whether an attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. There is no reference to S. 34 (3), Provincial Insolvency Act and no reference to the Privy Council case in 42 Cal 72.[7] The judgment of Wallace J., in A I R 1927 Mad 983,[2] was delivered in a case which is hardly parallel. There the Court had ordered summary administration under S. 74 of the Act. Wallace J. held that upon the order for summary administration the property of the debtor under S. 74 (2) vests in the Court as a receiver on the date of the admission of the insolvency petition. It is clear that this is not an authority applicable to a case where the property has vested in the Official Receiver. In 62 Cal 457[3] the question dealt with was the effect of service or non-service of a notice under O. 21, R. 22, Civil P. C. On p. 480 it is stated as follows:

> In support of the appeal to this Court it was argued before us that the sale sought to be avoided by the receiver was a nullity in view of the non-compliance with the provisions of O. 21, R. 22, Civil P. C.; it was contended that the property, having been sold on 22nd September 1932, after the judgment-debtor was adjudicated insolvent, and no notices having been served on the legal representative of the judgment-debtor as required by O. 21, R. 22, the sale was void ab initio.

Their Lordships held that the sale in that case was not void because it was not the fault of the decree-holders that no notice had been served upon the Official Receiver. There is a reference to the Privy Council case but their Lordships held that it had no application to the case before them. Their Lordships dealt with the judgment of the Privy Council only on the question of the effect of want of service of notice to the representative of the judgment-debtor. They did not deal with the third ground upon which the judgment of the Privy Council was based. The most recent case and the one most strongly relied upon by Mr. Satyanarayana Rao is the case in 59 Mad 928.[1] That was a case of a sale held after the admission of the insolvency petition but before adjudication and it was decided that the sale was good as against the receiver. Mr. Satyanarayana Rao relies upon certain observations made obiter by Sir M. Venkatasubba Rao J. The learned Judge considers that S. 51 (3) applies to all cases whether the sale is held before the adjudication or after the adjudication. He holds that the Privy Council case in 42 Cal 72[7] does not apply because in the Insolvency Act there was no provision corresponding to S. 51 (2). There is

however no discussion by the learned Judge of what appears to me—I say it with great respect—to be the most weighty reason for the decision of their Lordships of the Privy Council, viz. that the insolvent's property having vested in the Official Receiver upon adjudication, there is nothing left which an executing Court can sell as the property of the debtor. On the other hand Mr. Govindarajachari is able to point to an explicit authority in this Court, 30 M L J 611.[8] This case is particularly important because it was decided under the Act of 1907 in which S. 34 (3) corresponded precisely with the present S. 51 (3). There is a reference to S. 34 (3), and in spite of the existence of that provision, Sadasiva Iyer and Moore JJ., held that a sale after adjudication must be a nullity. This they held on two grounds, firstly that the sale was altogether irregular having been made in violation of the provisions of S. 34 (1) after the Official Receiver had notified the Court of the presentation of an insolvency petition. They go on to say that the sale was also wholly inoperative :

> We are also of opinion that the judgment-debtor had at the time of the sale no right, title or interest which could be sold or vested in a purchaser, and that consequently the 2nd respondent acquired no title to the property, which had passed to the receiver on the adjudication order being made : see 42 Cal 72.[7]

So far as I am aware there is no authority in this Court to the contrary and I am therefore bound to follow it. I do so with greater readiness because with due respect I consider it to be altogether sound. This decision is supported by the observations made by Waller J., in 55 Mad 316.[10] In that case, the Official Receiver, who had been appointed interim receiver of a debtor's land, applied to the Court under S. 52, Provincial Insolvency Act to adjourn the sale. The Court refused to adjourn the sale and the sale was held, and subsequently, on the Official Receiver's application to have the sale set aside, his application was dismissed by the executing Court, a decision which was finally upheld by the High Court in 50 M L J 665.[11] Waller J. however held that :

> The Official Receiver was quite justified in declining to recognize the title of the auction purchaser under a sale that should not have taken place or been confirmed by a Court which was required peremptorily by the statute to stay its hand and to transfer the attached property to the receiver.

In A I R 1929 Mad 609,[3] Odgers J., though not referring to 42 Cal 72,[7] made certain observations which are in point. The learned Judge says on page 611 :

> It is perfectly obvious why notice is necessary to the Official Receiver in a special sense, because as the whole right, title and interest of the insolvent's property has after adjudication become vested in the Official Receiver, no title by sale or otherwise can be acquired without his concurrence.

I cannot accept the contention that since the Official Receiver was given a notice in the execution proceedings in this case, therefore he is bound by the sale. That, as I have already observed, is a question of procedure only. It is quite true that under the decision of the Privy Council the sale would have been bad if the Official Receiver had not been given notice; but it does not follow that since the Official Receiver was given notice the sale is good. If *A* is the judgment-debtor and the executing Court sells *B's* property in execution of the decree against *A*, the sale must be a nullity, (it seems to me) whether it is held behind the back of *B* or before his face. The mere giving of a notice to *B* in the execution petition cannot confer upon the Court the power to sell his property to satisfy a decree against another.

I do not think that this interpretation leads to any great difficulties. S. 51 (3) in my judgment can only refer to all cases of execution sales held before adjudication. S. 51 (1) provides that no person shall be entitled to the benefit of execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. If a sale is held before the insolvency petition is admitted, the judgment-creditor can retain the sale proceeds. If it is held after the presentation of the insolvency petition, the judgment creditor cannot retain the sale proceeds as against the Official Receiver. But under S. 51 (3) in all cases the purchaser of the property of the debtor acquires a good title as against the receiver; in other words the sale cannot be set aside. It was necessary to make a provision like S. 51 (3) by reason of the provision of S. 28. By S. 28 (7) an order of adjudication shall relate back to, and take effect from, the date of the presentation of the insolvency petition. This would have the effect of making the insolvent's property vest in the Official Receiver with effect from

11. Subramania Iyer v. Official Receiver, Tanjore, (1926) 13 A I R Mad 432=93 I C 877=50 M L J 665.

the date of the insolvency petition and therefore if there were no such provision as S. 51 (3), any sales held in execution between the date of presentation of the insolvency petition and the date of adjudication would have to be considered null and void. It is to prevent this effect of the doctrine of relation back that S. 51 (3) is introduced; but it can clearly not operate in cases of sales held after adjudication for the two reasons which I have already indicated, viz. (1) that it comes in the Insolvency Act amongst a set of provisions dealing with the effect of insolvency, (i. e. adjudication) on antecedent transactions and (2) that after adjudication the debtor has no property which can be sold in execution. I would therefore hold that the decision of the learned Subordinate Judge is correct and that this appeal should be dismissed with costs of respondent 1.

Mockett J. — The difficulty in this case is in my opinion due to the use of the word 'debtor' throughout the Provincial Insolvency Act. In many sections it is used as meaning the insolvent although in S. 55 it is used as meaning the debtor. It seems to be clear that a debtor and an insolvent are strictly speaking different persons. The use of the word 'insolvent' in the Indian Acts is represented by 'bankrupt' in the English Bankruptcy Act, but in England 'insolvency' is used in a rather general sense as indicating a stage prior to adjudication, e. g. vide S. 94, Bankruptcy Act 1914, where a trustee against whom a receiving order has been made has to vacate his office by reason of insolvency. Under the Bankruptcy Act, 1914, the word 'debtor' is dealt with in S. 1, sub-s. (2) and the meaning seems to be a person liable to bankruptcy proceedings who is under S. 1 (2) amenable to the jurisdiction of the English Bankruptcy Court : vide Williams Notes to S. 1, Bankruptcy Act. He is a person liable to adjudication but not yet adjudicated. S. 18, Bankruptcy Act emphasizes the difference. The section says :

> Where a receiving order is made against a debtor then (if certain conditions are fulfilled) the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors.

It seems to me beyond doubt that an insolvent under the Insolvency Act means a person against whom an order of adjudication has been made and that a debtor is a person who has made himself amenable to adjudication but who has not yet been adjudicated. Can it be doubted that it might well be defamatory to describe a debtor against whom a petition was pending as "an insolvent" as in England 'a bankrupt'? The fact that the draftsman of the Provincial Insolvency Act has had little regard to the special meaning of the words 'debtor' and 'insolvent' does not seem to me in any way to affect the matter. For instance, in Ss. 27 (1) and (2), Provincial Insolvency Act, a person who has been adjudicated is referred to as a debtor, whereas in S. 28 (2) he is quite correctly described as the insolvent and S. 28 (2), says :

> On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court. . . . . .

In S. 31 (1) a person who has been adjudicated is described as an insolvent, whereas in sub-s. (2) he is spoken of as a debtor and in sub-s. (3) again he is referred to as an insolvent. It is unnecessary to give further examples but perhaps S. 59 is another striking example of an adjudicated person being called both a debtor and an insolvent in the same section. It is therefore necessary, in order to ascertain what meaning is to be given to the word 'debtor' in a particular section, to examine that section having regard to its context and we have to consider in this appeal what is its meaning in S. 51 (3), Provincial Insolvency Act. If the word 'debtor' is to be used as meaning an insolvent, i. e. a person who has been adjudicated, then in spite of the decision of the Judicial Committee in 42 Cal 72,[7] where no provision similar to S. 51 (3), Provincial Insolvency Act had to be considered, I should feel constrained to hold that the Indian Legislature intended to give sanctity to sales by the Court in all cases and that 'all cases' means sales both before and after adjudication. But can such a meaning be attached to the word 'debtor' in S. 51 (3)? I think not. In such a case as this, it is necessary to call in aid the rules of construction of statutes and in this matter I derive from them considerable assistance. S. 51, Provincial Insolvency Act is the first of five sections under the heading "Effect of insolvency on antecedent transactions", which paraphrased means "the effect on transaction which took place before the order of adjudication of the insolvent had been made." In (1862) 9 H L C 32,[12]

12. Eastern Counties etc. Ry. Cos. v. Francis Marriage (1862) 9 H L C 32=31 L J Ex 73=7 Jur (N S) 53=3 L T 60=8 W R 748.

which concerns the construction of two sections of the Land Clauses Consolidation Act, Baron Channell, in order to ascertain the meaning of the section, discusses the value of headings in interpreting statutes. He says at page 41 :

> In different parts of the Act there are to be found classes of enactments applicable to some special object. Such enactments are in many instances preceded by a heading, special no doubt in one sense, as addressed to the object or purpose, but where not otherwise provided for, general in its application to the enactments passed to accomplish the object. These various headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the construction of the sections which follow than might be afforded by a mere preamble.

Baron Channell was recording his opinion as one of the Judges summoned to the House of Lords. Lord Wensleydale says at page 68 :

> I am of opinion that an Act, penned as this is, cannot be read as a continuous enactment would be; various clauses relating to each separate subject are collected under various heads; with an appropriate heading to each class, which must apply to the whole of that class to which it is the heading and the meaning of this heading, "and with respect to small portions of intersected land, be it enacted as follows," is equivalent to saying, that all the enactments or sections of the statute contained under that head relate to small portions of intersected land and they must therefore be construed as to relate.

Lord Wensleydale approves the observations of Baron Channell.

> It is a rule of construction that where in the same Act of Parliament and in relation to the same subject matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally and with some definite purpose; prima facie such an alteration would be considered intentional.

Thus Lord Esher M. R. observes in (1891) 2 Q B 156[13] at p. 167. Applying these rules this case seems to me to be free from any difficulty. The words "the property of a debtor" in S. 51 (3) read with the heading can only mean the property of a person which has been sold previous to adjudication, the 'transaction' being the sale. This leads to a reasonable result, namely that all sales both before and after the presentation of a petition but before adjudication by the Court are protected so far as passing a good title to a purchaser is concerned. It would have the effect of overriding in such cases the "relation back": S. 28, sub-s. (7). To hold that S. 51 (3) applies to sales by the Court after adjudication would lead to a most anomalous position. Such a sale must prima facie be inoperative because a bankrupt has nothing to sell, his property having vested in the Official Receiver which position is emphasized by the Judicial Committee in the case above cited. So far from extending the meaning of a word in order to produce such a result, I should require unequivocal words in constraining me to arrive at a result so wholly opposed to principles of Insolvency law.

I have had the advantage of reading my learned brother's judgment with which I entirely agree. I have arrived at the same conclusion approaching it from a somewhat different angle which makes it unnecessary for me to deal with the authorities which have been cited and which have been discussed by my learned brother. I would dismiss this appeal with costs of respondent 1.

C.R.K./D.S. *Appeal dismissed.*

13. Guardians of Parish of Brighton v. Guardians of Strand Union, (1891) 2 Q B 156.

---

* A. I. R. 1938 Madras 454

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Makina Atchayya Patrudu—Appellant.

v.

Jalaluddin Sahib and others —

Respondents.

Letters Patent Appeal No. 84 of 1936, Decided on 26th November 1937, against Judgment and Decree of King J., D/- 16th April 1936.

*** (a) Adverse Possession—Essential ingredients explained — Test is acts of person in possession should be irreconcilable with rights of true owner — Conducting school in temporary sheds and giving lectures on vacant land would not create adverse possession.**

The possession of the wrong doer to avail him must be adverse in its character, importing a denial of the owner's title in the property claimed. It is settled law, that possession cannot be adverse unless it is held in such circumstances as are capable in their nature of notifying mankind that the party is on the land claiming it as his own, openly and exclusively. There ought to be nothing equivocal in a possession which is relied upon as a bar. Possession cannot be adverse unless the owner is in denial of his title excluded from enjoyment. The test is, are the the acts of the person in possession such as to be irreconcilable with

the rights of the true owner? Possession to be adverse must be notorious, exclusive and hostile. [P 455 C 2]

Mere acts of conducting an Arabic School in a thatched shed constructed in a vacant site and conducting lectures and meetings in the vacant site for some time would not constitute possession for creating an adverse possession against the owner. [P 455 C 1]

(b) Adverse Possession — Character of, explained — Mode of proof for showing that title is not lost will be different in different cases.

The kind of possession that an owner of land will have to prove to establish that he has not lost the title by the adverse possession of another will be different in different cases. What will be sufficient in one may not be sufficient in another. In the case of vacant land the same kind of possession cannot be expected as in the case of an occupied land or building. Even apart from some slight acts of possession which the owner may prove, the principle of law that possession follows title would apply to a case of vacant land. The owner would be considered as being in possession so long as there was no effective intrusion: *A I R 1922 P C 181, Ref.* [P 455 C 2]

D. Narasa Raju for Y. Suryanarayana — *for Appellant.*

V. Govindarajachari — *for Respondents.*

Venkatasubba Rao J. — This is a Letters Patent appeal from the judgment of the Honourable Mr. Justice King in a second appeal reversing the decision of the lower Appellate Court. The learned Judge has found that the mosque, the defendant in the suit, has established its title by adverse possession. The question to decide is whether that view is right. The suit relates to a vacant site adjacent to the house of the plaintiff, who bases his title to it, upon a sale deed of 1899 executed by one Ambu Sarang Saheb. There was some difficulty in obtaining possession and a suit was filed and a decree was obtained against the vendor in 1900. Whether the decree has been executed or not is a matter in debate, but in our opinion nothing turns upon it. The claim has been resisted by certain persons on behalf of the mosque and the points to decide are whether the plaintiff has been in possession within 12 years of the action and whether the mosque obtained title by adverse possession.

On both these points it seems to us that the plaintiff is bound to succeed. First turning to the question of adverse possession, the acts relied upon are these: that an Arabic school was being conducted in a shed constructed on the site, that lectures were being delivered there and that meetings were being held. There can be no doubt on the evidence, that such sheds as there were, were temporary ones built of thatch. Granting that these acts have been fully proved, do they constitute the evidence of adverse possession? The possession of the wrong-doer to avail him must be adverse in its character, importing a denial of the owner's title in the property claimed. It is settled law, that possession cannot be adverse unless it is held in such circumstances as are capable in their nature of notifying mankind that the party is on the land claiming it as his own, openly and exclusively (*see* Rustomji on Limitation, 1922 Edition, p. 604). There ought to be nothing equivocal in a possession which is relied upon as a bar (Ibid, p. 600). Possession cannot be adverse unless the owner is in denial of his title excluded from enjoyment. In other words, the test is, are the acts of the person in possession such, as to be irreconcilable with the rights of the true owner? Possession to be adverse must be notorious, exclusive and hostile and we agree with the Subordinate Judge that the acts relied on here are not sufficient to constitute adverse possession.

Then as regards the second point, namely whether the plaintiff has been in possession within 12 years of the suit, the question is, what is the nature of the possession of which this particular property is capable? The kind of possession which will be sufficient in one may not be sufficient in another. In the case of vacant land such as the suit plot, the same kind of possession cannot be expected as in the case of an occupied land or building. Even apart from some slight acts of possession to which the plaintiff speaks, the principle of law that possession follows title would apply to a case of this sort. The owner would be considered as being in possession so long as there was no effective intrusion. As held by the Privy Council in 44 Mad 883[1]:

> When a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of the acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title.

These observations apply to the facts here and we are clearly satisfied that the plaintiff was in possession within 12 years of the action. It remains to mention that an attempt was made to show that even

1. Kuthali Moothawar v. Peringati Kunharankutty, (1922) 9 A I R P C 181=66 I C 451=48 I A 395=44 Mad 883 (P C).

before the sale by Ambu Sarang Saheb, he made a dedication of the property to the mosque. The lower Appellate Court has found against this contention and there is no reason why this finding of fact should be disturbed. Apart from that, the contention is negatived by the very recitals of the sale deed and there is absolutely no substance in it. The judgment of the learned Judge is set aside and the suit is decreed. In regard to the costs, this is our order: The plaintiff's costs in the two Courts below will be borne by defendants 2 to 5, his costs in the High Court in the second appeal will be borne by defendants 2 and 3 and in the Letters Patent appeal by defendant 2. That is no reason why the mosque should be saddled with the costs.

C.R.K./B.D. *Appeal allowed*

---

* A. I. R. 1938 Madras 456

PANDRANG ROW AND ABDUR RAHMAN JJ.

G. Meenakshisundaram Iyer — Appellant.

v.

Swaminatha Iyer — Respondent.

Letters Patent Appeal No. 11 of 1936, Decided on 11th November 1937, from Judgment of Wadsworth J., D/- 29th November 1935.

*** Execution — Mortgage suit — Unregistered agreement by decree-holder after preliminary decree but before final decree agreeing not to execute decree against certain items of hypotheca can be pleaded in bar of execution of final decree.**

There is no doubt that where there is a decree against more than one defendant, an agreement prior to the decree whereby the decree-holder agreed not to execute the decree against one of the defendants can be pleaded in bar of execution of the decree as against him. Similarly it is permissible to plead in bar of execution of the final decree in a mortgage suit an unregistered agreement alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby the decree-holder agreed not to execute the decree against some out of several items of hypotheca as such agreement merely relates to the execution of the decree and does not attack the decree itself: *A I R 1918 Mad 1174 and A I R 1935 Mad 860, Rel. on.* [P 456 C 1, 2; P 457 C 1]

K. P. Ramakrishna Ayyar — *for Appellant.*

K. S. Champakesa Ayyangar — *for Respondent.*

Pandrang Row J.—In this appeal the only question for determination is, as stated by Wadsworth J. whether it is permissible to plead in bar of execution of the final decree in a mortgage suit an unregistered agreement alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby the decree-holder agreed not to execute the decree against two out of four items of the hypotheca which were in the enjoyment and possession of the appellant. The learned Judge appears to have thought that the agreement was drafted with a view to avoid the application of Ss. 17 and 49, Registration Act, and of O. 21, R. 2, Civil P. C. This view does not seem to be be correct because if, as contested by the appellant, it is an agreement relating to the execution of the final decree arrived at before the final decree was passed, none of these provisions of law would come into operation or affect the agreement in question and there would have been no need to attempt any evasion of such provisions. The general principle was laid down so long ago as 1916 in 40 Mad 233[1] which itself recognized the general rule followed for many previous years. This Full Bench decision was again considered comparatively recently in 1935 in 58 Mad 994[2] and the judgment of the Full Bench in that case which was delivered by me stated that the Full Bench ruling in 40 Mad 233[1] covers agreements which relate to the execution of the decree, but not agreements which attack the decree itself. In other words, it has been made clear by this Full Bench decision that any agreement which merely relates to the execution of the decree and does not attack the decree itself can be pleaded in bar of execution of the decree.

The simple question therefore for decision in this appeal is whether the agreement in this case whereby after the preliminary decree but before the final decree the decree-holder agreed in writing to exclude two items of the hypotheca from execution and to take out execution only as against the remaining two items is an agreement which relates to the execution of the decree or is an agreement which attacks the decree itself.

There is nothing in the agreement to show that it was intended to attack the decree sought to be executed, for it cannot be said that it was intended to attack the

1. Chidambaram Chettiar v. Krishna Vathiyar, (1918) 5 A I R Mad 1174=37 I C 836=40 Mad 233=32 M L J 13 (F B).

2. Papamma v. Venkayya, (1935) 22 A I R Mad 860=158 I C 187=58 Mad 994=69 M L J 451 (F B).

final decree which had not yet been passed. There is no doubt that where there is a decree against more than one defendant, an agreement prior to the decree whereby the plaintiff agreed not to execute the decree against one of the defendants can be pleaded in bar of execution of the decree as against him. The present case is more or less similar, for the decree in this case is one for sale and some items otherwise liable to be sold in execution were agreed to be released from such liability to be sold in execution. I do not see how in view of the general rule prevailing in this Presidency an agreement of the kind pleaded in this case can be said to be one which cannot be pleaded. This is not a case in which any money has been paid outside Court when the preliminary decree directs that the money should be paid into Court, in which case it may be said that the payment pleaded is one which is contrary to the preliminary decree. To my mind the point seems to be fairly clear, namely that the agreement that is pleaded in this case is one that can be pleaded and is not one which the appellant is debarred from pleading in bar of execution of the decree against the items agreed to be released.

The appeal must therefore be allowed with costs. It follows therefore that the order of the first Court allowing execution to proceed without determining the truth of the agreement pleaded must be set aside as well as all proceedings in execution taken thereafter. The first Court must now restore E. P. No. 137 of 1930 to its original number on the file and dispose of it according to law, after determining, in particular, whether the agreement pleaded by the appellant is true. The appellant is entitled to have his costs in all the Courts from the respondent decree-holder.

Abdur Rahman J.—Whatever may be my personal view in the matter, I agree that in view of the Full Bench decisions of this Court it is impossible to come to any other conclusion.

C.R.K./D.S. *Appeal allowed.*

---

* A. I. R. 1938 Madras 457

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

R. V. Lakhshmayya Naidu—Appellant.

v.

Purushothama Naidu and others — Respondents.

Appeals Nos. 152 of 1932 and 59 of 1935, Decided on 20th October 1937, against decrees of Sub-Judge, Coimbatore, in O. S. Nos. 93 of 1929 and 114 of 1934, respectively.

(a) Sale — Vendor and vendee — Charge on property for purchase money—Vendor asking vendee to withhold payment of one of vendor's creditors — Vendor does not lose charge of property.

The mere fact that vendor who had asked the vendee to pay the creditors of the vendor asked the vendee sometime after the sale deed was executed not to pay the amount due to one of the creditors does not mean that the vendor intended to give up or waive the right given by the statute in the shape of a charge on the property for unpaid purchase money. [P 458 C 2]

*** (b) Charge — Charge is saleable property.**

The charge is an interest in property and it is saleable. [P 458 C 2]

S. V. Venugopalachari and T. V. Ramayya — *for Appellant.*

S. Muthiah Mudaliar, M. Krishna Bharathi, B. Sitarama Rao, V. Rajagopala Iyer and T. K. Subramania Pillai — *for Respondents.*

Pandrang Row J. — The main facts in these connected appeals are simple and undisputed. The plaint properties in both the suits are one and the same. They were sold by one Lakshmi Ammal, the plaintiff, in O. S. No. 114 of 1934 on 31st March 1922 to one Purushotham Naidu, defendant 1 in that suit. These will be referred to as the vendor and the vendee respectively. The vendor had succeeded to the properties on the death of her infant son and immediately thereafter the creditors of her husband filed several suits and obtained decrees. It was mainly to pay off these decree debts that the sale was effected for Rs. 11,000. The sale deed clearly recites that the properties were sold for Rs. 11,000, out of which Rs. 1041 were received in cash and the balance was left with the vendee for payment to the decree-holders. The vendee paid off the decree debts except one, namely the debt due to the decree-holder in O. S. No. 166 of 1921. That decree-holder brought the properties to sale after the private sale in favour of the vendee and the properties

were purchased in Court auction by one Ponni Naidu who subsequently transferred the same to one Gopala Naidu. They were ultimately brought to sale in execution of a decree obtained against Gopal Naidu and purchased by Lakshmiah Naidu, the plaintiff in O. S. No. 93 of 1929.

This suit was one in which there were three alternative reliefs prayed for, namely (1) recovery of possession of the plaint properties ; (2) refund of the money deposited as purchase money by the plaintiff and (3) to enforce the vendor's lien or charge in respect of the unpaid purchase money due under the sale deed of 31st March 1922. That suit was dismissed by the Court below mainly on the ground that there was no right of suit in a case of this kind, the learned Judge having relied upon the decision in 50 Mad 639,[1] and having declined to follow the Full Bench decision in 5 Luck 552.[2] Since then however the question has come up before a Full Bench of this High Court in 59 Mad 202,[3] which lays down the law more or less in the same terms as 5 Luck 552[2] and 13 Lah 618,[4] another Full Bench case. Appeal No. 152 of 1932 is by the plaintiff in O. S. No. 93 of 1929. In the other suit by the vendor against the vendee to enforce the lien a decree was passed in favour of the plaintiff, the plaintiff in the other suit being also a party to that suit. Defendant 1, vendee, is the appellant in the other appeal. From the facts stated above, it is very clear that this will not be a case in which the judgment-debtor, i. e. the vendor, had no saleable interest in the property that was sold in execution of the decree in O. S. No. 166 of 1921, if it is found that there was a vendor's lien or charge subsisting at the time of the Court sale.

The question whether the vendor had such a charge is raised in the other appeal by the vendee. This question can be answered very shortly because a perusal of the sale deed shows that there was no contract to the contrary negativing the charge given by the statute. The sale deed clearly says that the sale was of land for a price, namely Rs. 11,000. No doubt the bulk of the price was retained with the vendee for being paid to certain creditors mentioned therein at the request of the vendor. In these circumstances it cannot be said that the statutory charge was given up. There is absolutely no substance in the contention that there was a waiver of this charge. There is nothing to show that the charge was at any time waived. The mere fact that the vendor asked the vendee some time after the sale deed was executed not to pay the amount due to one of the creditors does not mean that the vendor intended to give up or waive the right given by the statute in the shape of a charge on the property for unpaid purchase money. There is thus no doubt that there was at the time of the Court sale in execution of the decree in O. S. No. 166 of 1921, the statutory charge in favour of the vendor, a charge which was available against the plaint properties. It cannot therefore be said that the judgment-debtor had no saleable interest in the properties that were sold. The charge is an interest in property and it is saleable. What passes at a Court sale is the right, title and interest of the judgment-debtor, whatever that might be, and in this particular case what passed at the sale was a charge on the property which the judgment-debtor had even after the sale by her to the vendee in March 1922. This charge must be deemed to have passed by subsequent transactions to the plaintiff in the other suit, O. S. No. 93 of 1929. It is therefore clear that this plaintiff, that is to say the appellant in Appeal No. 152 of 1932, is entitled to enforce the charge as against the vendee, defendant 1. On the other hand, it is clear that as the charge had passed from the vendor to the appellant in Appeal 152 of 1932, the vendor could not enforce that charge as against defendant 1.

In other words, the proper course for the Court below to have adopted in these circumstances was to have passed a decree in favour of Lakshmiah Naidu for the unpaid purchase money with interest and costs and dismissed the suit of the vendor herself to enforce the same charge. As regards interest, we see no reason why interest should not be allowed at 6 per cent. Some interest has to be allowed according to law because the provision of law which gives the charge gave a right to

---

1. Muthukumaraswami Pillai v. Muthuswami Thevan, (1927) 14 A I R Mad 394=100 I C 522=50 Mad 639=52 M L J 148.
2. Bahadur Singh v. Ramphal, (1930) 17 A I R Oudh 148=124 I C 641=5 Luck 552=7 O W N 232 (F B).
3. Macha Koundan v. Kottora Koundan, (1936) 23 A I R Mad 50=159 I C 625=59 Mad 202=69 M L J 750 (F B).
4. Mehrchand v. Milkhi Ram, (1932) 19 A I R Lah 401=138 I C 47=13 Lah 618=33 P L R 649 (F B).

recover interest as well. It follows therefore that both these appeals must be allowed, and the decrees of the lower Courts in both the suits set aside. O. S. No. 114 of 1934 will be dismissed, the parties bearing their own costs throughout. In the other suit 93 of 1929, there will be a decree in favour of the plaintiff for Rs. 7879-5-4 with interest on the principal amount of Rs. 4585 at six per cent. per annum from 22nd March 1934 till date of payment against defendant 1, Purushotham Naidu, the suit being dismissed but without costs as against the other defendants. Time for payment six months from this date. The appellant in Appeal No. 152 of 1932 is entitled to get his proportionate costs of the appeal from defendant 1. The respondents will bear their own costs in this appeal.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1938 Madras 459

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Bhamidipati Satyanarayana, Receiver, Chinchinada Estate — Appellant.

v.

Alluri Krishnamraju — Respondent.

Letters Patent Appeal No. 116 of 1935, Decided on 3rd December 1937, against Judgment of Wadsworth J., *reported in A I R 1936 Mad 10.*

Madras Estates Land Act (1 of 1908), S. 42 —Decree cannot be passed for back rent also.

A retrospective effect cannot be given to an adjudication under S. 42 and hence a decree in respect of an excess area cannot be granted for the past faslis also. [P 459 C 2]

P. Satyanarayana Rao and A. Satyanarayana — *for Appellant.*

V. Rangachari — *for Respondent.*

Venkatasubba Rao J. — The point is one of some difficulty in regard to S. 42, Madras Estates Land Act (1 of 1908). The landholder filed an application before the Sub-Collector under S. 42 (2) praying for an alteration of the amount of rent in respect of the excess area in the defendant's holding. The rent which was sought to be altered, was being paid under the terms of a patta, which had been for long in force. At that time there was a previous suit filed by the landholder, pending before the Sub-Collector, for rent under the Act. The defendant had pleaded that the rent claimed was excessive and issues had been framed in the suit. It was at this stage that the application under S. 42 (2) was made. The Sub-Collector heard the application and the suit concurrently and gave a consolidated decision, as it were, holding the defendant liable in respect of a large excess area and passed a decree upon that footing, for back rent also, thus giving retrospective effect to his adjudication under S. 42. It is not material to the question, but it may be interesting to note, that the patta rent was in respect of less than an acre and the area found by the Sub-Collector was upwards of six acres.

The short point raised by this Letters Patent appeal is, whether the Courts below are right in holding that a decree can be granted in respect of an excess area for the past faslis also. It would be false analogy to refer to other sections of the Act, or to other Acts which contain similar but differently worded provisions. S. 42 obviously does not refer to land on which there has been a trespass, for, there are other sections dealing with cases of trespass. S. 163 refers to the ejectment of, and S. 45 to the rent payable by, trespassers. S. 42, the provision with which we are concerned, is a special piece of legislation involving an invasion of accrued rights. Construing the section strictly—and there can be no doubt that such a provision should be so construed—we find it difficult to hold that retrospective effect was intended. The notion that the rent which has been acquiesced in, can be abruptly altered with retrospective effect, seems repugnant to every legal conception. Wadsworth J., from whose decision this appeal has been filed, was also of the opinion that back rent cannot be claimed, but he seems to suggest the sanctity of contracts, as the ground of his decision. We doubt, although we agree with his conclusion, if his reasoning is correct, for the section seems to proceed upon the footing of an absence of contract. For instance in S. 44, which prescribes the rules for determination of alteration of rent, it is stated that the Collector should have regard inter alia to the fact whether the rent was a consolidated rent for the entire holding. This and other similar rules seem to exclude the idea of an inroad upon people's rights where the tenancy has its origin in an express contract.

In support of our view that S. 42 does not refer to back rent, we may refer to the marked contrast of its wording to that of S. 45. The latter section deals, as already

stated, with the case of trespassers. It makes the person in possession liable to pay not only what the Collector determines to be fair rent, but, in addition, such sum as he may award as damages for unauthorized occupation; thus, this section expressly enacts that an amount in respect of a past period can be awarded. The omission of similar words in the section in question is significant. In the result, the judgment of Wadsworth J. is confirmed and the Letters Patent appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

✻ A. I. R. 1938 Madras 460

HORWILL J.

Public Prosecutor — Appellant.

v.

Marimuthu Gounden and others — Respondents.

Criminal Appeals Nos. 245 to 248 of 1937, Decided on 19th November 1937, against order of the Stationary Second Class Magistrate of Omalur in C. C. Nos. 1826 to 1829 of 1936.

✻ Evidence Act (1872), S. 25—Excise Officer is not Police Officer within meaning of S. 25.

As S. 25 refers only to a Police Officer, a Court should not extend it to other classes of officers merely on grounds of similarity of function, especially in view of the fact that the Evidence Act was introduced at a time when the methods of the police were much more open to attack than they are now. Excise Officer is not Police Officer and hence the restrictive provisions of S. 25 should not be applied to Excise Officers: *A I R 1934 Cal 580 (F B), Dissented.* [P 460 C 2; P 461 C 1]

Public Prosecutor *in person.*

K. Aravamudha Ayyangar — *for Respondents.*

Judgment.—It appears that the Excise authorities had reason to suspect that illicit distillation was going on in a certain area and posted a number of Sub-Inspectors and peons in various parts of a forest at the early hours of the morning in the hope of detecting illicit distillation. At about 6 A. M., P. Ws. 1 and 2 detected the accused preparing wash for the purpose of distilling arrack. They then took the accused to the Excise Circle Inspector who charged them with having been in possession of 19 gallons of fermented wash fit for illicit distillation and asked them what they had to say. Each admitted the offence saying that they prepared the wash for distilling arrack for their private use at Deepavali. The Magistrate who tried these accused acquitted them on the ground that the evidence of P. Ws. 1 and 2 was not supported by that of such disinterested witnesses who could have been procured, and also because he thought that although the accused had made a confession, yet it was not safe to rely on it, as it was retracted in Court. The Crown appeals on the ground that there are no sufficient reasons for acquitting the accused: and the learned Public Prosecutor contends that, on the evidence, the accused in these appeals should have been convicted.

It is contended by the learned advocate for the accused that the evidence of confessions are inadmissible and in support of this view he has referred me in particular to 61 Cal 607,[1] in which a Full Bench of five Judges, with one dissenting, held that an Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act. They were of opinion that as a general principle of equity, it was difficult to distinguish between the position of an Excise Officer and a Police Officer and that an accused person was just as likely to be induced to make a confession on account of the official position of an Excise Officer as he would by that of a Police Officer. They further thought that the special provisions of the Bengal Excise Act make Excise Officers, for purposes of excise offences, Police Officers; and they pointed out that these officers had the same powers as Police Officers had with regard to the cognizance and investigation of offences. The Full Bench of the Calcutta High Court followed a Full Bench of the Bombay High Court, whose decision naturally turned on the interpretation of the Bombay Excise Act which, in this respect, is similar to the Calcutta Act. The Madras Act however does not give Excise Officers quite the same powers as the Bombay and Calcutta Excise Acts, and for that reason this Court has on three occasions held that for the purpose of S. 25, Evidence Act, an Excise Officer is not a Police Officer. It appears to me that as S. 25 refers only to a Police Officer, a Court should not extend it to other classes of officers merely on grounds of similarity of function, especially in view of the fact that the Evidence Act was introduced at a time when the methods of the police were much more open to attack than they are now. I therefore

1. Amin Shariff v. Emperor, (1934) 21 A I R Cal 580=1934 Cr C 841=150 I C 561=35 Cr L J 1071=61 Cal 607=59 C L J 555=38 C W N 930 (F B).

respectfully agree with the learned Judges of this Court who have held that the restrictive provisions of S. 25 should not be applied to Excise Officers.

That a confession was made by the accused to the Excise Inspector appears not to have been denied by them in the first instance; and the confessions were recorded in writing and bear the thumb impressions of the accused. Apart from these confessions, we have the evidence of P. Ws. 1 and 2; and I can see no reason why they should implead innocent persons who were not found with the implements said to have been with the accused. The Excise Officers were lying in wait from the early hours of the morning looking for persons who were illicitly manufacturing wash for distillation; and it can hardly be expected that disinterested persons would be willing to leave their beds and sit before dawn with the Excise Officers in the forest on the chances of their being able to render some assistance to them. I do not think that public opinion has yet reached the stage where villagers are prepared to undergo a great deal of inconvenience and discomfort for the detection of minor crime. There seems to be no reason at all why the learned Magistrate should have rejected the evidence of P. Ws. 1 and 2, especially when it was reinforced by the confession of the accused to the Excise Officer. The appeals are therefore allowed. The accused are convicted under S. 55 (g), Madras Abkari Act of being in possession of three pots of wash for the illicit distillation of arrack. They are sentenced to one month's rigorous imprisonment and a fine of Rs. 100 each or a further one month's rigorous imprisonment in default.

C.R.K./D.S. *Appeals allowed.*

A. I. R. 1938 Madras 461

PANDRANG ROW AND
ABDUR RAHMAN JJ.

Ramakrishna Reddy and another — Appellants.

v.

Official Receiver, Bellary and another — Respondents.

Letters Patent Appeal No. 59 of 1935, Decided on 1st November 1937, against order of Burn J., D/- 5th March 1935.

Provincial Insolvency Act (1920), S. 75 (3) — Application by creditor on behalf of other creditors to District Judge to modify his predecessor's order of annulment by vesting insolvent's estate in Official Receiver till debts due to unpaid creditors were paid — Order of District Judge rejecting application is appealable.

A creditor on behalf of himself and other creditors made an application to the District Judge under S. 151, Civil P. C., read with S. 5, Provincial Insolvency Act, praying that the order annulling the adjudication passed by the predecessor of the District Judge should be modified by vesting the insolvent's estate under S. 37, Provincial Insolvency Act, in the Official Receiver till the debts due to the unpaid creditors were paid under the insolvency law. The District Judge refused to modify the order of his predecessor :

Held that the order of the District Judge was appealable with leave of the District Judge or of the High Court. [P 462 C 1]

V. S. Narasimhachar — *for Appellants.*

B. Somayya and T. M. Venugopala Mudaliar — *for Respondents.*

Facts. — One *K* was adjudicated insolvent in 1929 by the District Judge of Bellary. He did not apply for discharge within the period limited. He died and his son *T* applied in 1931 to the District Judge for annulling the order of adjudication. The District Judge annulled the adjudication under S. 43, Provincial Insolvency Act and vested the property in one *S*, until the payment of debt due to *L*. In 1934 one *M* on behalf of himself and other creditors moved an application under S. 151, Civil P. C., read with S. 5, Provincial Insolvency Act, praying that the order annulling the adjudication may be modified by vesting the insolvent's estate under S. 37, Provincial Insolvency Act in the Official Receiver till the debts due to the unpaid creditors are paid under the insolvency law. The allegations were that the son *T* played fraud upon the Court by giving notice only to one creditor *L*, and that no notice was served on the other creditors and that immediately after the order of annulment the property of the deceased had been mortgaged by the son. The District Judge dismissed the application on the ground that "the insolvency had been annulled and he had no jurisdiction over the estate except in accordance with that order".

Against this order the creditor *M* preferred a C. M. A. to the High Court and prayed for leave to appeal under S. 75 (3), Provincial Insolvency Act. In the High Court, Burn J. refused to give leave to appeal on the ground that the order of the District Judge refusing to modify the order of his predecessor passed nearly three years ago was not an appealable order. Against this order the present Letters Patent appeal was preferred.

Judgment. — The provisions of S. 75 (3), Provincial Insolvency Act clearly show that the order of the District Judge of Bellary dated 28th September 1934 and made in I. A. No. 409 of 1934 in I. P. No. 4 of 1929 is appealable with the leave of the District Court or of the High Court. We are therefore unable to concur in the view of our learned brother Burn J. that the order is not appealable at all. Further the circumstances of the case clearly demand that leave to appeal should be given, there having been no decision on the merits. The appeal is therefore allowed and leave to appeal from the order of the District Court, Bellary, granted. There will be no order as to costs in this appeal.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 462

STODART J.

In re Hilton Brown — Petitioner.

Civil Revision Petn. No. 1369 of 1937, Decided on 8th December 1937, from decree of District Munsif, Vellore, D/- 3rd July 1937.

Madras District Municipalities Act (5 of 1920), Sch. 4, Rr. 18 and 19 — Profession tax in case of Government servant is to be calculated on half yearly income irrespective of fact that he has received salary out of India for portion of the period.

In case of a Government servant, the profession tax is to be calculated on the half yearly income irrespective of the fact that he has received his salary out of India for a portion of the period. So also profession tax is payable whether the income or gain arising from the profession is capable of being assessed to income-tax or not. [P 462 C 2]

K. Rajah Aiyar and K. S. Ramamurthy — *for Petitioner.*

Order.—Mr. Hilton Brown was Collector of North Arcot with headquarters at Vellore, in the year 1934 and he went to England on leave on 5th July 1934. For the half year, 1st April 1934 to 1st October 1934, he became liable to profession tax and education tax and he was assessed on the basis of the emoluments he received from the Government during that period, 1st April 1934 to 1st October 1934, including, that is to say, the salary paid to him at some places out of India for the period from 5th July 1934 to 1st October 1934. He has however paid tax on the basis of salary received from 1st April 1934 to 5th July 1934, namely the period when he was in India. The Municipal Council filed a small cause suit against him for the balance and the suit has been decreed in his absence. He sent a written statement by post from England but this was rejected which of course was perfectly correct. I am told however that no evidence was given on behalf of the plaintiff Municipality and I am asked on that ground to set aside the decree and order a retrial when Mr. Hilton Brown would of course have an opportunity of stating his case. But I do not think there is any use ordering a retrial because I think the petition is bound to fail on the merits. Mr. Hilton Brown's profession tax must be calculated on his half yearly income and there is an end of it.

The argument that only that part of the income must be adopted as the basis of assessment which was actually received in India is based on Rr. 18 and 19, Sch. 4, District Municipalities Act. R. 18 provides in the case of business concerns that the basis of the half yearly assessment shall be not the actual income derived from the business during that half year but one-half of the profits of the whole year which have been accepted as the basis of the assessment of the annual income-tax. For instance if a company or an individual trader earns Rs. 1200 in the first half year and Rs. 3000 in the second half year he is not assessed as in Class 9 for the former and as in Class 7 for the latter period. But his total income is taken as Rs. 4200 and he is assessed on each half year in Class 8 on the footing that his income is Rs. 2100 for each half year. Again the explanation to R. 19 makes it obligatory on the Municipality to accept for the purpose of assessing profession tax the figures accepted by the income-tax authorities for the purpose of assessing income-tax.

Now, on the emoluments drawn by Mr. Hilton Brown after he left India on 5th July 1934, he was not liable to pay Indian income-tax. Therefore he argues that portion of his salary cannot be taken into account as part of the half yearly salary arising from his profession. But surely profession tax is payable whether income or gain arising from the profession is capable of being assessed to income-tax or not. I do not think it would serve any useful purpose to reopen the case. Petition dismissed. Written and pronounced in Court.

C.R.K./R.M. *Petition dismissed.*

A. I. R. 1938 Madras 463

PANDRANG ROW AND ABDUR RAHMAN JJ.

Ladooram Sowcar and another —
Appellants.

v.

Nidamarti Jala Durgaprasadarayudu
—Respondent.

Letters Patent Appeals Nos. 101 of 1935 and 8 and 9 of 1936, Decided on 10th November 1937, against decree of Wadsworth J., *reported in A I R 1936 Mad 687.*

Trespass—Action against trespasser — Relief is possession and not damages.

In cases of actual encroachment or trespass by the encroacher on the land of owner, the appropriate remedy is delivery of possession to the owner and not the award of damages. [P 463 C 2]

P. Somasundaram — *for Appellants.*
C. Rama Rao — *for Respondent.*

Pandrang Row J.—These appeals arise out of two second appeals, namely Nos. 894 and 895 of 1931, which in their turn arise out of two connected suits of 1923 on the file of the District Munsif's Court of Vizagapatam. One of them was instituted by the partners of Baughmul Sowcar against Mr. Jala Durgaprasadarayudu, a lawyer of Rajahmundry, and the other suit was by the lawyer as the plaintiff and the Sowcars as the defendants. The suits arose out of a dispute regarding the boundary between the properties belonging to the two parties on the Beach Road at Vizagapatam. The dispute was originally taken to the notice of the Survey Officer and after a decision by the survey authorities these suits were filed, both parties being dissatisfied therewith.

Speaking broadly, the dispute relates to three items : (1) The road which lies between the two properties which was claimed by Mr. Jala Durgaprasadarayudu as a common or joint road, but which according to the Sowcars was their own exclusive property; (2) that the wall built between the properties by the Sowcars and a small strip of land varying in width from 1½ to 2½ feet by the side of it constitute an encroachment by the Sowcars on Mr. Jala Durgaprasadarayudu's property; and (3) that there was also an encroachment of about 3⅓ square yards by the Sowcars by building an extension of the kitchen in their property. It was found by both the Courts below that the road in question was the exclusive property of the Sowcars and that finding, in our opinion, was not open to question in second appeal and there has been no interference with that finding in second appeal. As regards the encroachment by extending the kitchen also there has been no interference in second appeal. It is as regards the second item which relates to the wall and the strip of site adjoining it that Wadsworth J. modified the decree of the lower Appellate Court and directed the restoration of the first Court's decree relating thereto. The point involved was not whether it was an encroachment or not, because the fact of the encroachment was established beyond doubt to the satisfaction of both the Courts below. But Wadsworth J. thought that the lower Appellate Court was not justified in modifying the decree of the first Court for delivery of possession of the portion encroached upon by substituting a decree for money damages instead. It is contended before us in Letters Patent Appeal No. 101 of 1935 that this interference in second appeal was not justified or proper. In the other Letters Patent appeals by Mr. Jala Durgaprasadarayudu, the finding about the ownership of the road in favour of the Sowcars is questioned as well as the disallowance of the claim to recover possession of the small extent of 3⅓ square yards encroached upon by the Sowcars.

The facts of the case need not be narrated further for the purpose of deciding these Letters Patent appeals. Reference has been made to a number of cases and in particular to 12 Rang 200.[1] This however is a case in which we are not concerned with an invasion of one man's rights of easement by another, but with an actual encroachment or trespass by one on the property of another. In the latter class of cases, there is, in our opinion, no scope for the contention that money damages may be given in certain circumstances. The decisions which deal with the question of awarding damages as the more appropriate remedy instead of an injunction do not apply to the present case where the encroachment has been established, and there is no other remedy possible except that of delivery of possession. We are therefore of opinion that so far as the wall and the strip of site adjoining it are concerned, the proper decree to be passed in the suit is the decree that was passed by the first Court and that portion of the decree of the first Court must therefore be restored; it would thus follow that so far as this item of encroachment is con-

1. Pazundaung Bazaar Co. Ltd. v. Ellerman's Arracan Rice and Trading Co. Ltd., (1934) 21 A I R Rang 144=151 I C 193=12 Rang 200.

cerned, the decree of Wadsworth J. is right though not for the reasons given by him. As regards the kitchen, no doubt the same conclusion ought to follow but it is found that in lieu of 3⅓ square yards which has been encroached upon, Mr. Jala Durgaprasadarayudu has got nearly 6 square yards belonging to the Sowcars in the very same neighbourhood and remains in possession thereof. He cannot, in our opinion, be allowed to have these 3⅓ square yards while keeping in his possession the 6 square yards, which do not belong to him. In these circumstances we do not propose to interfere in appeal with the decree of the Courts below so far as this item is concerned.

As regards the road, the concurrent findings of fact by the two Courts in the mofussil really conclude the matter and we see no reason to suppose that those findings are not supported by the evidence. The Sowcar's house has been occupied for very many years and there is a good deal of evidence to show that the road in question has been used only by people who occupied the house and as part of the Sowcar's property. There is no case made out for interference with the findings of fact so far as this road is concerned. The question of costs has been raised in all these appeals. The order passed by the first Court was that all parties must bear their own costs and this was interfered with by the lower Appellate Court which substituted money damages instead of delivery of possession of the encroached site after removing the wall thereon. Now that that modification of the decree has been found to be wrong, there cannot be any justification for any change in the first Court's order relating to costs. As these appeals have failed in part and succeeded in part, we think, in the circumstances of the case, the proper order to pass is that the parties should bear their own costs throughout, that is to say, in all the Courts including this Court and in these appeals.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1938 Madras 464

HORWILL J.

In re Kalli Koravan — Appellant.

Criminal Appeal No. 457 of 1937, Decided on 19th November 1937, against the sentence of Court of Session, Coimbatore Division, D/- 5th August 1937.

Criminal Trial—Trial by jury—Theft case—Evidence against accused being of woman who received stolen property from accused—Judge in his charge to jury not pointing out with sufficient force, unsafety of relying on her evidence—Omission amounts to misdirection.

Where in a theft case the only evidence connecting the accused with the offence was the evidence of a woman who had received stolen property from the accused, the position of that woman is little different from that of an accomplice and if the Judge in his charge to the jury does not point out with sufficient force, the unsafety of relying on her evidence, the statement of the Judge amounts to misdirection. [P 464 C 2]

Public Prosecutor — *for the Crown.*

Judgment. — That the offence complained of was committed there can be no doubt; but the only evidence connecting the accused with the offence was that of P. W. 3, who is undoubtedly an habitual receiver of stolen property. The learned Sessions Judge in charging the jury said :

Gentlemen, the evidence of P. W. 3, which alone connects the accused with the crime appears to show that she is not as innocent as she pretends. It is by no means unlikely that she is the receiver of the stolen property. It is for you to see whether her evidence can be believed when she says that she did not know that M. Os. 2 to 5 were stolen when the accused pledged them with her. If she had received stolen property knowing them to be stolen, she would certainly not own it here. But however it is for you to see how far you should discredit her evidence regarding the fact that she received the properties from the accused.

If you, Gentlemen, do not believe her evidence, then there is nothing to connect the accused with these properties; and you will have to find him not guilty. But, if you feel that she is speaking the truth when she says that the accused pledged the vessels with her, then in the absence of a satisfactory explanation on the part of the accused as to how he came by them, it is open to you to find that he is guilty. (In paras. 12 and 13 of the lower Court's judgment.)

This statement, although correct, did not, I think, point out with sufficient force the unsafety of relying on her evidence; for her position was very little different from that of an accomplice. The learned Sessions Judge then pointed out to the Jury that the absconding of the accused was a point against him, although it appears in doubt whether he was not absconding even before the offence was committed. It is with some reluctance that I describe the above as a misdirection; but I am justified in my opinion by the remarks of the learned Judge who admitted the appeal and who expressed a like opinion. The appeal is accordingly allowed and the conviction and sentence set aside and the appellant ordered to be set at liberty.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1938 Madras 466

HORWILL J.

Mariyappa Nadar and another —
Appellants.

v.

Ramanuja Naick and others —
Respondents.

Second Appeal No. 621 of 1933, Decided on 23rd September 1937, against decree of Sub-Judge, Ramnad at Madura, in A. S. No. 39 of 1932.

Mortgage—Mortgage of four items by *A* for himself and his sons to *C* and *D*—Purchase by *A* of remaining six items—To raise money for purchase *A* mortgaging all ten items to *P*—Suit by *C* and *D* on their mortgage without impleading *P*—Sale proceeds being insufficient *C* and *D* obtaining personal decree for remainder and attaching remaining six items—During attachment sale of six items to *P*—Suit by *P* on his mortgage—*P* held not precluded from bringing mortgage suit against six items by reason of purchase during attachment—Shares of sons in items 1 to 4 held liable.

One *A*, on behalf of himself and his sons mortgaged four items of property to *B* who represented *C* and *D*. Subsequently *A* purchased the remaining six items of property but as he had not sufficient money to pay for the whole of the consideration, he mortgaged all the ten items in favour of *P*. Later on, *C* and *D* brought a suit for sale with regard to the four items mortgaged to them and the property was bought in auction by them. *P* was not made a party to this suit. As the property did not fetch an amount sufficient to meet the whole of the mortgage debt, *C* and *D* obtained a personal decree for the remainder and in execution of that decree they attached the remaining six items of the property. During attachment these six items of property were sold to *P* in partial discharge of mortgage. *P* brought a suit for sale of all the ten items of the property :

Held that the sale to *P* during attachment was void by virtue of S. 64, Civil P. C., and as the sale was void, *P* became a simple mortgagee, the position which he occupied before the sale took place. The decree-holder could not be heard to say in the same breath that there was no sale binding on him because the property was under attachment and that there was a sale which extinguished the mortgage. Hence so far as *C* and *D* were concerned, *P*'s mortgage existed over all the ten items of property just as it did prior to the sale of six items to him and therefore he was not precluded from bringing a mortgage suit against the six items.

[P 466 C 2; P 467 C 1]

Held further that the mortgage to *P* was a distinct transaction and as it was executed to pay off antecedent debts *P* was entitled to proceed against the share of the sons in items 1 to 4. [P 467 C 2]

K. S. Sankara Iyer — *for Appellants.*

R. Viswanathan and S. Tyagaraja Iyer — *for Respondents.*

Judgment.—On 1st October 1914, defendant 1, on behalf of himself and his sons, mortgaged four items of suit property to defendant 8, who represents also defendants 6 and 7. Towards the end of August 1916, defendant 1 purchased the remaining six items of the suit property; but as he had not sufficient money to pay for the whole of the consideration, he mortgaged all the ten properties in favour of the plaintiff on 30th August 1916. In 1921 defendants 6 and 7 brought O. S. No. 28 of 1921, a suit for sale, with regard to the four items of property mortgaged to them and the property was bought in auction by defendants 6 and 7. The plaintiff was not impleaded in that suit. As the property did not fetch an amount sufficient to meet the whole of the mortgage debt, defendants 6 and 7 obtained a personal decree against defendant 1 for the remainder; and in execution of that decree, they attached on 31st May 1926 the remaining six items of the suit property. On 1st October 1926, while the attachment was subsisting, these six items of property were sold to the plaintiff for Rs. 500, the consideration not being paid in cash, but credited to the mortgage debt by way of partial discharge. In October 1928, defendants 6 and 7, who had brought the six items to sale in pursuance of their attachment, were resisted in delivery proceedings. The plaintiff was unsuccessful in the consequent claim petition and he therefore brought the present suit on 6th December 1928, which is a suit for sale of all the ten items of property.

The questions that arise in this appeal are whether, in view of the fact that the plaintiff purchased the six items, he is precluded from bringing a mortgage suit against the six items and whether the plaintiff is entitled to bring to sale the share of defendants 2 to 5 in the four items. The Courts below decided both these points in favour of the appellants, except for a small change made by the Appellate Court, and these points have been made the subject of a memorandum of cross-objections. The appeal arises because of an apparent omission of the lower Appellate Court in not making it clear that the Rs. 500 could be paid only out of the sale proceeds for the 3/8th share of the four items. Admittedly, this is a mistake and so no discussion on that point is necessary. It is only the memorandum of cross-objections that needs further discussion.

The argument advanced on behalf of the appellants was that although, because of the prior attachment, the sale is not binding on defendants 6 to 8, yet as there was a sale the mortgage was extinguished

thereby and no mortgage suit therefore lies with respect to these six items of property. The argument on behalf of respondent 1 was that by virtue of S. 101, Transfer of Property Act, as it was before the amendment, there was a continuance of the mortgage if it was in the interest of the purchaser to keep the mortgage alive; for S. 101 makes no mention of intention. Although it has been found that the plaintiff had no knowledge of the attachment; yet as it was in his interest at the time of the sale to keep the mortgage alive, it must be deemed that the mortgage did continue for his benefit even after the sale; and as it was not extinguished, he is permitted to bring this suit on the mortgage. This argument was sought to be reinforced by an argument from analogy based on 69 M L J 566[1] which follows 47 Mad 551.[2] The earlier decision is to the effect that if in a mortgage sale a puisne mortgagee is not impleaded, the auction purchaser is entitled to bring a separate suit against the puisne mortgagee, which necessitates the conception that in spite of the fact that the mortgage was extinguished by a sale of the property, yet for certain purpose it is considered to continue. The opinion of Ananthakrishna Ayyar J. was there referred to with approval and the reason given by Ananthakrishna Ayyar J. for holding that the mortgage must be considered to be subsisting is that :

> The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, one fails to see how they could be heard to say that by virtue of the prior suit, which admittedly does not affect them, a (second) suit against them is not maintainable. So far as they are concerned the second is the only suit against them and the first suit and the proceedings connected with the same must be taken to be *non est* in the eye of the law.

Many cases have been cited to show that no distinction can be drawn between the rights obtained by a purchaser in a Court auction and those of a private purchaser of a mortgaged property and that the position of an auction-purchaser is therefore precisely the same as that of the plaintiff, who purchased the mortgaged property. It is therefore argued that for certain purposes the mortgage can be considered to be kept alive. This principle, it is argued, was recognized by S. 101, Transfer of Property Act. A reference has been made on behalf of defendants 6 to 8 to 65 M L J 819,[3] in which it was held that an extinguished mortgage cannot be revived when the property is attached; but in that case the attachment took place a considerable time after the property was purchased. In the present case the purchase was made during the continuance of the attachment.

Whatever may be the merits of the above argument, it seems to me that in view of the terms of S. 64, Civil P. C., the purchase from the point of view of defendants 6 to 8 must be deemed to have been non-existent. It has to be remembered here that defendants 1 to 5 have no interest in the suit at all; for, their property has been sold and no personal remedy against them now exists. S. 64, Civil P. C. goes so far as to say that where an attachment has been made, any private transfer shall be void as against all claims enforceable under that attachment. If the sale is void, then the plaintiff becomes a simple mortgagee. The fact that as against defendants 1 to 5 he is something more than a mortgagee cannot affect his position *vis a vis* defendants 6 to 8. Certain remarks in the judgment of their Lordships of the Privy Council in 29 Cal 154,[4] are I think very pertinent to the subject now under consideration. There, pending attachment, the judgment-debtor mortgaged the property, and according to the terms of the mortgage, the mortgagee was to discharge two prior mortgages which existed even before the attachment. The decree-holder then sought to sell the property free from the mortgages. His argument was that by his mortgage the prior mortgages had been extinguished, that therefore the property could not be sold subject to mortgages that had already been extinguished, and that the subsequent mortgage was not binding on him at all. The result of this argument was that he was to derive a benefit from the mortgage made during the attachment. Their Lordships of the Privy Council however repelled these arguments. They said :

> Nothing can be clearer than that the intention of the parties to this transaction was to give to

1. Venkatasami Chettiar v. Sankara Narayana Chettiar, (1935) 22 A I R Mad 12 = 154 I C 623=58 Mad 825=69 M L J 566.
2. Venkat Reddy v. Kunjappa Goundan, (1924) 11 A I R Mad 650 = 83 I C 1022 = 47 Mad 551 = 46 M L J 391.
3. Daso Polai v. Narayana Patro, (1933) 20 A I R Mad 879 = 148 I C 1121 = 57 Mad 195 = 65 M L J 819.
4. Dinobundu Shaw Chowdhury v. Jogmoya Dasi (1902) 29 Cal 154 = 29 I A 9=6 C W N. 209 (P C).

Mustafi a charge for Rs. 40,000 on the property in question in priority to all other charges if any. The property being represented as unencumbered, the statement in the judgment of the High Court that it was intended to keep the two old mortgages alive is open to criticism. But it does not affect the substance of the case. The respondents were intended to have the first and only charge, and it is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale.

Towards the end of the judgment they add:

The last point urged by the appellant's counsel was that, whatever the intentions of the parties may have been, S. 276 (the present S. 64) of the Civil Procedure Code rendered the mortgage for Rs. 40,000 wholly void as against the appellant. So to construe this section would be quite wrong. So far as the mortgage for Rs. 40,000 prejudiced the execution creditor, it is void as against him ; but the section does not render void transactions which in no way prejudice him ; and to hold the mortgage void so as to confer upon him a benefit, which no one ever intended he should have, is entirely to ignore the object of the section and to prevent its obvious meaning. It is impossible to hold that the effect of that section is to give an execution creditor an unencumbered fee simple instead of an equity of redemption against the intention of the parties.

It seems to me that the present case is an even stronger one from the plaintiff's point of view. In that case there was a basis for an argument that the mortgagee intended to extinguish the prior mortgages and that as the prior mortgages were paid off they ceased to exist and that the subsequent mortgage was not binding on the decree-holder ; but in the present case the effect of rendering the sale void as against the decree-holder is to place the plaintiff in precisely the same position as if the sale had never taken place. The decree-holder cannot be heard to say in the same breath that there was no sale binding on him because the property was under attachment and that there was a sale which extinguished the mortgage. I therefore hold that the effect of the attachment is that as far as defendants 6 to 8 were concerned, the old mortgage of 30th August 1916 exists over all the items of the property just as it did prior to the sale in October 1926. The plaintiff does not desire any decree against defendants 1 to 5 because the personal remedy has now been lost by lapse of time and they have now no rights in the properties mortgaged.

The other question raised in this appeal is whether the plaintiff is entitled to proceed against the share of defendants 2 to 4 in items 1 to 4. The argument of defendants 6 to 8 is that the mortgage of 30th August 1916 is not binding on defendants 2 to 4. With regard to the other six items defendants 6 to 8 cannot raise any objection; for, if the purchase of the property was by defendant 1 only, then undoubtedly the plaintiff can proceed against the whole of that property ; if the purchase was by defendants 1 to 5, then also the property will be liable, because the purchase of the property in August 1916 was for their benefit, so that the plaintiff will be entitled to a decree against the six items. The dispute is therefore with regard to the four items of property. It is argued on behalf of defendants 6 to 8 that although the evidence shows that the mortgage actually took place a few days after the sale of the six items to defendant 1, the mortgage and the sale are in effect one transaction ; for defendant 1, knowing that he had no money to pay the vendor, had at once to mortgage the property to raise money to pay the sale price. These two acts can however amount to one transaction only if the parties to the mortgage and the sale looked upon them as one transaction ; but there seems to be no evidence in this case that the vendor had anything to do with the mortgage or, more important still, that the plaintiff had anything to do with the sale. The mortgage does of course show that it was effected in order to raise money for the purchase of lands ; but that does not make the mortgagee a party to the sale, although he knew that the sale had taken place and that the purpose of the money advanced by him was to pay off the money due to the vendor of the six items. I therefore hold that the mortgage was a distinct transaction, and as the money was raised to pay off antecedent debts the mortgage is binding on defendants 2 to 4 also.

Another argument of the learned counsel for the plaintiff is that even if the purchase was not for family necessity, it was not on that account necessarily void. The sons need not and have not repudiated the act of their father and until they do so the sale is binding an any person who may take the property from them. It is further argued that if the assent of defendants 2 to 4 or those who acquired interest is necessary in order to make the property of defendants 2 to 4 liable, then that assent has been given by implication in the conduct of defendants 6 to 8 in attaching the six items which were purchased by defendant 1 as the property of defendants 1 to 5. It is unnecessary for me to express

any definite opinion on the validity of this argument in view of my finding that the mortgage debt is binding on defendants 2 to 5. The result is that in view of my findings on the memo of cross-objections the appeal is dismissed ; but as the appeal has not given rise to any discussion, there will be no order as to costs. The memorandum of cross-objections is allowed with costs throughout. Time for redemption three months from this date. Leave to appeal is granted.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 468

VARADACHARIAR AND KING JJ.

Anantha Pattar — Appellant.

v.

Padmanabha Panikkar and others — Respondents.

Appeal No. 378 of 1932, Decided on 4th November 1937, against decree of Sub. Judge, South Malabar at Palghat, D/. 18th July 1932.

(a) Malabar Law—Karnavan—Acts of—Karnavan entering into kuri chit transaction on behalf of tarwad — Transaction found on the whole to be prudent—Stake holder acting bona fide in admitting karnavan in the kuri chit — Transaction is binding on tarwad.

Kuri chit transaction should be viewed not with reference to the rigorous test applied when determining the validity of a borrowing but with reference to considerations of prudence and an honest exercise of discretion by the karnavan in the light of the circumstances of the case. [P 469 C 1]

Where the karnavan of a tarwad enters into a kuri chit transaction as representing the tarwad and not in his personal capacity, and where having regard to substantial means of the tarwad and the probabilities and risk involved in the transaction it appears that it is on the whole a prudent transaction for the karnavan to enter into and that the stake holder has acted bona fide in admitting the karnavan in the kuri chit as representing his tarwad, the transaction is binding on the tarwad and its properties are liable for payment of money due in respect of the transaction. [P 469 C 2; P 470 C 1]

(b) Malabar Law — Karnavan — Acts of — Mortgage executed by karnavan as representing tarwad — Court has power to investigate into necessity for imposing onerous terms and to reduce them reasonably.

It is well within the power of the Court, when dealing with a mortgage executed by a person in a representative capacity to investigate the necessity for imposing onerous terms upon the family or the tarwad which the executant represents and to reduce the terms to what may seem reasonable in the circumstances. [P 470 C 1]

B. Sitarama Rao and N. A. Krishna Ayyar — *for Appellant.*

T. R. Venkatarama Sastri, A. Sivarama Menon and Parakat Govinda Menon — *for Respondents.*

Varadachariar J. — This appeal arises out of a suit to enforce a security bond (Ex. A) dated 15th December 1926, executed by defendant 1 as the karnavan of a tarwad, charging the tarwad properties with the payment of moneys due for 16 future instalments in respect of a kuri chit in which defendant 1 had taken one share and successfully bid at an auction. The kuri was started on 17th February 1924 and was to run for 23 chits of Rs. 300 payable half-yearly. The tarwad was undoubtedly possessed of substantial properties which, it is agreed, yielded an annual income of about 10,000 paras of paddy. The greater portion of the lands was held by various people on kanom and it also appears that substantial amounts used to be received from time to time by way of renewal fees in respect of those kanoms. The above circumstances relating to the financial position of the tarwad have been relied on by the parties in this case as supporting different points of view in respect of the question of law raised in the case.

On behalf of the contesting defendants, who are some of the junior members of the tarwad, it has been argued that the financial position of the tarwad was not one in which it was necessary for the karnavan to enter into an onerous transaction like membership in a kuri chit and that therefore the transaction as a whole including the security bond Ex. A is not binding on the tarwad. On the other hand, it has been suggested on behalf of the plaintiff (the stake holder) that when a tarwad is possessed of sufficient means to make it likely that the karnavan can spare some moneys from time to time, it is a prudent act of management on his part to enter into a kuri chit transaction for the benefit of the tarwad. We recognize that there is something to be said in favour of both these points of view but it seems to us that neither point of view should be exclusively insisted on in dealing with the question of the propriety of transactions of this kind. These kuri chit transactions are well known in Malabar and so far as we have been able to understand, karnavans seem to be freely entering into them on behalf

of their tarwad. In none of the cases arising out of such transactions has the Court applied the test applicable to a loan borrowed by a karnavan or by the managing member of a Hindu family. There are at least two cases which have been brought to our notice in which learned Judges with considerable experience of such transactions on the West Coast have judged of the transaction more from the point of view of considering whether it was a prudent exercise of discretion on the part of the karnavan to enter into the chit transactions. One of them is a judgment of Benson and Sundara Ayyar JJ. in A. S. No. 218 of 1911 and the other is a judgment of the Travancore High Court reported in 2 Travancore L. J. 443.[1] The result of the discussion before us inclines us to the view that these transactions should be viewed not with reference to the rigorous test applied when determining the validity of a borrowing but with reference to considerations of prudence and an honest exercise of discretion by the karnavan in the light of all the circumstances of the case. The learned Subordinate Judge who dealt with this case in the lower Court is himself a gentleman of considerable experience of the West Coast and his judgment also had proceeded on the same lines.

The evidence in the case clearly establishes that the karnavan entered into this kuri chit as representing the tarwad and not in his personal capacity; such members of the tarwad as have given any indication of their view in the matter have also treated this transaction as having been entered into on behalf of the tarwad. Mr. Venkatarama Sastriar who appeared for the contesting junior members placed strong reliance on the fact that the first three subscriptions for the kuri chit were not even paid in cash by the karnavan but were treated as amounts lent by the plaintiff to defendant 1 and that the same thing happened in connexion with the sixth instalment also. There might be some force in this argument if it was Mr. Venkatarama Sastriar's suggestion that the tarwad had no means to pay the kuri chit instalments as and when they fell due, but that certainly was not his argument. It may be an accident that the karnavan had no cash on hand at the time or it may be an act of misconduct on his part that though he had the resources to pay the instalments in the ordinary course from out of his income, he did not pay. But we do not see how the plaintiff can be held not to have acted bona fide in admitting defendant 1 as a representative of his tarwad to membership in the kuri chit, when he knew that the tarwad was possessed of substantial means to enable defendant 1 to pay the instalments regularly.

It also appears that about the time the kuri chit was started, defendant 1 had to repay some loans borrowed for what the evidence shows to be tarwad purposes. A sum of about Rs. 1100 was due under Ex. H for moneys said to have been borrowed for a kattu kalyanam in the tarwad celebrated in 1919; and about Rs. 300 had to be paid as subscription to another kuri which the tarwad admits to be a tarwad transaction. These amounts were first included in the promissory note (Ex. L) executed by defendant 1 in favour of a shop run by the plaintiff and another partner. Ex. L-1 includes subscriptions lent by the plaintiff to defendant 1 to meet the first three instalments of the kuri chit and Ex. L-2 is a consolidation of the previous loans and this document was discharged out of the amount which defendant 1 obtained by his successful bid at the auction held on payment of the 7th instalment. The balance of the bid amount, namely about Rs. 1450, was paid over in cash to defendant 1, and the evidence shows that at least Rs. 300 out of this amount was paid in discharge of Ex. M, another promissory note loan due by defendant 1. The record discloses nothing as to what happened to the balance of Rs. 1100 odd. On these facts, the lower Court has come to the conclusion that having regard to the friendly relations subsisting between defendant 1 and the other members of the tarwad at the time when he entered into this kuri chit transaction, there is no reason to suspect that it was a misuse of his powers or that he intended to defraud the tarwad by throwing upon it a liability for money which he ultimately intended to use for his own personal benefit. After a careful discussion of the probabilities and of the risk said to be involved, the learned Judge has come to the conclusion that it was on the whole a prudent transaction for defendant 1 to enter into and that the plaintiff acted bona fide in admitting defendant 1 into this kuri chit as representing the defendants'

1. Ouseph Ittoop v. Krishnan, (1912) 2 Travancore L J 443.

tarwad. We see no reason to differ from this conclusion. The mere fact that the mortgage bond, Ex. A, recites that a sum of Rs. 4715.3.0 was paid to defendant 1 in cash instead of setting out the appropriation made therefrom towards the amount due under Ex. L.2 does not seem to us to suggest any want of bona fides because the details are fully recited in the endorsement on Ex. L.2 as well as in the plaintiff's account. The learned Judge has however taken into account the onerous terms of Ex. A, and has come to the conclusion that there was no justification for making the tarwad properties liable to the full extent imposed by those terms. It is well within the power of the Court, when dealing with a mortgage executed by a person in a representative capacity, to investigate the necessity for imposing onerous terms upon the family or the tarwad which the executant represents and to reduce the terms to what may seem reasonable in the circumstances. It is in the exercise of this power that the learned Judge has reduced the liability of the tarwad and its property. Against this reduction, the plaintiff has preferred the appeal and against the main decree the contesting defendants, i. e. the junior members, have filed a memorandum of objections.

For the reasons above stated we do not think there is much substance either in the appeal or in the memorandum of objections so far as the question of the liability of the tarwad property is concerned. Mr. Krishna Ayyar however, raised a special point in support of the appeal in so far as the personal liability of defendant 1 as per the terms of Ex. A is concerned. He invited our attention to the line of cases which the Courts, in dealing with bonds executed by members of a kuri chit to secure punctual payment of future instalments, have frequently declined to regard the provisions relating to interest as penal. With respect to this argument, it is sufficient for us to say that at this stage we are not dealing with the question of defendant 1's personal liability under the covenants in Ex. A. It is perhaps possible to read the decree of the first Court as fixing even the quantum of his personal liability. We wish to make it clear that that question is left open and all that we are deciding now is the extent of the liability of the tarwad and its properties. It will be open to the lower Court when dealing with the plaintiff's application for a personal decree against defendant 1, to deal with the question whether or not the plaintiff is entitled to enforce against defendant 1 all the stipulations in Ex. A, in respect of payment of interest. With these observations we dismiss the appeal as well as the memorandum of objections with costs to be paid to and to be received by defendants 3 to 7 and the plaintiff.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 470

VARADACHARIAR AND KING JJ.

Secretary of State — Appellant.

v.

Sree Rajah Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Maharajah of Pithapur and others — Respondents.

Appeals Nos. 475 and 584 of 1931, Decided on 4th November 1937, against decrees of Sub.Judge, Amalapuram, D/- 9th March 1931.

(a) Alluvion and Diluvion—Right to emerged land — Plaintiff claiming declaration of title to lanka situated in river, establishing identification of part of lanka with site of land which formerly belonged to him — Such identification is sufficient to support title by re-formation — Claim based on re-formation prevails upon claim based on lateral accretion — Title founded on original ownership and identification of site is to be confined to re-formation of that site only.

Where the plaintiff in a suit for a declaration of his title to a lanka situated in a river, establishes identification of part of the suit lanka with the site of the land, which formerly belonged to him and which according to him was washed away by the river, such kind of identification is all that is required to establish title by re-formation. The fact that between the submergence and the re-formation, the land is wholly lost and absorbed, and no part of its surface remains capable of identification, in no way militates against title based upon re-formation : *13 M I A 467 (P C), Rel. on.* [P 473 C 2]

Where there are two competing claims to land, one based upon re-formation, and the other based on lateral accretion, the former must prevail. [P 473 C 2]

So also a title founded on the original ownership and identification of site is to be confined prima facie with re-formation of that site only : *10 Beng L R 406 (P C), Rel. on.* [P 474 C 1]

(b) Alluvion and Diluvion— Right to emerged land—In case of river frequently throwing up and washing away lankas, period of 70 years' submersion is not sufficient to amount to abandonment of right to land claimed on ground of re-formation— Presumption is the other way.

In the case of a river whose fluctuations in course and tendency to throw up and wash away lankas is notorious, the mere extension of the period of submersion to nearly 70 years is not

enough to support a finding that the plaintiff claiming title to a lanka on the ground of re-formation, must be deemed to have abandoned his right to the land. [P 474 C 1]

In normal cases the presumption must clearly be the other way, as in the nature of things the owner of submerged land can exercise no act of ownership over it during the period of its submersion. [P 473 C 2]

(c) Alluvion and Diluvion — Accretion — Land claimed as alluvial accretion — It is not necessary that its re-formation must be proved to have been gradual.

With regard to land claimed as alluvial accretion, it is not necessary that its formation must be proved to have been gradual. The recognition of title by alluvial accretion is largely governed by the fact that the accretion is due, to the normal action of physical forces and the word 'gradual' with its qualifications only defines a test relative to the conditions to which it is applied : *A I R 1922 P C 105, Rel. on.* [P 474 C 1, 2]

Govt. Pleader — *for Appellant.*

Advocate-General — *for Respondents.*

King J. — These appeals arise out of a suit brought in 1925 by the Maharajah of Pithapuram with the Secretary of State as the principal defendant, for a declaration of his title to a lanka measuring about 140 acres, in the river Vainatiam, a branch of the Godavari. This lanka adjoins the right or western bank of the river, and extends from the Gannavaram aqueduct in the north to the Government village of Mondepulanka in the south. To the west of the river throughout this length lies the zamindary village of Lankala Gannavaram belonging to the plaintiff along with the bank being lands bearing S. Nos. 5 (Uta Badawa Lanka), 2 (Gaddavani Lanka Thoorpulanka Polemere dori Tuni) and 1 (Jonnalanka). Plaintiff laid claim to this lanka on two grounds (i) because the Vainetyam at this point was neither tidal nor navigable, and he therefore was the owner of its bed, and (ii) because part of it was a re-formation of part of an old lanka of his called Turpulanka which had existed at this site and had been washed away by floods in 1849 and the rest was an accretion to this re-formed land; Government, on the other hand, denied plaintiff's right to the bed of the river, denied any re-formation of any lanka belonging to plaintiff and claimed that the lanka in suit was not an accretion to any part of the village of Lanka Gannavaram, but was an independent formation first appearing in the river as an island. Even if, in the alternative, the lanka be found to be a lateral accretion and not an island it was contended that it was an accretion not to plaintiff's land but to a strip of land along the river bank acquired by Government under the provisions of the Land Acquisition Act in 1898.

The learned Subordinate Judge of Amalapuram found, (i) that the river at this point was both tidal and navigable, so that plaintiff could lay no claim to the ownership of its bed, (ii) that the lanka was not an island but a lateral accretion to the land on the river bank, (iii) that though it was probable that some part of the lanka was a re-formation of land once belonging to plaintiff, plaintiff had not been able to adduce sufficient proof of identity of site, and that, even if he had afforded such proof, he must be deemed to have abandoned his claim to the submerged land and therefore could not rely upon any such identification as affording him any title; and (iv) that the strip of land acquired by Government in 1898 did not extend throughout the whole length of the bank now in question, but only as far south as the junction between S. No. 5 and S. No. 2.

On these findings, the learned Judge held that the title to the northern portion of this lanka lay with Government as being an accretion to the land acquired by Government—and to the southern portion with the plaintiff as an accretion to his land in Lankala Gannavaram. With this decision neither party was satisfied, and each has preferred an appeal (475 by Government and 584 by plaintiffs), claiming title to the whole subject-matter of the suit. It may be stated at the outset that the plaintiff no longer contests the first of the learned Subordinate Judge's findings that the river is both tidal and navigable; and in spite of a reference in the written statement to 1859 as the date of the first emergence of the island which according to Government has since grown into this lanka, it was common ground at the arguments that the suit lanka first made its appearance in approximately the same shape and area as were observed during the pendency of the suit, in the year 1917-18.

The first point to be decided is whether the suit lanka is an island or vertical accretion, or whether as held by the learned Subordinate Judge, it is to be regarded as a lateral accretion. It is admitted that there is no positive evidence that the lanka was first observed as an island, and later as attached to the land on the bank; but it is argued for Government that the present condition of the suit lanka proves that it could have been formed in no other way

There admittedly exists a depression in the level of the suit lanka running close to and parallel with the river bank. This is called by Government's witnesses a 'paya' or arm of the river, and they say generally that it used to be much deeper than it is now. D. W. 3, Mr. Stephens, who at the time of his giving evidence, was Executive Engineer, Godavari Central Division, refers to some old plans as proving the existence of such an arm of the river in 1860 and 1875. Now there is no doubt that the plans in question do suggest that in both those years the river was flowing in two streams with a sand shoal between them, but there is this striking difference between the two plans, that whereas the narrower stream in 1860 was near the western bank, the narrower stream in 1875 was on the other side. We are unable therefore to accept these plans as proving that there is any continuity in the course of the streams from year to year; and, we find from another plan, Ex. CCC, which shows the state of the river in 1903-04, that there is no stream at all but only an extensive formation of sand along the western bank at this point. As the learned Subordinate Judge points out in para. 46 of his judgment, it is impossible to call the suit lanka an island as it exists now. The levels of the depression as shown in Ex. VII, a plan prepared in December 1923, are on an average but very slightly below the levels of the higher portions of the lanka. We think that as the lanka presents every appearance now of being a lateral accretion and not an island, the onus is upon Government to show that it once was an island. No positive evidence of this fact exists, and a study of previous plans of the river cannot possibly establish the continued existence of any stream along the western bank which has now shrunk into the present depression. It is obvious that the course of the deep channels in the river must be subject to frequent changes. We are of opinion accordingly that there were no sufficient reasons for dissenting from the view of the learned Subordinate Judge that the suit lanka is a lateral and not a vertical accretion.

The next question is regarding the exact length of the strip of land acquired by Government in 1898. The oral evidence here is clearly in favour of the lower Court's finding. Mr. Stephens examined for the Government was shown a plan Ex. vi-b, prepared by the P. W. D. in 1898, and stated specifically that land was acquired as far as a point which he marked thereon as 'D'. This corresponds with the point which marks the junction between S. fields Nos. 2 and 5. Government however relies upon Ex. vi-b as showing a "boundary line to the west of P. W. D. land", which proceeds all the way from the aqueduct to the Government village of Mondepulanka at a place called Jonnelanka. What Mr. Stephens says about this is not that it shows that any land was acquired south of his point 'D', but 'I think that Ex. vi-b, showed the P. W. D. boundary line with a view to fix once for all the boundary between lanka high level margin and the river bed'. Government further seeks to rely upon a note found in Ex. 15 to the effect that from a point corresponding to Mr. Stephen's 'D' down to Jonnelanka there is no land to the east of the line being enjoyed by the zamindar or his lessees, and it is suggested that that unoccupied land was nevertheless 'acquired' by Government but acquired without the need of paying compensation for it.

It is noteworthy, however, that Ex. 15 is a sketch prepared by the P. W. D. of 'land to be taken up,' and shows that land as stopping definitely short at Mr. Stephen's point — the note in question evidently explaining why it goes no further south. Finally Government relies upon the southern boundary given in the notification (Ex vi-c). This is given as "Juvvalanka", and it is argued that the name must be a clerical error for "Jonnalanka". This, however, is a mere speculation upon which no question was asked of or information given by any of the witnesses. And it manifestly conflicts with other indications in Ex. vi-e. The land to be acquired is described as a portion of Untabadavalanka, which is the name appropriate only to S. No. 5, and not to S. No. 2, and the extent is given as 3.71 acres. Ex. vi (m) (as well as Ex. 15) show beyond any doubt that the land which was thus measured had a length of 1797 links and could not have extended any further south than Mr. Stephen's point. We think therefore that the learned Subordinate Judge was right in his finding that the strip of land acquired by Government stopped at the point which marks the junction between S. No. 5 and S. No. 2; and that upon his findings as so far upheld the decree dividing the lanka between Government and plaintiff was the correct decree.

It then remains to discuss plaintiff's case with regard to the re-formation of part of his old Turpulanka. We have already said that the learned Subordinate Judge refuses to find that plaintiff has sufficiently identified the site of the land which he lost in 1849, although the loss itself he holds to be proved beyond doubt. The main reason for this former finding appears to be an etymological one. Plaintiff's case is that the lost land lay east of Utabadavalanka which is now S. No. 5. The learned Judge points out that 'badava' in Telugu means 'swamp' or 'marshy land' and argues that as such land must naturally be by the water's edge it would be impossible for any land to exist to the east of it, so that the land lost by the plaintiff in 1849 could not have been where he now claims it to have been. There is however no evidence as to when this name was first given. It is clear that at the present time the land called Uttabadavalanka (S. No. 5) has got land to the east of it (i. e., part of the suit lanka) and it is equally possible that in 1849 also the same physical conditions may have existed, and the original meaning of the name may have no longer applied to those conditions. If therefore positive evidence exists by which the location of the lost land may be discovered, it ought not, we think, to be rejected merely because the name Utabadavalanka seems at first sight an inappropriate one. Now, that positive evidence is, in our view, clearly afforded by certain 'amarakam' accounts of Gannavaram village produced by plaintiff. The learned Advocate-General who appeared for the plaintiff has carefully compared and analysed two of these accounts, Ex. D, relating to Fasli 1258 (1848-9, the Fasli immediately preceding the flood) and Ex. E relating to Fasli 1260. They show the extents and the lease-amounts realized in respect of five plots of land which must have been then existed along the western bank of the river. In Ex. D the total extent of these 5 plots is 87.3 acres, in Ex. E, 55.9 acres, and it is possible to discover the extent of the diminution in area in each of these plots. In one of the plots, described on p. 83 of the printed papers as being 'near Polimera' there is no loss. This plot, it was not seriously disputed, must correspond to the present S. No. 2. Another plot, given immediately after Vootabaduva, both on p. 70 and on p. 84, is agreed to have lain north of the aqueduct and was diminished by 8 acres. It seems reasonably certain that the remaining 3 plots which together suffered a loss of 23.6 acres must have been situated east of what is now called Utabadava Lanka is now S. No 5.

There is thus established the identification of the site of part of the suit lanka with the site of land which formerly belonged to the plaintiff and was washed away in 1849. That this kind of identification is all that is required to establish title by re-formation is clearly laid down in the leading case upon the subject : 13 M I A 467[1] by the Privy Council. The fact that between the submergence and the re-formation the land was 'wholly lost and absorbed and no part of its surface remained capable of identification,' in no way militates against the title based upon the re-formation. The same case and succeeding cases also show that where there are two competing claims to land, one based upon re-formation, the other upon lateral accretion, the former must prevail. The learned Subordinate Judge however lays great stress upon a reservation found in 13 M I A 467[1] at p. 478. Their Lordships while affirming the title based upon re-formation in the case before them, observe as follows :

> Their Lordships however desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derilect land, into the public domain as part of the sea or river of the State, and so liable to the written law as to accretion and annexation.

The learned Subordinate Judge after quoting this passage, goes on to observe (in para 61 of his judgment) that although the written statement (and indeed the evidence) furnishes no suggestion of any act of abandonment on plaintiff's part, the long lapse of time is enough to 'raise a presumption of abandonment.' Now, it is true that the lapse of time here amounts to nearly 70 years, and none of the reported cases had to deal with anything like so long an interval; but, after all, seventy years is within the span of a single lifetime. In normal cases, the presumption must clearly be the other way as in the nature of things the owner of submerged land can exercise no acts of ownership over it during the period of its submersion. In the

1. Lopez v. Muddan Mohan Thakur, (1869-70) 13 M I A 467=14 W R 11=5 Beng L R 521=2 Suth 336=2 Sar 594 (P C).

present case, when we are dealing with a river whose fluctuations in course and tendency to throw up and wash away lankas is notorious, we think that the mere extension of the period of submersion to nearly seventy years is not enough to support a finding that the plaintiff must be deemed to have abandoned his right to the land. The plaintiff's title has therefore been established to the 23.6 acres of the suit lanka to which we have referred and to such further slighter and later losses suffered by the same three plots or to 25 acres in all.

The question then arises whether plaintiff can also be held entitled to the remaining portion of the suit lanka which lies east of S. No. 5 and has been decreed to Government by the learned Subordinate Judge. We did not find that any of the reported cases deal with a situation similar to this, but there is a reference to such a contingency in 10 Beng L R 406[2] at page 433, where their Lordships of the Privy Council say :

> They also consider that a title founded on the original ownership and identification of site is to be confined prima facie to the re-formation on that site.

On the evidence in this case, which contains no account of any stages in the formation of the suit lanka, we are unable to hold that the portion of the suit lanka east of the 25 acres has been shown to be an accretion to those 25 acres, to which alone in the northern portion of the suit lanka we hold that plaintiff's right must be restricted. In regard to the southern portion of the suit lanka, decreed to plaintiff by the learned Subordinate Judge, one argument advanced by the learned Government Pleader remains to be briefly mentioned. It is this, that the suit lanka is not an accretion at all, as its formation has not been proved to have been gradual. This point we may notice was never taken in the pleadings in the Court below, nor did it form the subject-matter of any issue, and we think that the formation of this lanka comes within the rule laid down by the Privy Council in 45 Mad 207[3] (another Godavari case), that :

> The recognition of title by alluvial accretion is largely governed by the fact that the accretion is due to the normal action of physical forces, and that the word 'gradual' with its qualifications only defines a test relative to the conditions to which it is applied.

In the result the appeal by Government (A. S. No. 475) must be dismissed with costs. The appeal by plaintiff (A. S. No. 584) is allowed to the extent that his title will be declared to 25 acres of the suit lanka lying east of S. No. 5 to the east of the land acquired by the Government in 1898. A commissioner will be appointed to demarcate these 25 acres in a rectangular plot. For the rest the plaintiff's appeal is dismissed.

C.R.K./R.M. *Order accordingly.*

2. Nogender Chunder Ghose v. Mohomed Esof, (1873) 10 Beng L R 406=18 W R 113=3 Sar 151 (P C).
3. Secy. of State v. Rajah of Vizianagaram, (1922) 9 A I R P C 105=67 I C 1=49 I A 67 =45 Mad 207 (P C).

A. I. R. 1938 Madras 474

VARADACHARIAR J.

Puthia Kovilagath Thekke Kettu Thavazhiyil Manavedan — Petitioner.

v.

Puthia Kovilagath Thekke Kettu Thavazhiyil Karnavan Manavedan — Respondent.

Civil Revn. Petn. No. 1347 of 1936, Decided on 3rd November 1937, from order of Sub-Judge, South Malabar at Calicut, D/- 9th October 1936.

(a) Court-fees Act (1870), S. 7 (v), as amended by Madras Act 5 of 1922—Suit for partition of tavazhi properties with prayer that certain mortgages were not binding on tavazhi—One item in possession of defendant karnavan which he had mortgaged as his separate property—Court-fee under S. 7 (v) held should be paid as regards that item.

A person instituted a suit for partition of certain tavazhi properties on the footing that he was a junior member thereof and that the suit properties were tavazhi properties. The plaint referred to certain mortgages and debts and alleged that they were not binding on the tavazhi. In regard to one item the plaintiff stated that the karnavan, the defendant, was still in possession of the item which he had mortgaged as his separate property and therefore he should not be called upon to pay additional court-fee:

Held that as the defendant's possession on the date of the suit was not on behalf of the tavazhi according to the plaint, court-fee under S. 7 (v), Court-fees Act, ought to be paid as regards that item: *A I R 1930 Mad 597, Foll.* [P 475 C 2]

(b) Court-fees Act (1870), Art. 17-A (i), as amended by Madras Act 5 of 1922—Suit for partition with prayer that certain debts are not binding on joint family property—Such suit cannot be regarded as one in which no consequential relief is prayed for (*Obiter*).

It is not correct to say that a prayer in a partition suit relating to the binding character of particular debts on the joint family property can be regarded as a prayer in a suit where consequential relief is not prayed for because in a partition suit

it is proper to make provision for the discharge of the family debts. Once it is recognized that it is the duty of the Court to make provision for discharge of binding debts before partition is decreed, the suit should be dealt with as one in which consequential relief is prayed for. [P 475 C 2; P 476 C 2]

D. A. Krishna Wariar — *for Petitioner.*

K. Kuttikrishna Menon — *for Respondent.*

K. S. Champakesa Iyengar — *for Government.*

Order.—This petition raises some questions as to the court-fee payable on a plaint filed by the petitioner, in the Subordinate Judge's Court at Calicut, for partition of certain Tavazhi properties on the footing that the plaintiff is a junior member thereof and that the suit properties are tavazhi properties. The plaint makes reference to certain mortgages and debts and alleges that these mortgages and debts are not binding on the tavazhi. The relief portion is very inartistically drawn and rightly or wrongly the lower Court has construed it as praying for certain declarations. On objection taken to the sufficiency of the court-fee paid, the lower Court has directed the plaintiff to pay court-fee under S. 7, Cl. V, Court-fees Act, in respect of the plaintiff's share in items 1570 to 1595 of the plaint schedule and to pay court-fee under Art. 17-A (i), Sch. 2, in respect of the debts referred to in paras. 8 to 10 of the plaint. The petitioner has accepted the order of the lower Court in so far as the direction relating to items 1570 to 1594 is concerned.

As regards item 1595, he contends that as the karnavan is still in possession of that item the plaintiff should not be called upon to pay court-fee so far as the plaint relates to that item. This contention is opposed to the decision of a Division Bench in 53 Mad 540.[1] Mr. Warrier, the learned counsel for the petitioner, seeks to distinguish that case on the ground that there the Tavazhi was never in possession of the disputed items of property which all along remained in defendant 1's possession; whereas here, the plaint alleges that till 1933, the Tavazhi has been in possession of item 1595 through its Karnavan and it is only after that date that defendant 1 began to mortgage that item stating that it is his separate property. I do not think that this distinction on the facts makes any difference in the principle applicable. For the purpose of determining the court-fee payable, the point for consideration is, whether on the date of suit it can be said that defendant 1's possession was possession on behalf of the Tavazhi. There can be no doubt that on the allegations in the plaint in this case, defendant 1 could not, after 1933, be held to be in possession of this item on behalf of the Tavazhi. The lower Court's direction that court-fee under S. 7, Cl. V should be paid in respect of the plaintiff's share of item 1595 will therefore stand.

Objection is next taken to the lower Court's direction in respect of the debts. In para. 8 of the plaint, reference is made to five mortgages created by defendant 1 on item 1595, on the footing that that item was his separate property. The decision of a Division Bench in 64 M L J 24,[2] supports the view that if the plaintiff in a partition suit attacks a mortgage of joint family property made by the manager and asks for a declaration that the mortgage is not binding on his share he is bound to pay court-fee in respect of such declaration under Art. 17-A (i). With respect I feel bound to state that I have some doubts as to the correctness of that judgment because it does not consider the question whether such a suit can be regarded as a suit for declaration where no consequential relief is prayed for. Art. 17-A (i) governs only cases where no consequential relief is prayed for. If as incidental to his remedy by way of partition, a plaintiff contends that a mortgage said to have been effected on the joint family property is not for family purposes I am not as at present advised prepared to say that the suit is one in which no consequential relief is prayed. I may refer by way of analogy to another familiar class of cases, i. e., where a reversioner sues for possession of property mortgaged or alienated by a widow. Such suits often times involve a declaration that a mortgage or sale made by the widow is not binding on the estate. The Court in such cases is bound to investigate the binding character of the alienation before decreeing possession. If in this class of suits, the prayer for a declaration does not require separate court-fee, I do not see how partition suits stand on a different footing.

The decision in 64 M L J 24[2] is however that of a Division Bench and it is not open to me to differ from it. If necessary,

1. Kandunni Nair v. Raman Nair, (1930) 17 A I R Mad 597=127 I C 128=53 Mad 540=58 M L J 497.

2. Secy. of State v. Lakhanna, (1933) 20 A I R Mad 430=141 I C 80=64 M L J 24.

I would have placed the matter before the Chief Justice for further directions to post the matter before a Full Bench, but Mr. Warrier has relieved me of this necessity by offering to make an amendment of the plaint in respect of this part of this case. Relying upon the decision of the Privy Council in 34 All 296,[3] he is prepared to limit the prayer in the plaint to a decision of the question whether item 1595 is Tavazhi property or the personal property of defendant 1. He contends that if the Court finds it to be Tavazhi property, the mortgages effected thereon by defendant 1 on the footing that the property was his separate property will not avail against the Tavazhi and he therefore wants no declaration as to the binding character of the deeds of mortgage. It is not for me at this stage to express any opinion as to whether this contention is supported by 34 All 296[3] or not. That is a matter which the plaintiff must be left to decide for himself. But I accept Mr. Warrier's application that the allegations in the plaint relating to this item may be allowed to be amended in the manner suggested by him in the draft which he has placed before me, omitting the prayer for declaration as to the validity of the mortgages and limiting his contention to the Tavazhi character of item 1595. In this view, the plaintiff need not pay any court-fee in respect of the mortgage amounts and it will be sufficient if he pays the court-fee already referred to under S. 7, Cl. V.

As regards the debts referred to in paras. 9 and 10 of the plaint, the view of the lower Court is no doubt supported by the decision of Venkatasubba Rao J. in 58 Mad 821,[4] which has been followed recently by Venkataramana Rao J. in (1937) 2 M L J 616.[5] Here again, with all respect, I must express my doubts as to the correctness of the view taken in 58 Mad 821.[4] So far as I can gather from the judgment in (1937) 2 M L J 616,[5] the learned counsel for the petitioner in that case does not seem to have questioned the decision in 58 Mad 821.[4] In the earlier case Venkatasubba Rao J. admits that in a partition suit, it is proper to make provision for the discharge of family debts before effecting partition. This was so laid down by this Court in 50 Mad 535[6] and the propriety of that view was recognized by the Privy Council in 17 Lah 644[7] at p. 657. If that is the correct position, I find it difficult to say that a prayer in a partition suit relating to the binding character of particular debts can be regarded as a prayer in a suit where consequential relief is not prayed for. Suppose for instance the plaintiff in a partition suit merely says that he understands that the managing member has borrowed a number of debts and leaves it to the Court to decide which of them are binding on the joint family and make provision before partition for the discharge of the debts that may be found to be binding, I presume that no question of separate court-fee will arise in that case, as regards those debts.

I am reluctant to think that the liability of the plaintiff to pay court-fee in a matter of this kind should be made to depend upon the way in which the plaint is drafted. Once it is recognized that it is the duty of the Court to make provision for discharge of binding debts before partition is decreed, I am inclined to think that the suit should be dealt with as one in which consequential relief is prayed for. Here again I should have hesitated to act on this opinion of mine, but for the fact that Mr. Warrier has offered to make certain amendments in the plaint which avoid the necessity of deciding this question finally. He states that his client is anxious to press on with a Receivership petition pending in the lower Court and he is prepared to adopt such a course as will avoid further delay in the decision of this court-fee question. He has accordingly agreed to omit in para. 9 of the plaint and to omit certain portions of para. 12 and also amend the prayer portions as to limit his prayer to the avoidance of the award mentioned in para. 10 of the plaint. The lower Court will see that proper amendments are made in the plaint to carry out the above offer. I direct that the draft amendment presented before me may be attached to the records for the information of the lower Court. On these amendments being made,

3. Balwant Singh v. Rev. Rockwell, Clancy, (1912) 34 All 296=14 I C 629=39 I A 109=9 A L J 509 (P C).
4. Perraju v. Subba Rao, (1935) 22 A I R Mad 419=156 I C 625=58 Mad 821=68 M L J 876.
5. Narayanaswami v. Swaminatha Iyer, (1937) 24 A I R Mad 876=(1937) 2 M L J 616.
6. Venku Reddi v. Venku Reddi, (1927) 14 A I R Mad 471=100 I C 1018=50 Mad 535=52 M L J 387 (F B).
7. Sat Narain v. Sri Kishen Das, (1936) 23 A I R P C 277=164 I C 6=63 I A 384=17 Lah 644 (P C).

it will be sufficient if the plaintiff is called upon to pay court-fee under Art. 17-A (i) of Sch. 2 in respect of the award amount. The order of the lower Court will be varied accordingly.

Before taking leave of this case, I must refer to a request made to me by Mr. Warrier on behalf of the plaintiff that I should direct the lower Court to deal with the Receiver petition without further delay. I do not feel that I can straightway give any such direction but it seems to me right to ask the lower Court not to allow that petition indefinitely to lie over on account of any disputes relating to the payment of court-fee. Mr. Warrier apprehends that objection may be raised in the lower Court about the valuation of item 1595 and that may involve delay. I must leave it to the discretion of the lower Court to see that the matter is not allowed to be dragged on on frivolous grounds. I have no doubt that if the plaintiff's counsel before the lower Court will give an undertaking to pay such court-fee as may be finally assessed, all adjournments on the score of non-payment of court-fee can be overcome.

The points raised before me are not by any means free from doubt and difficulty. In the circumstances, I therefore make no order as to the costs of this Revision Petition. On the plaint being amended on the lines above indicated, the issues will be re-cast so as to bring them into conformity with the amended plaint.

C.R.K./D.S. *Order varied.*

A. I. R. 1938 Madras 477

HORWILL J.

In re Thevar Servai and others —

Appellants.

Criminal Appeals Nos. 136 and 170 of 1937, Decided on 17th November 1937, against order of Asst. Sess. Judge, Ramnad Division, D/- 27th January 1937.

(a) Penal Code (1860), S. 397—Robbers exhibiting dangerous weapons in such manner as to intimidate persons robbed and to facilitate robbery—They can be punished under S. 397 even if blows were not actually inflicted.

If robbers so exhibit dangerous weapons as to intend that by their exhibition of them, the persons robbed or sought to be robbed are likely to be further intimidated and that the commission of robbery might be facilitated, the robbers can be punished under S 397, although they did not actually inflict blows with these weapons.

[P 478 C 2]

(b) Criminal Trial—Trial by jury—Number of important points—Judge may separate some of them from other items of charges.

It is not possible for any Judge to bring all the important facts together in one paragraph for the benefit of the jury. Where there are a large number of important points to be discussed, it is necessary that some of those points should be separated by some considerable time from the other items of the charges.

[P 478 C 2]

K. Swaminatha Iyer and R. Sundaralingam — *for Appellants.*

A. S. Sivakaminathan — *for the Crown.*

Judgment. — The appellants in C. A. No. 170 of 1937 were charged under Ss. 392, 394 and 397, I. P. C., with having waylaid a bandy and beaten the driver and the occupant and taken from the occupant valuable jewels; in the alternative they were charged under S. 411, I. P. C. The jury have found them guilty under Ss. 392, 394 and 397. The appellants in C. A. No. 136 of 1937 were charged with receiving property that has been the subject of this robbery. The jury have found them guilty of the offences under which they were charged. The Assistant Sessions Judge of Ramnad sentenced accused 1 and 2, who are the appellants in C. A. No. 170 of 1937, to the minimum sentence under S. 397, viz. seven years' rigorous imprisonment. The appellants in C. A. No. 136 of 1937, who were accused 3 and 4, have been sentenced to the maximum punishment which can be inflicted under S. 411, I. P. C.

With regard to accused 3, from whom the stolen property was recovered four days after the offence, it is argued that no proper search took place and that the jury have not been properly charged with regard to the legal requirements of S. 103, Criminal P. C. I do not find any substance in either of these objections. With regard to accused 4, the complaint of the learned advocate appearing on his behalf is that the attention of the jury was not sufficiently drawn to the fact that there was an interval of one month and seven days between the commission of the robbery and the finding of jewels in his possession and to the implications arising therefrom. There can be no doubt that the learned Assistant Sessions Judge did draw the attention of the jury to the fact that the property was recovered only on 19th May 1936 and also to the fact that the inference under S. 114, Illus. (i), Evidence Act, that a man who is in possession of stolen goods soon after a theft is either the thief or has received the goods knowing them to be stolen, unless

he can account for his possession. But the objection is that these two elements that have to be considered were referred to by the learned Sessions Judge in two parts of the same judgment widely separated and that the jury probably therefore did not associate them. It would have been undoubtedly better had the learned Judge, after discussing the evidence against accused 4, told them that they should consider for themselves whether the date of the arrest of accused 4 was sufficiently near to the date of the offence to justify their making the presumption under S. 114, Illus. (i). It has however to be remembered that there are certain other circumstances in the case which entitled the jury to bridge over this interval. A search was made of accused 4's house on information furnished by accused 3 on 16th April. From that date onwards, the police were on the look out for accused 4, and the Sub-Inspector has deposed that this accused was absconding until the date of his arrest (19th May the date of recovery of the jewels from this accused) and there was certainly ground for thinking that accused 4, knowing of the search in his house, had kept out of the way during that time.

The last point argued in C. A. No. 136 of 1937 is with regard to the sentences on the accused. Although the maximum punishment which can be inflicted under S. 411 is much less than that which can be inflicted under S. 394 and 397 still it has to be remembered that if it were not for the existence of receivers of stolen property, most of these robberies would never be committed. It is because there are people ready to receive this property and to convert it, that encouragement is given to persons who are inclined to commit robbery. Accused 3 was found in possession of a considerable amount of jewellery and there seems to be no reason why he should not receive the maximum punishment, especially as he presumably knew the circumstances in which this robbery had been committed. Accused 4 however was found in possession of only two bits of chain and the sentence is therefore very heavy. His sentence is therefore reduced from three years' rigorous imprisonment to eighteen months' rigorous imprisonment.

The objection to the charge with regard to accused 1 and 2 is that the Judge did not sufficiently direct the jury to the necessity for their finding that both the accused had aruvals; and it is also argued that S. 397 cannot be applied when all that has been shown is that the accused were possessed of aruvals. Taking the second point first, it is true that no injuries were caused by the aruvals; but it does not seem that the accused were merely in possession of aruvals. They held them in such a manner that P. W. 2, who was compelled to give up the jewels, was fully aware that the accused were armed with these aruvals. If robbers so exhibit dangerous weapons as to intend that by their exhibition of them, the persons robbed or sought to be robbed are likely to be further intimidated and that the commission of robbery might be facilitated the robbers can be punished under S. 397, although they did not actually inflict blows with these weapons: The application of S. 397 by the learned Assistant Sessions Judge was therefore correct.

It appears that there were some grounds for doubting whether both these accused were armed with aruvals; and the learned Sessions Judge has drawn the attention of the jury to that in para. 14 of his judgment. Here again the complaint is not so much that the Judge did not tell the jury that it was necessary for them to find that both these accused were armed with aruvals—for he did this; but that the portion of his charge in which he pointed this out to the jury was separated by a considerable time from that portion of his charge in which he referred to the discrepancies with regard to the accused's being armed with a stick or an aruval and finally summed up the evidence against accused 1 and 2. It is not possible however for any Judge to bring all the important facts together in one paragraph for the benefit of the jury. Where there are a large number of important points to be discussed, it is necessary that some of those points should be separated by some considerable time from the other items of the charges. It is true that he might have told the jury that if they believed that only one of the accused was armed with an aruval and they were uncertain which accused it was, they should find both of them not guilty; but I do not think that the evidence in the case really necessitated the addition of a sentence of this kind, because although in the earlier documents there is a reference only to a stick and an aruval, yet the evidence was consistently to the effect that both the accused were armed with aruvals. It was therefore difficult for the jury to accept the evidence as true with regard to one accused

and not with regard to the other. After they had been warned that the complaint of P. W. 2 referred only to a stick and an aruval and it was in evidence that accused 2 had a stick, it was open to the jury to find that accused 2 had only a stick and not an aruval. There was no reason on the evidence apparently why they should suspect that accused 1 had no aruval. I do not therefore consider that there was anything in the manner in which the jury were charged with respect to the use of aruvals that would amount to a misdirection prejudicing the accused. As accused 1 and 2 were awarded the minimum sentence, there can be no ground for complaint on that head. Their appeal is therefore dismissed.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 479

PANDRANG ROW AND
ABDUR RAHMAN JJ.

Sivanagalingam Pillai — Appellant.

v.

K. V. Ambalavana Pillai and another — Respondents.

Letters Patent Appeal No. 26 of 1936, Decided on 10th December 1937, against judgment of Cornish J., D/- 11th February 1936.

(a) Hindu Law—Marriage—Form—Marriages among Hindus in Madras Presidency are presumed to be in Brahma form unless shown otherwise — Party alleging marriage to be in Asura form must prove payment of bride price by bridegroom — Mere customary presents do not amount to bride price—Incurring whole of expenditure by bridegroom and celebrating marriage at bridegroom's place according to usage do not convert marriage in Brahma form into one in Asura form — Custom regarding expenses of marriage has no force of law.

The essence of a Brahma form of marriage is the gift of the bride, without receiving any consideration therefor, to the bridegroom in marriage. When along with the bride, jewels are also given, the marriage must be regarded as one in the Brahma form. The mere fact that the bridegroom and his people also spend money in respect of the marriage does not convert the marriage which is otherwise in the Brahma form into one which is in the Asura form. Where the bride is given in exchange for wealth, the marriage is considered to be in the Asura form. [P 480 C 2; P 481 C 1, 2]

So far as the Madras Presidency is concerned, all marriage among the Hindus are presumed to be in the Brahma form unless it is proved that they were in the Asura form. It is incumbent on the party who alleges that a particular marriage was in the Asura form to prove that bride price was paid in respect of the marriage by the bridegroom or his people to the bride's father. Mere customary presents in cash and cloth would not necessarily amount to a payment of bride price. So also the mere fact that the whole expenditure of the marriage is borne by the bridegroom or the fact that the marriage takes place at the bridegroom's house according to a usage prevailing in his caste would not convert a marriage which is otherwise in the Brahma form into one in Asura form. A custom of this kind cannot have any effect on the nature of any particular marriage. A custom regarding the expenses of marriages is not necessarily a custom which has the force of law and cannot be relied upon to show that the marriage was in the Asura form : *A I R 1921 Mad 608 and A I R 1926 Mad 37, Disting.* [P 480 C 2; P 481 C 2]

(b) Court-fees Act (1870), S. 13 — Suit remanded in Letters Patent appeal — Appellant is entitled to certificate for refund only in respect of court-fees paid on memorandum of Letters Patent appeal and not in respect of court-fees paid in first or second appeals.

Where a suit is remanded in a Letters Patent appeal for a second decision by the lower Court, the appellant is entitled under S. 13 to the refund of only the court-fee paid on the memorandum of appeal in the Letters Patent appeal. S. 13 does not contemplate the grant of certificates in respect of court-fees paid in the lower Appellate Court and no certificates for refund can be claimed in respect of court-fee paid in second appeal and in first appeal : *A I R 1932 All 550 and A I R 1934 All 106, Foll.* [P 481 C 2; P 482 C 1]

T. R. Venkatarama Sastri and K. R. Rangaswamy Iyengar—*for Appellant.*

S. Narasimha Iyengar — *for Respondents.*

Pandrang Row J.—This appeal arises out of a suit brought by one Sivanagalingam Pillai against his father-in-law and mother-in-law for recovery of certain jewels and cloth belonging to his deceased wife, who died on 10th January 1931 at Cuddalore. Naturally one of the allegations in the plaint was that the plaintiff's marriage with the daughter of the defendants was in the Brahma form and this allegation was denied by the defendants, according to whom the marriage was in the Asura form in spite of the fact that it was admitted by the defendants that a dowry of Rs. 3000 was agreed to be paid in respect of the marriage and was actually paid, Rs. 1600 in the shape of jewels and the balance in cash at the time of the marriage. The contention of the defendants that the marriage was nevertheless in the Asura form was based mainly on the ground that a parisam or present of Rs. 101 had been paid at the time of the marriage according to the custom of the caste by the plaintiff's brother-in-law on behalf of the plaintiff into the hands of the bride's father. This it was contended by the defendants in the written statement

was payment of consideration for the bride. It was also alleged that a cloth worth about Rs. 65 was also given at the same time. It was further alleged that it had been agreed also before the marriage that all the expenses of the marriage should be borne by the plaintiff, and that accordingly the marriage was celebrated in the house of the plaintiff at his own cost. These are the facts which were relied upon in support of the contention of the defendants that the marriage was in the Asura form, namely the presents of Rs. 101 in cash and a cloth, and the agreement that the expenses of the marriage should be borne by the plaintiff.

Unfortunately instead of the contentions in the suit being fully tried after taking all the evidence the parties had to adduce, the learned Subordinate Judge appears to have thought that it was possible to determine the suit entirely on the bare statement made by the plaintiff himself, on 23rd March 1933, which according to him was sufficient to show that the marriage was in the Asura form. He found accordingly against the plaintiff and dismissed the suit. On the same material the District Judge on appeal was of the same opinion and dismissed the plaintiff's appeal. A second appeal by the plaintiff had the same result. And in the present Letters Patent appeal, the only point for us to determine is whether in the light of the statement of the plaintiff referred to above the finding that the marriage was in the Asura form is according to law. It must be made perfectly clear at the same time that any decision that may be pronounced in this appeal will not finally decide any issue that arises in the suit, because the present decision can only proceed on the statement made by the plaintiff and on no other material. That statement has been extracted in the judgments, the material portions of which are as follows :

> I am a Vellala by caste. In my caste the usage is that the marriage takes place in the bridegroom's house unless he is too poor to bear the expenses. My expenses connected with the marriage amounted to about Rs. 2400. The expenses included music, dancing, feeding of guests, presents to the purohits, and all other items. The whole expenditure was borne by me and no contribution was taken from the bride's party. The marriage wholly took place at my house and at my expense.

Along with this statement it must be borne in mind that the payment of a dowry, Rs. 3000, is admitted by both parties. Now the question is whether in view of these facts it is possible to say that the marriage was in the Asura form. As stated by Cornish J. in the judgment under appeal the distinctive mark of the Asura form of marriage is the receipt of pecuniary consideration or bride price by the father of the bride for giving his daughter in marriage. This definition, so to speak, of the Asura form of marriage has not been taken objection to by either side and in fact this point is settled beyond all doubt. Where the bride is given in exchange for wealth the marriage is considered to be in the Asura form. On the other hand, so far as our presidency is concerned, all marriages among Hindus are presumed to be in the Brahma form unless it is proved that they were in the Asura form; in other words, it is incumbent on the party who alleges that a particular marriage was in the Asura form to prove that bride price was paid in respect of the marriage by the bridegroom or his people to the bride's father.

In the present case, apart from the payment of the customary presents of Rs. 101 in cash and a cloth it is not alleged that anything was paid by the bridegroom or his people to the bride's father. These customary presents would not necessarily amount to a payment of bride price. In any case, it was not on this ground that it has been decided by the Courts below that the marriage was in this case in the Asura form. That decision was based entirely on the fact that the marriage expenses were entirely met by the bridegroom in this case and on the custom referred to in the plaintiff's statement. Reliance was placed in this connexion on the observations of Ramesam J. in the cases reported in 41 M L J 76[1] and 49 M L J 554.[2] It was these observations that appear to have governed the decision of the Courts below as well as that of Cornish J. In 41 M L J 76[1] there was an actual payment of Rs. 200 to the bride's father and it is stated by Ramesam J. that it was clear from the evidence and the pleadings that this payment of Rs. 200 for the expenses of the marriage was a term of the contract of marriage. In 49 M L J 554[2] also it was found that a certain sum of money was paid by the bridegroom to the bride's father specifically as a contribution towards the expenses of the marriage. It would be

1. Rathnathanni v. Somasundara Mudaliar, (1921) 8 A I R Mad 608=62 I C 931=41 M L J 76.
2. Samu Asari v. Anechi Ammal, (1926) 13 A I R Mad 37=91 I C 561=49 M L J 554.

enough for our present purpose to say that the facts of the present case as contained in the plaintiff's statement are quite different. In the first place there was no payment of any money towards the expenses of the marriage by the bridegroom to the bride's father; nor is there any evidence at present to show that the bridegroom's meeting the expenses of the marriage in this case was the result of any contract between him and the bride's father and was not at his own will and pleasure.

It is however argued that the existence of the custom referred to by the plaintiff has the effect of converting the marriage which is otherwise clearly in the Brahma form into one of the Asura form. I am unable to follow this reasoning. The custom in the first place is most vague and uncertain, and as is well known, the expenses of a marriage are a very uncertain factor which may range from a few rupees to many thousands of rupees, and even according to the plaintiff the custom is for the bridegroom to meet the expenses of the marriage unless he is too poor. A custom of this kind cannot be regarded as having any effect on the nature of any particular marriage. It has really no bearing on the question of law as to whether a particular marriage is in the Brahma or in the Asura form. A custom regarding the expenses of marriages is not necessarily a custom which has the force of law. Ramesam J. appears to have relied to some extent on a statement made in Steele's Law and Custom of Hindu Castes to the effect that in Brahma marriages the charges are incurred solely by the girl's father. I do not think the learned author intended in that passage to give an accurate definition of what a Brahma marriage was, or to lay down that if any portion of the expenses of the marriage was met by the bridegroom the marriage would cease to be in the Brahma form. The essence of the Brahma form of marriage is the gift of the bride without receiving any consideration therefor to the bridegroom in marriage; and when along with the bride jewels are also given it is obvious that the marriage must he regarded as one in the Brahma form. It is a well-known fact that, whatever the custom is, the bridegroom and his people also spend a considerable sum of money in respect of the marriage whenever they can afford it. Such expenditure obviously does not convert the marriage which is otherwise in the Brahma form into one which is in the Asura form. I have no doubt that in this particular case the reference to the custom in the plaintiff's statement cannot be relied upon in the least to show that the marriage in question was in the Asura form. It follows therefore that the finding to the effect that the marriage was in the Asura form, based as it is entirely on the plaintiff's statement of March 1933, cannot be supported in law; it is, in short, contrary to law. The finding must therefore be set aside and the suit remanded to the first Court for fresh disposal according to law after taking all the evidence adduced by the parties. The plaintiff-appellant will be entitled to have his costs in all the Courts up-to-date from the respondents except the costs in the first Court which will be within the discretion of that Court.

Abdur Rahman J. — I concur. There appears to be no basis for the assumption that the bride's father is not only liable to bear the expenses incurred or to be incurred by him on the marriage of his daughter, but is also required to pay any sum, according to what has been termed by the counsel for respondent as a social custom, towards the expenses which the bridegroom or the other members of his family may take it into their heads to spend. The custom pleaded in this case would be so unreasonable, variable, and uncertain that it could not be enforceable in a Court of law. In any case it is well established in this Presidency that, unless it be proved to the contrary, every marriage has to be presumed to be in Brahma form. One must therefore try to ascertain if the ingredients of an Asura form of marriage have been established in this case. If a party wishes to assert that the marriage was Asuric in form, he must establish that some price was paid for the bride in pursuance of either of an express or implied contract to the bride's father or on his account. There is nothing on the record to establish this and the appeal must therefore be accepted.

Pandrang Row J. — This appeal has been taken up once more for the purpose of deciding the question of refund of court-fee paid on the memoranda of appeal in this litigation. So far as the court-fee paid on the memorandum of appeal in the Letters Patent appeal is concerned, there can be no doubt that refund can be claimed as of right under S. 13, Court-fees Act. A certificate regarding this court-fee will therefore issue. As regards the claim for a certificate in respect of the court-fee paid on the

memoranda of appeal in the second appeal as well as in the first appeal the words of S. 13, Court-fees Act do not appear to contemplate the grant of a certificate in respect of such court-fee. It is clear from that section that the certificate is to be given only by the Appellate Court when it remands the suit under appeal for a second decision by the lower Court and that too for the amount of fee paid on the memorandum of appeal. It does not contemplate the grant of certificates in respect of court-fee paid in the lower Appellate Courts. The question has been so decided in 54 All 523[3] by a Bench whose decision was affirmed by a Full Bench of the same High Court reported in 56 All 526.[4] We see no sufficient reason to take a different view. We are therefore unable to accede to the request that a certificate should be given in respect of the court-fee paid in second appeal and in first appeal in this case.

C.R.K./R.M. *Order accordingly.*

3. Kanhaiya Lal v. Mt. Mahadei, (1932) 19 A I R All 550=140 I C 466=54 All 523=1932 A L J 320.

4. Mt. Kaul Pati Kuer v. Kashi Prasad Singh, (1934) 21 A I R All 106=147 I C 686=56 All 526=1934 A L J 41.

A. I. R. 1938 Madras 482

HORWILL J.

In re Shanmugham Asari and others— Petitioners.

Criminal Revn. Case No. 474 and Petn. No. 442 of 1937, Decided on 17th November 1937, from Judgment of Sess. Court, Ramnad Division at Madura, D/. 25th January 1937.

Criminal P. C. (1898), S. 110—S. 110 is not confined in its application to cases in which parties are strangers to locality in which offences are committed — Proof of previous convictions is not necessary if it can be proved otherwise that person concerned is habitual thief or house-breaker — Evidence of reputation, although admissible must be viewed with caution.

There is nothing in the wording of S. 110 or any other section of the Code that leads to the inference, that S. 110 can only be used where the parties are strangers to the locality in which the offences are committed. If the persons or the acts which they commit are such as to make it difficult to deal with them under the ordinary provisions of law, then S. 110 can be used. So also, it is not necessary, before a person is bound down under S. 110, or similar sections, that a certain number of previous convictions should be proved against him, if it can be proved otherwise that the person is a habitual thief, house breaker, or robber. If there are no previous convictions, the quantum of proof would, of course, be greater. Then again, evidence of reputation, although admissible and even important, must be accepted with caution. It is the weakest form of evidence and requires material corroboration by other evidence proving the habits of the persons against whom the police are proceeding. [P 482 C 2 ; P 483 C 1, 2]

M. Somasundaram — *for Petitioners.*

A. Sivakaminathan for Public Prosecutor — *for the Crown.*

Order.—It has been found by the Joint Magistrate of Sivakasi, and his finding has been confirmed on appeal by the Sessions Judge of Ramnad, that the petitioners are by habit house-breakers and thieves : and so they were called upon under S. 110, Criminal P. C., to show cause why they should not execute bonds with sureties for good behaviour. Not having shown cause, they have been called upon to execute bonds and they have done so.

Before discussing the actual evidence against these petitioners, I think it is necessary, as this point is frequently raised, to say a word or two with regard to the scope of S. 110, Criminal P. C. It is of course true that S. 110 is intended to deal with persons who cannot readily be brought under the ordinary law and who for special reasons could not be convicted under the Penal Code in respect of the offences said to have been committed by them. It is argued that S. 110 is intended only to deal with gangs of people who are strangers to a locality, who enter that locality for the purpose of committing crime, and who because of the fact that they are strangers and work together, render their offences difficult of detection. I do not find anything in the wording of S. 110 or of any other section of the Code that leads to the inference that S. 110 can only be used where the parties are strangers to the locality in which the offences are committed. If the persons or the acts which they commit are such as to make it difficult to deal with them under the ordinary provisions of law then S. 110 can be used. If the thefts committed are of a petty nature and if much loss does not result, villagers are reluctant to complain to Courts and be compelled to give evidence at a number of hearings at great inconveniences to themselves. The recovery of some small article or property is very little recompense for the trouble to which they would be put by lodging a complaint. Even when a thief makes himself a general nuisance, an individual villager is unwilling to put himself

to any trouble on behalf of the community. It often happens that villagers fear that if they complain against a person who has committed thefts and house breaking in the locality, they will be subjected to the attentions of the person against whom they have complained to a much greater degree in the future; and for that reason they are not willing to complain to the police. Often, petty depredators combine to make themselves a burden to the neighbourhood: and village roughs and rowdies are no less a menace and terror to their village because they live in houses and have a settled habitation. It is in dealing with persons of that kind that the police carefully record over a considerable period the items of evidence against particular persons and when they think they have sufficient material they bring a case under S. 110 before the Court. I can see nothing improper in this procedure. If the police did not take action under S. 110, the villagers would be compelled to take the law into their own hands, with resulting breaches of the peace. It sometimes happens that persons who commit offences of this kind are members of factions; and offences are committed in pursuance of the factious spirit of the parties. Even there the police are justified in taking action under this section when they find for one reason or another that they are unable to have recourse to the ordinary provisions of the law. It is the duty of the police to see that the law is respected; and if they find they are unable to proceed against persons in the ordinary way they are justified in using these special provisions of the Criminal Procedure Code. It is further contended that before a person can be bound over under this or similar sections it is necessary that a certain number of previous convictions should have been proved. I can see no necessity for this if the evidence that a person is a habitual robber or house breaker or thief can be proved otherwise. If there are no previous convictions, the quantum of proof necessary would naturally be greater.

Turning to the facts of this particular case, we find that the amount of evidence accepted by the learned Sessions Judge is a mere skeleton of what the prosecution attempted to prove by means of the 29 witnesses examined on their behalf. All that the Sessions Judge has believed is, that the appellants trespassed into the house of P. W. 6 at night and that they removed some brass vessels one night from the house of P. W 10. The learned Sessions Judge has also however accepted the evidence of P. Ws. 3, 8, 9 and 24 to 28 that the appellants bear a bad reputation. Evidence of reputation, although admissible and even important, has to be accepted with caution as it is very easy to say that a person is of ill repute, and in the nature of things such evidence is too indefinite to permit of cross-examination. Reasons why the person is held to be of ill-repute cannot be given by the witnesses: for, all evidence in which a person seeks to explain why he considers the reputation of a person is bad amounts to hearsay. Evidence of reputation is the weakest form of evidence and requires material corroboration by other evidence proving the habits of the persons against whom the police are proceeding. In view of the facts the prosecution has sought to establish a very large number of actual crimes committed by these accused and has succeeded in proving only two and that in many cases the trial Magistrate seems to have been of opinion that not only was the evidence insufficient but false. I do not think that the facts actually established are sufficient to warrant the calling upon the petitioners to execute bonds. The petition is therefore allowed and the security bonds cancelled.

C.R.K./R.M. *Petition allowed.*

A. I. R. 1938 Madras 483

PANDRANG ROW AND KING JJ.

Chandalavada Venkata Subbayya — Appellant.

v.

Secretary of State and another — Respondents.

Appeal No. 54 of 1933, Decided on 15th December 1937, against decree of Sub-Judge, Tenali, in O. S. No. 31 of 1932.

(a) Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 and 21 — Claim to office—Revenue Courts alone competent to decide—Board of Revenue is final authority in second appeal — Order of Board is decree of final Court—Civil Courts cannot interfere with it.

Under Ss. 13 and 21, a claim to a village office can be decided only by Revenue Courts and a second appeal in such matter is not only within the jurisdiction of the Board of Revenue but the Board of Revenue is the only authority which can entertain a second appeal in such a matter. No separate suit would lie in a Civil Court for a village office under the Madras Hereditary Village Offices Act, and when the highest Revenue Court of Appeal, the Board of Revenue, has decided a particular claim in a particular way, it is final.

It is not competent for a Subordinate Judge to entertain a suit for a declaration that the order of the Board of Revenue passed in the exercise of its appellate jurisdiction was contrary to law. The order of the Board of Revenue has the force of a decree and it is the decree of the final Court of appeal in a suit under the Madras Hereditary Village Offices Act. Even if the decision of the Board of Revenue is contrary to law, it is not competent for a Civil Court in the mofussil to declare that such a decision was contrary to law.

[P 484 C 2]

(b) Madras Hereditary Village Offices Act (3 of 1895), S. 23 — Appeal before Board of Revenue can be decided without hearing parties.

The rules of procedure governing the hearing of suits and appeals under the Madras Hereditary Village Offices Act do not require that the Board of Revenue should hear either the appellant or his counsel before disposing of the second appeal and therefore the decision by the Board of Revenue of an appeal to it without hearing the appellant or his counsel is not illegal or ultra vires. It has jurisdiction to decide it without giving the parties an opportunity of being heard : *A I R 1932 Mad 529, Foll.*

[P 485 C 1]

V. Rangachari — *for Appellant.*

K. S. Krishnaswami Aiyengar and V. Govindarajachari—*for Respondents.*

Pandrang Row J. — The appellant in this appeal was the plaintiff in the Lower Court. He sued the Secretary of State for India in Council and the present Village Munsif of Pedapudi in the Tenali Taluk for a declaration that the order of the Board of Revenue dated 12th May 1928 in Second Appeal is illegal and ultra vires. The facts necessary to understand the points in issue may be stated briefly. The plaintiff-appellant's grand-father Ramanappa was Village Munsif of Pedapudi till 1883 when he was dismissed by the Sub-Collector for misconduct and divided member of the same Mirasi family was appointed to the office, namely the grandfather of defendant 2. The plaintiff's contention was that that appointment was only temporary, and to be in force only during the lifetime of the dismissed village Munsif, and that on the death of the latter in 1923, the plaintiff was entitled to be appointed village Munsif. On this basis, the plaintiff during his minority by a next friend sued in the Court of the Revenue Divisional Officer, under S. 13, Madras Hereditary Village Offices Act 3 of 1895, namely S. S. No. 1 of 1926, for being registered as the village Munsif of Pedapudi. That suit was dismissed and an appeal from the decree of the Revenue Divisional Officer was also dismissed by the District Collector in S. A. S. No. 1 of 1927. The plaintiff preferred a second appeal to the Board of Revenue as provided for in S. 23, Madras Hereditary Village Offices Act and that second appeal was also dismissed by the Board of Revenue in May 1928.

It is this dismissal of the second appeal by the Board of Revenue that is sought to be declared illegal and ultra vires. It cannot be contended that the Board of Revenue had no jurisdiction to entertain the appeal or to deal with it in the manner which the Board thought fit. In fact, a claim to a village office of this kind can be decided only by Revenue Courts as will be seen from a perusal of Ss. 13 and 21, Madras Hereditary Village Offices Act 3 of 1895. This position is not contested. It is therefore clear that the Board of Revenue had not only jurisdiction to entertain and dispose of the second appeal, but also that the Board was the only authority in fact which could have entertained such a second appeal in this matter. The contention that the Board of Revenue acted without jurisdiction must be dismissed as having no foundation, and as being even absurd. The jurisdiction of the Board of Revenue was invoked by the plaintiff himself and that jurisdiction which undoubtedly existed when the appeal was entertained could not be said to have been lost simply because, as the plaintiff-appellant believes, the Board decided the second appeal wrongly.

So far as the contention that the order of the Board of Revenue was illegal is concerned, it appears to us that no civil suit of this nature could have been entertained by the Subordinate Judge for the purpose of getting a declaration that the order of the Board of Revenue passed in the exercise of its appellate jurisdiction was contrary to law. No separate suit would lie in a case of this kind, and when the highest Court of Appeal, so far as this subject-matter is concerned, has decided a particular claim in a particular way, it is final, and it is not open to any Court in the mofussil to canvass the correctness of such an order. The order of the Board has the force of a decree and it is the decree of the final Court of Appeal in a suit of this kind. Assuming for argument's sake that that decision was contrary to law, it is obviously not competent to the Subordinate Judge's Court in which this suit was filed to declare that such a decision was contrary to law. In effect, the present suit though framed as one

for a declaration that the order of the Board of Revenue is illegal and ultra vires is a suit for the office of a village Munsif in which the plaintiff seeks the same relief which he sought in the suit which he filed before the Revenue Divisional Officer. He is really therefore attempting to obtain an adjudication by a Civil Court of a claim which has been excluded from the jurisdiction of Civil Courts for over a century by express legislation. It may at the same time be mentioned that the Subordinate Judge, while holding that the suit was maintainable, came to the conclusion that the order of the Board of Revenue was right on the merits and that the view taken by the Board as regards the appointment of defendant 2's grandfather was right.

A further complaint has been made on the ground that the Board of Revenue passed its order in second appeal without hearing the plaintiff-appellant or his counsel. The rules of procedure governing the hearing of suits and appeals under the Madras Hereditary Village Offices Act are rules framed under S. 20, Cl. (4) of that Act, and the rules so framed do not require that the Board of Revenue should hear either the appellant or his counsel before disposing of a second appeal. This rule of procedure cannot be regarded as ultra vires in the light of the decision reported in 55 Mad 942[1] which expressly decided the question that the Board of Revenue having jurisdiction to decide a second appeal under S. 23, Madras Hereditary Village Offices Act, has jurisdiction to decide it without giving the parties an opportunity of being heard. This Bench decision which directly bears on the point disposes of the contention that the decision of the Board of Revenue must be deemed to be illegal or ultra vires because it was pronounced without giving a hearing to the plaintiff-appellant or his counsel. We see no reason to differ from the decision in 55 Mad 942.[1] It follows therefore that there was never any substance in the plaintiff-appellant's suit and that the appeal must fail. It is accordingly dismissed with costs (two sets).

C.R.K./B.D. *Appeal dismissed.*

1. Kumaraswami Mudali v. Muniratna Mudali, (1932) 19 A I R Mad 529=138 I C 390=55 Mad 942=63 M L J 282.

✻ A. I. R. 1938 Madras 485

VENKATARAMANA RAO AND STODART JJ.

Pollachi Transport Ltd. Coimbatore — Appellant.

v.

Arumuga Kounder — Respondent.

Appeal No. 222 of 1936, Decided on 14th December 1937, against order of Commissioner for Workmen's Compensation, Madras, D/- 8th April 1936.

(a) Workmen's Compensation Act (1923), S. 10 (1), Proviso (3) — "Sufficient cause"— Man's illness is sufficient cause.

The fact that the man had been ill and was a complete wreck after his discharge from the hospital is a sufficient cause within the meaning of Proviso 3 to S. 10 (1). [P 486 C 1]

✻ (b) Workmen's Compensation Act (1923), S. 2 (1) (n) and Sch. 2, Cl. (i)—Conductor of motor omnibus is workman.

The word 'operation' in Cl. (i) of Sch. 2 means the working of the vehicle. The duty of a conductor is not merely to sit in the car and issue tickets but he has to see to the safety of the passengers in getting in and getting out, to the starting of the car and the stopping of the car at convenient places and co-operate with the driver in the proper running of the car throughout the journey. He is therefore as much concerned with the operation of the mechanically propelled vehicle as the driver and is therefore a workman : *42 C W N 123, Rel. on.* [P 486 C 1]

V. Ramaswamy Ayyar — *for Appellant.*

Venkataramana Rao J.—This appeal is under S. 30, Workmen's Compensation Act, against an order granting compensation to the respondent for an injury he suffered while he was doing the duties of a conductor in a vehicle belonging to the appellant-company which plied from Palghat to Pattancheri on the 13th March 1935. So far as the amount of the award is concerned, it has not been challenged before us. Two points were argued before us by Mr. V. Ramaswami Ayyar, the learned counsel on behalf of the appellant-company. One is the question of limitation and the other is that the respondent is not a 'workman' within the meaning of the Workmen's Compensation Act. In regard to the question of limitation, his point is that while the accident took place on 13th March 1935, the claim to compensation was instituted on 12th December 1935 and notice of compensation was given only on 6th November 1935. It is true that under S. 10 (1) of the Act, notice of the accident must be given as soon as practicable and the claim must be instituted within six months of the occurrence of the accident. But there is a Proviso which provides :

That the Commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given or the claim has not been instituted in due time as provided in this sub-section, if he is satisfied that the failure to so give the notice or institute the claim, as the case may be, was due to sufficient cause.

The learned Commissioner has taken the fact of the man's illness, his being a complete wreck after his discharge from the hospital and all other circumstances into consideration in coming to the conclusion that there was sufficient cause which enabled him to exercise the discretion which is conferred on him under the Proviso and he did not see any reason to disallow the claim. We see no reason to differ from his conclusions on this part of the case. We therefore overrule the plea of limitation. The second contention is that having regard to the definition in S. 2 (n) (i) of the Act taken in conjunction with Sch. 2, Cl. (i), the respondent is not a 'workman' because he could not be said to be a person connected with the operation or maintenance of a mechanically propelled vehicle. We are not inclined to agree with this contention either. The word 'operation' in Cl. (i) of Sch. 2 means the working of the vehicle. So far as the duties of a conductor in this case are concerned, there is evidence that his duties are not only to issue tickets, to collect fares, sign time sheets at police stations but also, as admitted by D. W. 1, to look after the convenience of the passengers, their luggage and generally do all that is prescribed in the Motor Vehicles Rules.

Apart from any question of evidence, the duty of a conductor is not merely to sit in the car and issue tickets but he has to see to the safety of the passengers in getting in and getting out, to the starting of the car and the stopping of the car at convenient places and co-operate with the driver in the proper running of the car throughout the journey. In our opinion, he is therefore as much concerned with the operation of the mechanically propelled vehicle as the driver is within the meaning of that clause. The question whether the conductor of an omnibus is a "workman" within the meaning of the Act was recently considered by a Bench of the Calcutta High Court and they have taken the same view as we have taken (*see* 42 C W N 123[1]). As observed in that case, the presence of a conductor is not only desirable but is really necessary and is indeed obligatory for the purpose of the proper working of a bus. We are therefore of the opinion that the respondent is a 'workman' within the meaning of the Act. In the result, the appeal fails and is dismissed with costs.

C.R.K. D.S. *Appeal dismissed.*

1. Nanda Kumar v. Pramatha Nath, (1937) 42 C W N 123.

---

* A. . R. 1938 Madras 486

GENTLE J.

Palani Gramani and another —

Plaintiffs.

v.

Manickammal and another —

Defendants.

T. O. S. No. 16 of 1931 and Appln. No. 819 of 1937, Decided on 23rd August 1937.

*** (a) Civil P. C. (1908), O. 33, Rr. 1, 8, S. 141 — Applicability of pauper Rules to applications for grant of probate or letters of administration.**

An application by a petitioner for grant of probate or letters of administration is clearly a proceeding in a Court of civil jurisdiction and the pauper Rules contained in O. 33, are applicable to such petitions or suits, when petitions become suits in pursuance of the Original Side rules : *18 Bom 237 and Appl. No. 2925 of 1930, Rel. on.* [P 488 C 1]

(b) Madras High Court — Fees Rules (1933), O. 2, R. 2 — Provisions are in addition to and not in substitution for O. 33, Civil P. C.

The provisions of the Madras High Court Fees Rules are in addition to and not in substitution for O. 33, Civil P. C. Order 2, R. 2 of the Rules therefore does not prevent a person from availing himself of the pauper provisions of O. 33, Civil P. C. [P 488 C 1]

(c) Court-fees Act (1870), S. 19-I — Mandatory language of S. 19-I concerning fees for grant of letters of administration is subject to O. 33, R. 8, Civil P. C.

The mandatory language of S. 19-I, Court-fees Act regarding payment of fees for the grant of probate and letters of administration is subject to the provisions of O. 33, R. 8, Civil P. C., which unequivocally deals with exemptions from payment of all court-fees in any proceedings connected with a pauper suit. [P 488 C 2]

(d) Civil P. C. (1908), O. 33, Rr. 1 and 8 — Proper fees paid up to date of application to be admitted as pauper — No funds to continue suit — Plaintiff can be allowed to continue as pauper.

Where the plaintiff has paid all the proper fees up to date of the application to be admitted as a pauper and at that stage he has no funds to continue the suit, nor can he find the further fees required, the plaintiff can be admitted as a pauper and allowed to continue the suit : *20 Cal 319, Foll.* [P 489 C 1, 2]

C. S. Varadachariar — *for Plaintiffs.*

R. Ramamurthy Ayyar —

for Defendants.

Order.—This is an application in which the applicants pray for an order : (1) that letteres of administration ordered to be issued in this suit to them as plaintiffs may be granted to them in forma pauperis; and (2) that the court-fees payable in respect of the above grant of the letters of administration may be made a first charge upon the properties bequeathed to the plaintiffs under the will of the deceased dated 21st September 1920. It is conceded by the learned counsel on behalf of the Government Solicitor that, so far as the applicants' pecuniary position is concerned, they are paupers. The objection to the application is based upon two grounds : (1) that O. 33, Civil P. C., and the rules thereof are not applicable to proceedings for grants of probate or letters of administration; and (2) that, even though the contrary may be the correct view, the applicants cannot now avail themselves of the provisions of the pauper rules. There is no difference in principle between proceedings for the grant of letters of administration and proceedings for grant of probate.

The facts of this case are as follows : The testator by his will dated 21st September 1920 bequeathed to the plaintiffs and to other beneficiaries legacies and bequests. He appointed no executor. On 27th April 1921, the testator died. Since that date various members of his family have been in possession of the deceased's estate and have excluded the applicants from the benefits given to them under the will. On 28th August 1931, the applicants petitioned for a grant of letters of administration *cum testamento annexo*. The petitioners alleged in the petition that, on account of their poverty, they were unable to institute proceedings until the date of that petition and that no other beneficiaries under the will had taken any steps in regard to obtaining the grant. The widow and one son of the deceased filed a caveat. Subsequently the petition and the caveat were numbered as a suit, the applicants being the plaintiffs and the caveators the defendants. This was in pursuance of O. 34, R. 52 of the Original Side Rules. Under R. 55 of the same Order, it is provided inter alia that the provision of O. 4, Rule 4 of the Original Side Rules shall apply in the same manner as if the petition were a plaint filed on the date of registration of the petition as a suit. It follows therefore that the petition praying for the grant of letters of administration is deemed to be a plaint on the date mentioned in the Rule. Since the provisions of O. 4, R. 4 of the Original Side Rules apply, if follows from the wording of that Rule that the petition is dealt with as if it were a plaint presented and filed in accordance with the relevant rules.

In the written statement in the suit, the defendants raised many contentions against the validity of the will including an allegation that the testator's will was a forgery. Lakshmana Rao J. tried the suit and on 14th February 1935 he found in favour of the will and ordered letters of administration to issue. Against this decision the defendants appealed to the Appellate Court which appeal was dismissed on 1st April 1936. When the petition was first issued by the applicants, they paid the appropriate court-fees by affixing Rs. 20 stamp upon the petition pursuant to O. 2, R. 1, of the High Court Fees Rules of 1925, Appendix 2, Item 7. These rules have since been supplanted by the High Court Fees Rules of 1933 but no amendment or alteration has been made which is material so far as the matter before me is concerned. When a case is registered as a suit and the petition becomes a plaint, no fee is prescribed in the Rules as payable by the applicants. Letters of administration have been ordered to be issued. All that remains to be done is for the applicants to pay the appropriate court-fees computed upon the value of the estate and, upon this being done, letters of administration will issue. It is at this stage, that the present application is made pursuant to the provisions of O. 33, Civil P. C. and O. 8, Rule 14 of the Original Side Rules. It is necessary to refer to provisions of O. 33 in this application. O. 33, R. 1, Civil P. C. says :

> Subject to the following provisions, any suit may be instituted by a pauper.
>
> *Explanation.* — A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

Rule 8 of the same Order is in the following terms :

> Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Order 8, R. 14 of the Original Side Rules deals with the machinery to be followed by the applicants. S. 141, Civil P. C. provides as follows :

> The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

I see no reason why an application by a petitioner for grant of probate or letters of administration, which is clearly a proceeding in a Court of civil jurisdiction, cannot be subject to the provisions of O. 33, Civil P. C. nor that any of the Rules of that Order are inapplicable to such a petition. The provisions of the High Court Fees Rules, 1933, which supplant the former Rules, in my view, contemplate proceedings for the grant of probate and letters of administration being subject to the pauper Rules. O. 2, R. 2 of the High Court Fees Rules deals with these applications in so far as it provides for the fees payable and in the same Rule it is provided that :

> If an application for leave to prosecute or defend proceedings, in forma pauperis is granted, no fee shall be charged by the Registrar or the Sheriff, in respect of any proceeding by, or on behalf of the pauper, except the fees chargeable upon the said application.

It is contended on behalf of the Government Solicitor that the words in O. 2, R. 2 "no fee shall be charged by the Registrar or the Sheriff", excuse only the fees payable under the High Court Fees Rules and do not extend such relief to any other court-fees, those fees being only ones which are dealt with in that Rule, and that it does not deal with the court-fees under the Court-fees Act to which I shall refer later on. I do not accept the contention that this Rule prevents a person from availing himself of the pauper provisions of O. 33, Civil P. C. The provisions of the High Court Fees Rules are in addition to and not in substitution for O. 33, Civil P. C. R. 8 of that Order, set out above, expressly exempts a person admitted to sue in forma pauperis from payment of court-fees in respect of any proceedings connected with the suit. The issue of probate or letters of administration is a proceeding connected with the petition, and in this case a suit for such a grant. S. 19-I, Court-fees Act provides that the fees specified in Item 2, Sch. 1 of the Act must be paid before an order entitling the petitioners to a grant of probate or letters of administration can be made. Whilst this section mentions "fees" and not "court-fees", Ss. 19-A and 19-G of the same Act deal with the relief available when too high a fee has been paid and provides for payment to be made when too low a fee has been paid. Both describe such fees as "court-fees" and these court-fees are fees payable pursuant to S. 19-I. The mandatory language of S. 19-I regarding payment of fees for the grant of probate and letters of administration is, in my view, subject to the provisions of O. 33, R. 8, Civil P. C., which unequivocally deals with exemptions from payment of all court-fees in any proceedings connected with a pauper suit.

It was further contended on behalf of the Government Solicitor that the Court-fees Act is a special Act and that S. 4 (1), Civil P. C. provides that, in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law. It was argued that the Court-fees Act is a special law and that S. 4 (1) above referred to expressly provides that such Act shall not be limited or affected by the Code. This section however expressly says that this shall be so in the absence of any specific provision to the contrary. The wording of O. 33, R. 8 is such a specific provision, namely that court-fees connected with any proceeding, which includes court-fees payable under the Court-fees Act, are excused in the case of a person admitted as a pauper litigant. Incidentally the Court-fees Act provides for the fees payable for plaints and, if this argument were to prevail, it would destroy the effect and the relief given to paupers by the provisions of O. 33, R. 8, Civil P. C. I am satisfied that the paupar Rules mentioned above are applicable to petitions or suits when petitions become suits, for the grant of probate or letters of administration. This view was taken by the Bombay High Court: 18 Bom 237.[1] Whilst this case was decided before the Court-fees Act was amended by the inclusion of Ss. 19-A to 19-K, I see no difference in principle between that case and the one now before me. In Application No. 2925 of 1930, Venkatasubba Rao J. decided that the petitioner for grant of probate could be given relief in forma pauperis. I agree with the learned Judge in that decision. No proceedings had been taken by the petitioner in the application before

1. In the matter of the Will of Dawubai, (1894) 18 Bom 237.

Venkatasubba Rao J. before the application was made to him.

It is further contended that it is now too late for the applicants to be granted the relief to proceed as paupers. In 53 Mad 43[2] and in 64 M L J 728,[3] it was held that the Court could allow the plaintiff to continue the suit as a pauper although the application was made after the suit had been instituted and some court-fees had been paid upon the plaint. These decisions followed 20 Cal 319[4] and 8 Bom 615.[5] In the two Madras authorities mentioned above, court-fees which had been paid were not the proper court-fees inasmuch as a larger sum should have been paid. In 20 Cal 319,[4] the plaintiff had paid all the proper fees up to date of the application to be admitted as a pauper and at that stage he had no funds to continue the suit nor could he find the further fees required. Nevertheless, the plaintiff in that suit was admitted as a pauper. The definition of "pauper" is contained in the Explanation to O. 33, R. 1, which I have set out above. That Rule provides that a person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fees prescribed by law for the plaint in the suit, or, where no fee is prescribed, when he is not entitled to property worth Rs. 100. When the caveat was entered by the widow and the son of the deceased testator, and under the rules above mentioned, petition and the caveat were registered as a suit, no fee was prescribed when the petition became a plaint. At that time, it is not suggested by the learned counsel for the Government Solicitor that the applicants before me were possessed of Rs. 100. Interpreting strictly the definition set out in the Explanation, it follows that since no fee is prescribed upon the plaint when the petition becomes a plaint and the applicants are not possessed of Rs. 100, they are paupers within the meaning of the Explanation. Whilst upon the date of the issue of the petition, the requisite fee of Rs. 20 was paid in respect of that document, at the time when the petition became a plaint, no fee is prescribed. The applicants are paupers within the meaning of the Explanation in O. 33, R. 1, since they were not entitled to Rs. 100.

There will be an order in terms of prayer, viz. (i) letters of administration will issue to the applicants in forma pauperis. There will also be an order that the fees payable to the Government under S. 19-I, Court-fees Act, and any other court-fees which are payable will be a first charge upon the subject-matter of the grant pursuant to O. 33, R. 10, Civil P. C. There also will be an order that the applicants will pay the court-fees which they are now excused from paying. This last order will only be enforced subject to an application to Court for leave so to do. The learned counsel on behalf of the Government Solicitor stated that this application was contested upon a matter of principle in order that there might be a direction in regard to future litigation by paupers in respect of probate and letters of administration. I therefore direct that there will be an order for costs in favour of the applicant.

C.R.K./V.B.B. *Application allowed.*

---

2. Subba Rao v. Venkataratnam, (1929) 16 A I R Mad 828=121 I C 857=53 Mad 43=57 M L J 677.
3. Bava Sahib Miyan v. Abdul Ghani Sahib, (1933) 20 A I R Mad 498=147 I C 710=64 M L J 728.
4. Thompson v. The Calcutta Tramway Co. Ltd., (1893) 20 Cal 319.
5. Revji Patil v. Sakharam, (1884) 8 Bom 615.

A. I. R. 1938 Madras 489

BURN AND VENKATARAMANA RAO JJ.

Devarinti Dasi Reddi Annaji Chinnappa Reddi and others—Appellants.

v.

Dasari Venkobayya — Respondent.

Appeal No. 435 of 1935, Decided on 20th January 1938, against order of Dist. Court, Bellary, D/- 30th March 1935.

Insolvency — Creditor need only prove his right to present petition to adjudicate debtor—He need not prove debtor's inability to pay debts.

Under the Provincial Insolvency Act, the creditor need do no more than prove his right to present the petition to adjudicate the debtor and the alleged act of insolvency. The adjudication must then follow unless the Court is satisfied by the debtor that he is able to pay his debts. The creditor need not prove the debtor's inability to pay his debts. [P 489 C 2; P 490 C 1]

A. Gopalacharlu — *for Appellants.*

Judgment.—The learned District Judge was in error in holding that the creditor should prove the debtor's inability to pay his debts. The creditor need do no more than prove his right to present the petition and the alleged act of insolvency and then adjudication must follow unless the

Court is satisfied by the debtor that he is able to pay his debts (S. 25 (1) Provincial Insolvency Act). This appeal is accordingly allowed: the order of the learned District Judge is set aside and the insolvency petition restored to file for disposal according to law. The appellants will recover the costs from the estate.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 490

BURN AND MOCKETT JJ.

In re Dasi Viraya — Appellant.

Referred Trial No. 141 and Criminal Appeal No. 558 of 1937, Decided on 1st December 1937, referred by Sess. Court, Guntur Division, D/- 5th October 1937.

(a) Criminal Trial—Evidence—Unsworn testimony of young child is admissible in evidence.

An unsworn testimony of a young child is admissible in evidence. S. 13, Oaths Act expressly provides for cases in which the provisions of Ss. 5 and 6 of the Act have not been carried out: *A I R 1914 Mad 293, Rel. on.* [P 491 C 1]

(b) Madras High Court—Criminal Rules of Practice, R. 85—Omission to comply with R. 85 does not vitiate confession provided provisions of S. 164, Criminal P. C. are complied with.

The omission to comply with the requisites of the Madras Criminal Rules of Practice would not vitiate a confession provided S. 164, Criminal P. C. is complied with. [P 491 C 2]

Where a Magistrate does not record in writing, at the beginning of a confession, his reasons for believing that the accused is prepared to make the statement voluntarily, as required by R. 85, Criminal Rules of Practice and records at the end that the confession is a voluntary one but it is clear that the confession was a voluntary one and that the Magistrate had satisfied himself that it was so, the confession is admissible in evidence, although the provisions of R. 85 have not been strictly complied with. [P 491 C 1, 2]

G. Balaparameswari Rao — for Appellant.

Public Prosecutor — for the Crown.

Mockett J.—The accused has been convicted and sentenced to death for the murder of his wife on 28th July 1937, at about 10 o'clock in the morning. At the time of murder, the deceased was not living with the accused but was living about 100 yards away in the hut of P. W. 1. She had left her husband and was living under P. W. 1's protection. In P. W. 1's hut was also living a little girl, the daughter of the accused and the deceased (P. W. 2 in this case), who was a young child appearing to be about seven or eight years in the Sessions Court. Her evidence is that on that morning she was in P. W. 1's hut powdering chillies and her mother was washing clothes near the palmyra trees when her father, the accused, arrived and cut the deceased with a knife. She states:

> My father held my mother's tuft of hair and cut her neck. I was frightened that he would cut me also and hid myself behind a wall. Then I went to my grandfather's house and reported to him.

Then she describes how her father ran away after cutting her mother. She says that her father gave her mother two blows with the knife. But he gave many more blows than that. Altogether 15 wounds were found on the deceased; but it is enough to describe one of them, viz. wound No. 2 which was

> an incised wound 4 inches by 1½ inches by 1 inch; begins 1 inch below and 1 inch right of Pommu Adami and runs across the front of neck to the left. This runs parallel to injury No. 1, 1 inch below and ends 1 inch below middle of injury No. 1. The trachea is severed in front and connected posteriorly by ¼ inch left carotid and left sterno mastoid are severed.

This wound alone would be enough to cause death. There were in all 15 wounds many of which were of a grave nature. It is not unlikely that this little child after seeing her father cut her mother twice, hid herself away. However she went later to P. W. 3. P. W. 3 is the little girl's grandfather, the father of the deceased. He says that on that morning P. W. 2 came to him and said that her father had cut her mother's throat; and that he went to the house of P. W. 1 and saw the deceased, Pitchi, lying dead in a pool of blood. Now, P. W. 4 says that she heard P. W. 2 telling P. W. 3 that the accused had cut the deceased's throat and that she gave that information to P. W. 1 on her way to work. P. W. 1 describes how he heard the news from P. W. 4 and how he returned to the village and found Pitchi lying dead in the vacant yard by his house. He thereupon went to the village munsif and gave the statement, Ex. A which runs as follows:

> Having taken my breakfast (cold rice), I left this morning at 7 a. m. to do wet ploughing in the field of one Koduri Kotayya, son of Venkayya of Kenuegantivaripalem, hamlet of Voleru village. At about 11 A. M., and while I was ploughing the wet field, one Anki, wife of Rebba Mantrigadu, came to me and reported that Dasi Sampson murdered my wife Pitchi by cutting her with a knife. I thereupon left ploughing and came and found her (Pitchi) lying dead in the yard north of the house with her throat cut. A seven year old daughter Rami told me that Sampson slew her with a knife and ran away.

This statement was made at about 12 noon on that day. P. W. 7 is the Sub-

Assistant Surgeon who describes the wound to which reference has already been made. Now, the criticizm that is made from the bar on behalf of the appellant against the case of the prosecution amounts to this, viz. that the primary and the most important evidence in the case is that of the young child and that it ought to be rejected on two grounds. The first ground for rejecting it is that it is unsworn evidence and the testimony of an unsworn person is not admissible in evidence. The answer to that is that this Court has held, and so have all the Courts in India, that in the case of an unsworn testimony of a young child, that evidence is admissible : *vide* 38 Mad 550.[1] S. 13, Oaths Act, expressly provides for cases in which the provisions of Ss. 5 and 6 of that Act have not been carried out. The other point is that this evidence stands uncorroborated and that it would be unsafe to act on the uncorroborated evidence of a young child. But it will be seen that this little girl, immediately after the occurrence, went and reported to her elders as to what had happened. And there is the additional corroboration, a very strong corroboration, viz. the confession made by the accused in which, in as simple words as possible, he said that he did murder this woman because she started abusing him and that his heart-burning was such that he did commit the murder. This statement is found in Ex. M. But the learned counsel for the appellant urges that Ex. M too should be rejected because of the method of its recording as the provisions of R. 85 of the Criminal Rules of Practice have not been strictly carried out.

A perusal of Ex. M shows that the Magistrate did satisfy himself that it was a voluntary confession. It is unfortunate that he recorded at the end of the confession that it was a voluntary one and did not at the beginning record in writing his reason for believing that the accused was prepared to make the statement voluntarily. If there is the slightest doubt whether the statement was voluntarily made, then this defect would be an important factor in favour of the accused and in favour of rejecting this confession. There has been no cross-examination of the Sub-Magistrate addressed to this aspect of the case regarding the confession recorded by him. The Magistrate states in his evidence that the accused did not reply to any question except the one which he recorded. Ex. M suggests that it might have been split up into a number of questions but none evoked any answer from the accused until at the end he contented himself by making a complete confession. All that is relevant is that the Magistrate was satisfied that it was a voluntarily made and that we should be satisfied that it was a voluntary one. There is no material whatever on record to suggest otherwise. It has already been held by a Bench of this Court (which we are content to follow), that omission to comply with the requisites of the Criminal Rules of Practice would not vitiate a confession provided S. 164, Criminal P. C., is complied with; and that section has been complied with in this case. It is perfectly clear that the lower Court had no reason to come to any other conclusion than the one it came to. The conviction will be confirmed as also the sentence. It was a most ferocious attack on the deceased woman and the fact that she left her husband is no excuse for his murdering her in this manner. The appeal is dismissed.

C.R.K./R.M. *Appeal dismissed.*

1. China Venkadu v. Emperor, (1914) 1 A I R Mad 293=22 I C 737=38 Mad 550=15 Cr L J 161.

✻ A. I. R. 1938 Madras 491

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

N. Kayambu Pillai — Appellant.

v.

Lakshmi Ammani Ammal—Respondent.

Letters Patent Appeals Nos. 107 and 108 of 1937, Decided on 4th January 1938, from order of Horwill J., D/- 4th November 1937.

✻ (a) Civil P. C. (1908), O. 33, R. 5 (e) — "Interest"—Meaning—Interest does not necessarily mean one amounting to such under combined effect of provisions of Transfer of Property Act and Registration Act,

The word "interest" in O. 33, R. 5 (e) is used in its general and ordinary sense and not in any technical sense. Hence "interest" does not necessarily mean one which amounts to such under the combined effect of the provisions of the Transfer of Property Act and the Registration Act : *9 Bom 371 and A I R 1938 Mad 153, Rel. on.*

[P 492 C 2]

(b) Civil P. C. (1908), O. 33, R. 9 (c) — Word "plaintiff" in both places means plaintiff or his representative.

In both the places where the word "plaintiff" occurs in O. 33, R. 9 (c) it means the plaintiff or

his representative ; otherwise the section will lead to an absurdity. Any other construction will make the dispaupering of the representative impossible, where the original plaintiff entered into the agreement. [P 493 C 1]

C. S. Venkatachariar for S. Sundaresa Iyer and C. R. Pattabhirama Iyer — *for Appellant.*

K. Kuttikrishna Menon — *for Respondent.*

Venkatasubba Rao J.—*Letters Patent Appeal No. 108 of 1937* :—Horwill J. made an order dispaupering the appellant and its correctness is questioned in this Letters Patent appeal. The suit was filed by one Durasami in 1928 against the Court of Wards for the recovery of Marungapuri estate. He was allowed to institute the suit in forma pauperis, and died in 1929, and was succeeded by his son Ponnuswami, who brought himself on the record and continued the action. The suit was dismissed in 1930. Ponnuswami was allowed to file the appeal as a pauper and died in 1935 during its pendency. The present appellant Kayambu Pillai being the executor under Ponnuswami's will, was then brought on the record as his legal representative. The petition in question was filed by the Court of Wards to dispauper the appellant on the ground that his predecessors-in-interest, i. e. Doraswami and Ponnuswami, had entered into certain agreements of the kind contemplated by Cl. (e) of O. 33, Rule 5, Civil P. C.

The first question that arises, is whether the agreements, having regard to their nature, fall within the provision above mentioned, in other words, does a third party obtain under them an interest in the subject-matter of the action ? The agreements referred to were executed in favour of this very Kayambu Pillai. Besides these agreements, there were also in his favour two powers of attorney. The effect of these transactions was, that Kayambu Pillai was to be the agent, first of Doraswami, and then of Ponnuswami, for conducting the litigation, receiving in the first instance, a salary of Rs. 1000 a month—to be increased to Rs. 2000 after possession of the estate was obtained. He had the right to remain as agent for a period of 25 years, this period, as Horwill J. points out being sufficient not only to carry the appellant over the present litigation but to enable him to continue in possession of the estate and the collection of its moneys for a considerable time, after the zamindari was recovered—if the litigation should prove successful.

Under Ponnuswami's will, though the appellant appears in the guise of an executor, he gets as legacy about nine lakhs, which presumably represents the aggregate amount payable to him under the original contracts. The will also shows that the appellant's predecessors had stipulated to pay some advocate about one and a half lakhs for his services. The estate is devised eventually in favour of the appellant's son.

On these facts the question arises, as already stated, does Kayambu Pillai under the agreements referred to above obtain an interest in the subject-matter of the litigation within the meaning of Cl. (e) of O. 33, R. 5, Civil P. C. Mr. Venkatachari for the appellant contends that nothing is an "interest" under this section, which does not amount to such, under the combined effect of the provisions of the Transfer of Property Act and the Registration Act. This contention is totally opposed to, and frustrates the intention of the section. The contention really amounts to this : unless by reason of the agreement, a transferee or assignee is brought into existence, who is a mortgagee or co-owner or charge-holder, the section will have no application. The provisions in this order are intended to aid a pauper suing for his own benefit, but not to enable an ostensible pauper to figure as plaintiff, when in the fruits of the litigation, a third party has been given an interest. The only responsible way of construing the word "interest" is to hold that it is used in its general and ordinary sense and not in the technical sense ascribed to it by the appellant's counsel. This has been so held by Sargent C. J. and Birdwood J. in 9 Bom 371,[1] where a similar contention was repelled. The judgment is short, but it rejects the contention that the interest must be a vested and completed interest under the section. In a recent decision to which one of us was a party the same view was taken: 46 M L W 649.[2] Several cases have been referred to where this principle has been tacitly accepted and Mr. Venkatachari has not been able to point to a single decision in his favour.

The next argument turns upon the meaning of the wording of Cl. (c), R. 9 of O. 33, Civil P. C., the material portion of which reads thus :

1. Manohar Ramchandra v. Lakshman Mahadev, (1885) 9 Bom 371.
2. Sivarama Ayyar v. Akilambal Ammal, (1938) 25 A I R Mad 153=(1937) 2 M L J 789=46 M L W 649.

The Court may on the application of the defendant order the plaintiff to be dispaupered, if he (the plaintiff) has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

The argument is that this section can apply only to the party who has entered into the agreement, in both the places where the word "plaintiff" occurs; it means either the original plaintiff or his representative; it would be wrong to make the "plaintiff" in one place mean the original party and in the other, his representative. The short answer to this is undoubtedly what is suggested by Mr. Kuttikrishna Menon; in both the places the word "plaintiff" means "the plaintiff or his representative"; otherwise the section will lead to an absurdity. Any other construction will make the dispaupering of the representative impossible, where the original plaintiff entered into the agreement. In other words, by reason of the death of the plaintiff his representative would be in a better position than himself, an anomaly which, by a reasonable construction, can be prevented. In the result, the appeal fails and is dismissed with costs.

L. P. A. No. 107 of 1937.

The order of Horwill J. directing the appellant to furnish security is perfectly right. There is no reason why we should interfere with the exercise of his discretion. The appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeals dismissed.*

---

* A. I. R. 1938 Madras 493

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

P. M. V. P. Pappu Reddiar and another — Appellants.

v.

S. A. Pichu Ayyar — Respondent.

Letters Patent Appeal No. 66 of 1935, Decided on 7th December 1937, against Judgment of Varadachariar J., D/- 15th March 1935, *reported in A I R 1935 Mad 961.*

*** Contract Act (1872), S. 72—Decree-holder though his decree had been fully satisfied, failing to enter up satisfaction and fraudulently bringing property to sale—Mortgagee of property making payment under O. 21, R. 89, Civil P. C., to avoid sale—Payment so made can be recovered back:** *42 L W 435=A I R 1935 Mad 961=161 I C 962, Reversed.*

A payment made by a person to get rid of wrongful interference with his property would be involuntary, being made under compulsion of law, and an owner may bring an action to recover back the money so paid. The owner's right to recover back the money paid under compulsion does not rest merely upon justice and equity but is a statutory right expressed in terms of S. 72, Contract Act. The person obtaining payment under force of execution proceeding, i. e. under coercion within the meaning of S. 72, is a wrongdoer. [P 494 C 1, 2]

Where a decree-holder, who though his decree had already been fully satisfied has failed to enter satisfaction, fraudulently brings the property to sale in execution and the mortgagee of the property makes a payment under O. 21, R. 89 to set aside the sale, the money so paid can be recovered back from the wrongdoer. Although a fraudulent decree-holder can under Civil P. C., execute his satisfied decree where adjustment has not been certified, his liability under the substantive law remains: *42 L W 435=A I R 1935 Mad 961=161 I C 963*, **Reversed.**; *A I R 1930 Mad 921, Disting.*; *12 M I A 65 (P C); 7 Cal 648 (P C); 40 Cal 598 (P C) and A I R 1923 P C 114, Rel. on.* [P 491 C 2; P 495 C 1]

A. Swaminatha Iyer — *for Appellants.*

K. S. Champakesa Iyengar — *for Respondent.*

Venkatasubba Rao J. — The question which this Letters Patent Appeal raises is an important one, and the facts divested of all that is immaterial may be shortly stated. Defendant 1 filed a suit against defendants 7 and 8, got their properties attached before judgment and obtained a decree in 1923 in due course. Defendants 7 and 8 sold in 1924 under Ex. A the properties in question to defendant 2. In the sale deed the vendors (i. e. defendants 7 and 8) disclosed the attachment that had been effected and undertook to get the properties sold released from the attachment. In 1925, by virtue of a transaction we need not go into, defendant 1, to whom about Rs. 5000 was due under his decree, received in full satisfaction of his claim Rs. 4500 (that is the concurrent finding of the Courts below accepted by Varadachariar J.) in pursuance of an agreement with the judgment-debtors, namely defendants 7 and 8. In 1927, the plaintiff obtained a mortgage of the suit property from defendant 2. Though defendant 1's decree was fully satisfied as stated above, he failed to enter up satisfaction and fraudulently proceeded to execute the decree. He brought the properties mortgaged to the plaintiff to sale and purchased them himself in the name of his clerk on 16th September 1927. The plaintiff made the statutory deposit under O. 21, R. 89, Civil P. C., and got the sale set aside. The present suit has been brought by him to recover from various defendants,

of whom we are concerned only with defendant 1, the amount which he was obliged to pay into Court for getting the sale avoided. Varadachariar J. agreeing with the Courts below, negatived the plaintiff's claim as against defendant 1.

Several contentions were raised for the appellant and disallowed by the learned Judge. One of them was that defendant 1's liability was founded on tort, and that is the only contention that has been pressed before us. There can be no doubt that under the law as declared by the Judicial Committee, a person making a payment to rid himself of unlawful interference with his property, can recover the money back. The principle on which this rule rests, has been clearly expounded in four decisions to none of which the learned Judge's attention was called. In the first two cases, their Lordships stated that under the English Common law, a payment to get rid of wrongful interference would be involuntary, being made under compulsion of law, and held that in this country, as in England an owner may bring an action to recover back the money so paid: 12 M I A 65[1] and 8 I A 93.[2] In the two later cases, the principle was applied not merely on the analogy of English law and on grounds of justice and equity but as resting upon a statutory right conferred by an express provision of the Contract Act. S. 72 of that Act provides inter alia that a person to whom money has been paid under coercion must repay it. Formerly, the view that prevailed in India was, that the word 'coercion' in this section meant the same thing as 'coercion' as defined in S. 15 and therefore no act was coercion unless it was done "with the intention of causing any person to enter into an agreement", as required by the definition. That view, their Lordships have declared, is wrong. Lord Moulton delivering the judgment observes:

> It would be to make nonsense of the statute if it were to be taken to mean that 'coercion', in a legal sense, could only exist if the object was to bring about a contract. Indeed such an interpretation would render the Act inconsistent with itself.

Then, after quoting S. 72, which as already stated enacts that a person to whom money has been paid under coercion must repay it, his Lordship goes on to say:

> It is impossible to contend that the word 'coercion' referred to in this section . . . is 'with the intention of causing any person to enter into an agreement'. The word 'coercion' must therefore be there used in its general and ordinary sense as an English word and its meaning is not controlled by the definition in S. 15: 40 I A 56.[3]

The last mentioned case went up before the Board again and Lord Dunedin reaffirmed this view observing:

> The right here sought to be enforced is a statutory right expressed in terms of S. 72, Contract Act, and this Board has already held that the circumstances gave rise to a statutory right: 50 I A 162.[4]

Thus the owner's right to recover back the money paid under compulsion does not rest, as assumed in the two earlier decisions, merely upon justice and equity founded upon the English analogy, but is a statutory right expressed in terms of an Indian Act. What then is the true nature of the action brought to recover such money back? The person obtaining payment under force of execution proceedings, i. e. under coercion within the meaning of S. 72, is a wrongdoer, as described by their Lordships in 40 I A 56,[3] at pp. 63 and 66. This would suggest contrary to the view taken by Varadachariar J. that the liability is one in tort. But by whatever name the action may be called, it must now be taken as settled beyond doubt, that an owner may bring an action to recover back the money he has so paid. This being the true conception, does the fact that the payment made here was under O. 21, R. 89, Civil P. C., remove the case from the operation of this principle. Mr. Champakesa Ayyangar for the respondent strongly relies upon the ratio decidendi in 53 Mad 943,[5] approved and followed by the Full Bench in 58 Mad 972.[6] In the former case, it has been held that O. 21, R. 89 is inconsistent with the notion that payment can be made either under protest or coupled with conditions. True, but the whole judgment proceeds upon the footing, first that there was a subsisting decree, i. e. subsisting in fact, and secondly there was a decree-holder,

1. Fatima Khatoon Chowdrain v. Mohamed Jan Chowdhry, (1867-69) 12 M I A 65=1 Beng L R 21=10 W R 29=2 Suth 145=2 Sar 380 (P C).
2. Doolichand v. Ram Kishan Singh, (1881) 7 Cal 648=8 I A 93=3 Suth 734=4 Sar 245 (P C).
3. Kanhayalal v. National Bank of India, (1913) 40 Cal 598=18 I C 949=40 I A 56 (P C).
4. Kanhayalal v. National Bank of India, (1923) 10 A I R P C 114=75 I C 7=50 I A 162=4 Lah 284 (P C).
5. Kumukutti v. Neelakandan Nambudiri, (1930) 17 A I R Mad 921=128 I C 509=53 Mad 943 =59 M L J 893.
6. Krishna Iyer v. Arunachalam Chettiar, (1935) 22 A I R Mad 842=158 I C 207=58 Mad 972 =69 M L J 349 (F B).

one who really answered that description. The principle as stated in that very decision is, once "the decree debt is discharged and the decree-holder's remedy is gone," it would be improper for the person paying the money to claim it back. That this is the idea underlying the judgment, will be manifest on a reading of it and it is most significant that in not a single case of the many cited for the respondent, was the money, which the Courts held could not be recovered, paid in execution of a satisfied decree. It is the existence of fraud, the dishonest obtaining of the money after the decree was satisfied, that distinguishes the present case from those cited at the Bar. This difference is fundamental and ought not to be ignored. O. 21, R. 89 assumes the existence of a "decree" and of a "decree-holder" and where the very foundation is gone, namely a subsisting decree, it would be futile to contend that the decisions which refer to unconditional payment can apply.

It has been contended that in the Privy Council cases cited above, the money was paid to prevent a sale and not after the sale ; but that is a distinction without a difference. As their Lordships point out in 40 I A 56[3], already quoted, the greater or less probability of a sale taking place does not affect the real principle ; nor is there any reason to hold that the position is altered by the sale having actually taken place. The contention again that the decree was executable under the law of procedure satisfaction not having been reported is utterly beside the point. Although a fraudulent decree-holder can, under the Code, execute his satisfied decree where the adjustment has not been certified, his liability under the substantive law remains. When the rights of parties are in question, a contention based on the technicality of procedure law seems utterly irrelevant. It may be of interest to note, though that fact has not much bearing on our decision, that in 12 M I A 65,[1] their Lordships after indicating that the facts suggest that the decree there was a satisfied decree, observe "that alone would be a ground upon which the respondents must be held disentitled to retain the money they have received." Similarly in 8 I A 93,[2] after stating that the appellant obtained a decree in question upon a debt which had been already satisfied, their Lordships observed :

He has therefore received it twice over and it is obvious in such a case that it is unreasonable that he should hold the money paid to him under compulsion by the respondents.

In the result, we allow the appeal and pass a decree in favour of the plaintiff against defendant 1 for Rs. 1172-4-6 with interest thereon at 6 per cent. from date of plaint and costs throughout. The decree against defendants 7 and 8 passed by the learned Judge is vacated. The order of the lower Appellate Court directing the plaintiff to pay defendant 1's cost of the appeal before it is also set aside.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 495

BURN AND MOCKETT JJ.

In re Vatasseri Ittichathara Valia Munnadiar — Appellant.

Appeal No. 119 of 1937, Decided on 2nd December 1937, against order of Sub-Judge, Palghat, D/- 5th October 1936.

Execution—O. 9, Civil P. C., not applicable to execution proceedings — Yet application under O. 21, R. 90 can be dismissed for default —Power of dismissing for default is inherent.

It cannot be said that because O. 9, Civil P. C. is not applicable to execution proceedings, a Court has no power to dismiss for default an application under O. 21, R. 90, Civil P. C., and that it should decide it on merits. The dismissal for default is well within the inherent powers of the Court.

[P 495 C 2]

T. A. Anantha Aiyer — *for Appellant.*

Judgment.—We are unable to accept the contention of Mr. T. A. Anantha Iyer for the appellant that because O. 9, Civil P. C., does not apply to execution proceedings the lower Court had no power to dismiss for default the appellant's application under O. 21, Rule 90, Civil P. C. All the cases in which it has been held that O. 9, Civil P. C., is not applicable to proceedings in execution have been either cases in which applications have been dismissed for default or cases in which ex parte orders have been passed. The rulings have been that since O. 9 was inapplicable the applications could not be restored nor the ex parte orders set aside. Nobody has suggested till now that the dismissal for default or passing of an ex parte order was without jurisdiction. We are prepared to hold that dismissal for default is well within the inherent powers of the Court. It is in our opinion absurd to say that the Court must proceed to give a decision on the merits, when the applicant fails to

appear in support of his application. This appeal is accordingly dismissed under O. 41, R. 11, Civil P. C.

C.R.K. B.D. *Appeal dismissed.*

A. I. R. 1938 Madras 496

VARADACHARIAR J.

Ramaswami Mestriar — Appellant.

v.

Velayuthan Pillai and others — Respondents.

Appeal No. 340 of 1935, Decided on 7th January 1938 against order of Sub-Judge, Tinnevelly, D/- 4th July 1935.

Limitation—Acknowledgment—Admission of liability coupled with declaration as regards the arrangement proposed for its satisfaction is sufficient acknowledgment.

An admission of liability coupled with a declaration as regards the arrangement proposed for its satisfaction is sufficient acknowledgment.

[P 497 C 1]

Where a mortgagor executing a sale deed in favour of the mortgagee, states therein that a certain sum is due from him to the mortgagee on settlement of accounts, and that he is attempting to discharge that debt by sale of certain property under the sale deed, and that for the balance he is making provision for its discharge by execution of other documents, such a statement amounts to an admission of subsisting liability on the date of the sale deed as required by law so as to constitute an acknowledgment: *32 Bom 296; A I R 1924 Nag 147 and A I R 1936 Mad 943, Foll.; 9 Cal 616; 16 Mad 220 and A I R 1924 Pat 806, Disting.*

[P 496 C 1, 2]

A. Swaminatha Iyer and S. Thyagaraja Iyer — *for Appellant.*

P. N. Marthandam Pillai — *for Respondents.*

Judgment.—This is an appeal against the order of remand passed by the lower Appellate Court in a suit to enforce a mortgage. The only question arising for decision at this stage is the point of limitation raised by Issue 3 in the case. The District Munsif held in limine that the suit was barred by limitation, but the learned Subordinate Judge held otherwise and remanded the suit for disposal on the merits. The plaintiff seeks to enforce a mortgage dated 15th November 1913 and the question for decision is whether the reference to it in Ex. A, a sale deed dated 11th November 1921, amounts to an acknowledgment of liability at least to the extent of Rs. 850 in respect of the mortgage of 15th November 1913. The substance of the statements in Ex. A is that on 11th November 1921 a sum exceeding Rs. 850 was due from the debtor to the creditor on settlement of accounts, that the debtor was attempting to discharge the debt to the extent of Rs. 850 by the sale of certain properties under Ex. A and that for the balance due in excess of Rs. 850 he made provision for discharge by execution of other documents. On behalf of the mortgagor it is contended that the above statements do not amount to an admission of subsisting liability on 11th November 1921 as required by law to constitute an acknowledgment. I am unable to agree.

The cases cited by the learned counsel for the appellant will be found on examination to relate to statements to the effect that even before the date of the statement, the liability had been discharged: *vide* 9 Cal 616,[1] 16 Mad 220[2] and 78 I C 919.[3] In the present case, it is not the statement in Ex. A that the mortgagor's liability had ceased prior thereto; on the other hand, he accepted the liability as a subsisting liability on that day and took steps to discharge the same. If in law that discharge had proved effective, there would have been no further question. But it happened in this case that prior to the date of Ex. A, the mortgagee had sub-mortgaged his interest in favour of the present plaintiff's assignor and the sale under Ex. A did not therefore operate in law to discharge the mortgage. But it is not on that account reasonable to construe the statement in Ex. A as not amounting to an admission of liability which, but for the intended sale, would have been a subsisting liability. Mr. Swaminatha Aiyar relied on the observation in 16 Mad 220[2] at p. 223 to the effect that from the statement "an intention to continue the pre-existing jural relationship until it is lawfully determined must also be evident". I do not see why the present case cannot be held to satisfy the test stated in those terms. The position was that the mortgagor and the mortgagee thought that the sale under Ex. A sufficed to determine the pre-existing relationship of debtor and creditor but there they were in error. It may be useful to refer to an observation at p. 222 in the same judgment to the effect that "the acknowledgment must be such as will lead

---

1. Ram Das v. Birjnundan Das, (1883) 9 Cal 616 =12 C L R 284.
2. Venkata v. Parthasaradhi, (1893) 16 Mad 220 =3 M L J 35.
3. Chhaterdhari Mahto v. Nasib Singh, (1924) 11 A I R Pat 806=78 I C 919= 5 P L T 551.

the Court to infer an intention on the part of the writer to pay or satisfy the debt". It was certainly so here.

The present case is governed by the line of authority which holds that an admission of liability coupled with a declaration as regards the arrangement proposed for its satisfaction is a sufficient acknowledgment: *see* 32 Bom 296,[4] 79 I C 66[5] and 44 M L W 362.[6] See also Rustomji's Law of Limitation, Edn. 4, p. 166. The argument may be tested by an illustration. Suppose the mortgagor did not complete the sale by registration of the document, can there be any doubt that the statement in the document will be available as an acknowledgment of liability? I do not see why the proposition should be different when the contemplated discharge proved ineffective because the mortgagee to whom the conveyance was made had by that time become incompetent in law to give a discharge by reason of the anterior sub-mortgage. The appeal fails and is dismissed with costs of plaintiff-respondent 1. Leave refused.

C.R.K./R.M. *Appeal dismissed.*

4. Shriniwas v. Narhar, (1908) 32 Bom 296 = 10 Bom L R 374.
5. Daji Mahar v. Mahadev Kunbi, (1924) 11 A I R Nag 147=79 I C 66.
6. Kuppuswami Iyer v. Sabapathy Pathan, (1936) 23 A I R Mad 943 = 170 I C 288 = (1937) 2 M L J 24=44 M L W 362.

A. I. R. 1938 Madras 497

ABDUR RAHMAN J.

Dasa E. Krishniah Chetty—Petitioner.

v.

Kalavala Pedda Narayanappa — Respondent.

Civil Revn. Petn. No. 1519 of 1936, Decided on 9th December 1937, from order of Dist. Munsif, Anantapur, D/- 18th June 1936.

(a) Madras Village Courts Act (1 of 1889), S. 15—What suits can be entertained by village Courts explained.

Under S. 15, village Courts can only entertain the suits which are filed against persons who either reside within the local limits of their jurisdiction at the time of the commencement of the suit or carry on business or personally work for gain within those limits. No jurisdiction has been conferred by the Act on village Courts in cases other than those mentioned above. [P 497 C 2]

(b) Madras Village Courts Act (1 of 1889), S. 25 — Carrying on business.

The mere fact that the defendant purchased sarees at a particular place would not mean that he was carrying on business there. [P 498 C 1]

(c) Madras Village Courts Act (1 of 1889), S. 15—Jurisdiction—Courts being special tribunals their own laws must decide their jurisdiction — Provisions of Civil P. C. should not be applied.

Village Courts are special tribunals different from the ordinary Courts of the land brought into being by the Village Courts Act and therefore the Act itself must be looked into for specific grounds which would confer jurisdiction on that tribunal. The general provisions contained in the Code of Civil Procedure cannot be extended to the Village Courts and cannot be permitted to be added to the provisions of S. 15 of the Act. [P 498 C 1]

(d) Jurisdiction—Person filing suit must show that Court has jurisdiction—Merely stating that cause of action accrued within its jurisdiction is not enough.

The burden of proving want of jurisdiction is not on the defendant. It is for the plaintiff to allege specifically and prove how Court has jurisdiction. A bare statement in the plaint that the cause of action arose within its jurisdiction is certainly not enough. [P 498 C 1]

T. S. Narasinga Rao—*for Petitioner.*

S. Ramanujam and Venkataseshaya — *for Respondent.*

Judgment. — The only question which has to be decided in this revision relates to the jurisdiction of village Courts constituted under the Madras Village Courts Act (1 of 1889). The facts of the case are simple and may be briefly stated. A suit was filed by one Kalavelu Peddanarayanappa in the village Court at Dharmavaram. The defendant in his written statement questioned its jurisdiction and moved the District Munsif under S. 21 of the Act to withdraw the suit from the village Court. Before this application was disposed of, the suit was decreed ex parte and the petition had therefore to be dismissed. The defendant then applied to the District Munsif for setting aside the decree under S. 73. This has been dismissed and a revision petition has consequently been filed against that order. A perusal of S. 15 of the Act would show that the village Courts can only entertain the suits which are filed against persons who either reside within the local limits of their jurisdiction at the time of the commencement of the suit or carry on business or personally work for gain within those limits. No jurisdiction has been conferred by the Act on village Courts in cases other than those mentioned above. It has not been disputed before me that the defendant did not reside or personally work for gain within the limits of the village Court's jurisdiction. The District Munsif has rejected the defendant's application on the ground that it was admitted by him that

he carried on business at Dharmavaram. If this were so, the order passed by the District Munsif would be unassailable. But on going through the defendant's statement I do not find any such admission. He only stated that he purchases sarees at Dharmavaram. This surely does not mean that he was carrying on any business at Dharmavaram. The respondent's counsel did not support the interpretation put on the defendant's statement by the District Munsif and rightly so in my opinion. He however contended that in so far as the defendant has failed to substantiate his allegation that the goods in suit were delivered to him at Hindupur, it should be held that the village Court had jurisdiction to entertain the claim.

The other ground which was raised by the respondent was that as the defendant-petitioner did not appear before the village Court deliberately, the ex parte decree could not be questioned now. The first contention assumes, and wrongly so in my opinion, that the burden of proving the want of jurisdiction lay on the defendant. The plaint contained no allegation of fact from which it could be inferred that the defendant was alleged to have been carrying on business within the jurisdiction of the village Court. A bare statement that the cause of action arose within its jurisdiction is certainly not enough. Moreover the delivery of the goods in dispute at Dharmavaram would not confer jurisdiction on the village Court under S. 15 of the Act. The position might have been different if the provisions of the Code of Civil Procedure had applied. But a special tribunal, different from the ordinary Courts of the land, has been brought into being by this Act and one must look to the specific grounds given in the Act itself which would confer jurisdiction on that tribunal. The general provisions contained in the Code of Civil Procedure cannot be extended to the village Courts and cannot be permitted to be added to the provisions contained in S. 15 of the Act.

So far as the other ground is concerned, I should have agreed with the respondent's contention if any evidence was led on his behalf before the village Court that the defendant was carrying on business at Dharmavaram and it was held by that tribunal that it was entitled to entertain the claim. Nothing of the kind appears to have been done by the village Courts and there is nothing on the record from which such an inference could be drawn. It was for that reason apparently that the District Munsif attempted to spell out the admission from the defendant's statement, which, as has been already stated, is incapable of the interpretation placed upon it. In the circumstances, the village Court must be held to have exercised jurisdiction not vested in it by law and to have passed a decree which it was not competent to pass. The result is that the order of the District Munsif dismissing the petitioner's application under S. 73 is set aside and the application before the District Munsif is accepted and ordered. The District Munsif will now proceed with the case and dispose of it according to law. The respondent shall pay the costs of the petitioner in this Court as well as those incurred by him so far in the District Munsif's Court. Other costs will abide the event.

C.R.K./B.D. *Petition allowed.*

---

* A. I. R. 1938 Madras 498

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Kalliappa Goundan — Appellant.

v.

Kandaswami Goundan — Respondent.

Letters Patent Appeal No. 22 of 1936, Decided on 18th January 1938, against Judgment of Wadsworth J., D/. 9th August 1935.

(a) Interpretation of statutes—Fiscal statutes—Two constructions of fiscal enactment equally possible and reasonable — Construction more favourable to subject must be enforced.

It is settled law that the intention to impose a charge upon the subject must be shown by clear and unequivocal language. If two constructions of a fiscal enactment are equally possible and reasonable, the construction more favourable to the subject must be enforced : *A I R 1929 Mad 60, Rel. on.* [P 499 C 2]

*** (b) Court-fees Act (1870), Sch. 1, Art. 1—Rs. 100 paid as court-fees on memorandum of appeal — Appellate Court holding that correct fee payable was Rs. 412-7-0 and on failure by appellant to pay deficit court-fee, dismissing appeal—Appellant filing second appeal valuing it at Rs. 312-7-0 and paying court-fee on that valuation—High Court demanding Rs. 412-7-0 as court-fee and on non-payment dismissing second appeal — Case governed by Art. 1—Court-fee paid by appellant in second appeal proper.**

In the lower Appellate Court the plaintiff who was the appellant, paid as court-fees on the memorandum of appeal Rs. 100. The Court held that the correct fee payable was Rs. 412-7-0. The appellant failed to pay the deficit court-fee and

the appeal was dismissed. From the dismissal, the appellant filed a second appeal to the High Court, which he valued at Rs. 312-7-0 being the difference between Rs. 412-7-0 and Rs. 100. On that valuation he paid a court-fee of Rs. 35-15-0. The Judge holding that the proper fee payable was Rs. 412-7-0 directed the appellant to pay the balance and on his failure to do so, the second appeal was dismissed. The appellant filed a Letters Patent appeal :

Held that the case was governed by Art. 1, Sch. 1. But the subject-matter of the dispute in the second appeal was the difference between the court-fee paid and the court-fee demanded by the lower Appellate Court and the court-fee paid by the appellant in the second appeal was proper. It could not be said that the subject-matter in dispute in the appeal was the subject-matter in the suit : *S. R. No. 1923 of 1923 and (1882) A W N 244, Foll.; A I R 1929 Mad 60 (F B), Rel. on ; A I R 1935 Nag 83 (F B), Commented upon* (Niyogi A. J. C.'s opinion approved). [P 499 C 2]

T. R. Srinivasa Iyer —*for Appellant.*

S. Muthiah Mudaliar — *for Respondent.*

Govt. Pleader — *for the Crown.*

Venkatasubba Rao J. — In the lower Appellate Court the plaintiff, who was the appellant, paid as court-fee on his memorandum of appeal Rs. 100. The District Judge held that the correct fee payable was Rs. 412-7-0. The appellant failed to pay the deficit court-fee and the appeal was dismissed. From the dismissal he filed a second appeal in this Court, which he valued at Rs. 312-7-0 being a difference between Rs. 412-7-0 and Rs. 100. On that valuation he paid a court-fee of Rs. 35-15-0. Madhavan Nair J. holding that on the second appeal the proper fee payable was Rs. 412-7-0, directed the appellant to bring into Court the balance of Rs. 376-8-0. This order was not complied with and the second appeal was dismissed. The question we have to decide is, what was the subject-matter in dispute in the second appeal? A possible argument that the subject-matter is incapable of valuation and that therefore Sch. 2, Art. 17.B applies may be at once dismissed. Mr. Srinivasa Iyengar who appears for the Government Pleader does not put forward any such contention; nor has it found favour in any case dealing with this subject.

The provision then that is applicable is Art. 1, Sch. 1, Court-fees Act. In such a case as this, what is the subject-matter in dispute within the meaning of that Act? This point has been fully considered in a valuable judgment of Schwabe C. J. which unfortunately has not been reported and to which the learned Judge's attention was not called. "I think", observes Schwabe C. J.,

that the subject matter in dispute meaning the subject matter in dispute in appeal, has the simple meaning applicable to this case, namely the amount of stamp in dispute between the parties. (S. R. No. 1923 of 1923).

This view receives support from a case decided so far back as in (1882) A W N 244.[1] The Court-fees Act is a taxing statute and it is settled law that the intention to impose a charge upon the subject must be shown by clear and unequivocal language (Mr. Viswanatha Iyer's Court-fees Act, pages 4 to 9). If two constructions of a fiscal enactment are equally possible and reasonable, the construction more favourable to the subject must be enforced : *see* 56 M L J 141[2] at page 150. What then is the subject-matter of the appeal? According to Schwabe C. J. the dispute in the lower Court had reference only to the court-fee payable; the difference between the court-fee paid and the court-fee demanded is the matter in dispute in the second appeal. That seems to be the natural and plain meaning of the words and it would be wrong to put a forced construction on the language. The alternative contention is that the subject-matter in dispute is the subject-matter of the suit itself. In the differing judgments in A I R 1935 Nag 83,[3] the two rival views have been fully expounded. In my opinion, the view taken by Niyogi A. J. C. is, with all respect, the sounder one. As he points out, the rejection of a plaint means only a refusal to entertain the suit and can in no case imply a conclusive determination of the rights of the parties. O. 7, Rule 13, Civil P. C., which provides that the rejection of a plaint, inter alia, for failure to pay the deficit court-fee, shall not preclude the plaintiff from presenting a fresh plaint, lends support to that view. As pointed out in his judgment, granting that the rejection amounts to a decree within the meaning of the Code, it is difficult to see how it affects the question of court-fee. The question that still has to be determined is, what is the subject-matter in dispute? As already said, I see no reason why these words should not receive their natural meaning. The Letters Patent appeal is allowed with the plaintiff's costs to be

1. Durga Prasad v. Ragubar Dial, (1882) A W N 244.
2. Ramaswamy Chettiar v. Commissioner of Income-tax, (1929) 16 A I R Mad 60=116 I C 566=52 Mad 194=56 M L J 141 (F B).
3. Ganapathi v. Venkatesh, (1935) 22 A I R Nag 83=157 I C 186 (F B).

paid by the defendant. The second appeal is restored and must be heard. We make no order expediting its hearing. This being a pauper appeal, no question of refund of court-fee on the memorandum of Letters Patent appeal arises.

Abdur Rahman J. — I concur. The decision of this appeal depends, as pointed out by my learned brother, on a true construction of the words "subject matter of appeal" employed in Sch. 1, Art. 1, Court-fees Act. It is a matter of common experience that the subject-matter of every appeal does not necessarily coincide with the subject-matter of every suit in regard to which the appeal has been filed. In order to ascertain the correct valuation of each appeal for purposes of court-fee, one will have to ascertain the subject-matter of that appeal. What then is the subject-matter of this appeal? A mere cursory glance at the grounds of appeal filed on behalf of the appellant would show that he had come up to the High Court with the object of testing the correctness of the order passed by the District Judge, who had ordered him to pay an additional court-fee of Rs. 312.7.0 and the failure to pay which had resulted in the rejection of his appeal. He had therefore valued his appeal to the High Court at that figure. The learned Judge of the High Court refused to entertain the appeal unless the appellant made up the deficiency between the value placed by him and that ordered by the District Judge. He failed to comply with this order and his appeal was accordingly dismissed. This has given rise to this appeal under the Letters Patent. It might be mentioned that this appeal has been valued at the figure which the appellant was required to pay by the learned Judge of this Court in addition to what he had already paid on his appeal.

From what has been stated, it would be clear that the subject-matter of this appeal or the appeal against which the present appeal has been filed was the difference in the value of the court-fee which the appellant was called upon to pay and which he had failed to do. This should be the value then at which the appeal should be valued. The case might be looked at from a slightly different point of view as well. The Government Pleader contended that it was essential for the appellant to bring the valuation of the appeal to the High Court in a case like this in conformity with the valuation of the suit and to pay a court-fee of Rs. 412-7-0. If this view is allowed to prevail, it would follow that although the appellant allowed his appeal before the District Judge to be rejected by refusing to make up the deficiency, he must have nevertheless paid a court-fee when filing the appeal, necessarily larger than the deficiency which he was required to make up in order to have the point adjudicated whether his action in refusing to comply with the order to pay an additional court-fee was correct or otherwise. The fact that he would be entitled to refund in the event of his success could hardly be of any consolation to him, as he is all the same running a risk of his appeal, on the question of court-fee alone, being decided against him and losing the whole of the amount paid by him on appeal in the bargain.

The argument which found favour with the majority of the Full Bench of the Nagpur Judicial Commissioner's Court in A I R 1935 Nag 83[3] does not, with great respect to the learned Judges who held this view, impress me. It is undoubtedly true that the rejection of a plaint brings the litigation in that Court and in that case to an end, but it is incorrect to suggest, I mention to say with deference, that the rights of the parties have been or can be deemed to have been completely or finally determined. The very fact that a second suit is maintainable militates against the theory of finality. There is no doubt that the order rejecting a plaint has been included by the Legislature within the definition of a decree—by its specific mention in the definition suggests that if it were not so mentioned, it should not have fallen within that definition. This has been obviously done with the object of providing for an appeal against that order and save it from being otherwise attacked than by an appeal; but it does not lead to an inference in my opinion that the rights of the parties also should be deemed to have been conclusively determined. The fact remains that when a plaint is rejected on account of deficiency in the court-fee on the plaint, the only thing which has been decided in the suit is the question of court-fee alone and it is this particular *lis* which forms the subject-matter of this appeal. It would therefore follow that the court-fee should be paid on the difference between the court-fee paid by the appellant and demanded from him.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 501

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Arulayi and others — Appellants.

v.

Rakka Kudumban — Respondent.

Letters Patent Appeal No. 74 of 1936, Decided on 7th January 1938, against Judgment and decree of Cornish J., reported in *A I R 1937 Mad 228.*

Res judicata—Suit by *A* against *B* and *C* claiming certain plot of land — *C* claiming as vendee from *B*—Decree of trial Court in favour of *A* and negativing *B*'s title and consequently *C*'s — Appeal by *C* alone—*B* not made party — Finding of trial Court negativing *B*'s title does not operate as res judicata against *C* : *A I R 1937 Mad 228=169 I C 318*, *Reversed*.

A suit was brought by *A* against *B* and *C* in which he claimed certain plot of land. *C* claimed it as vendee from *B*. The trial Court held that *A* was the owner and *B* was not. This finding necessarily negatived *C*'s right. An appeal was filed by *C* in which *A* alone was impleaded as the respondent with the result that *B* was not a party on the record in the appeal. It was contended that the trial Court's decree negativing *B*'s title became final in the absence of an appeal by *B* and operated as a bar to *C*'s attempt to reopen that decision:

Held that the trial Court's finding negativing *B*'s title did not operate as res judicata against *C* who claimed through *B* : *A I R 1937 Mad 228 = 169 I C 318*, **Reversed** ; *A I R 1927 P C 252, Disting.* [P 502 C 1]

K. S. Desikan — *for Appellants.*

A. Swaminatha Iyer — *for Respondent.*

Venkatasubba Rao J. — We wish to state at the outset, with a view to avoid any further confusion, that the suit out of which this appeal arises, is concerned only with the central plot marked C-1, C-2, C-3, C-4 in the Commissioner's plan Ex. D-1 of the extent of 7½ cents, out of the larger parcel of 23 cents, which consists of three parts : the western, the central and the eastern parts. The point at issue, stated simply, which the first Court had to try, was—did the suit plot belong to the plaintiff Rakka Kudumban or to defendant 2 Mada Kudumban ? If it belonged to defendant 2, it is admitted that he having sold it to defendant 1, the latter was the owner on the date of the suit. The learned District Munsif held that the plaintiff was the owner and defendant 2 was not. This finding necessarily negatived defendant 1's right. The District Munsif, giving effect to this view, passed a decree in favour of the plaintiff. An appeal was filed before the Subordinate Judge by defendant 1. The plaintiff alone was impleaded as the respondent, with the result that defendant 2 was not a party on the record in the appeal. The learned Subordinate Judge accepted defendant 1's case, and reversing the Munsif's judgment, dismissed the plaintiff's suit. A second appeal was filed by the plaintiff which came on before Cornish J. The learned Judge held that the Munsif's decree negativing defendant 2's right became final in the absence of an appeal by the latter and operated as a bar to defendant 1's attempt to re-open that decision; in other words, there being no appeal by defendant 2 against the trial Court's finding, it had become res judicata (the question is rather one of finality of the finding than of res judicata) against defendant 1 who claimed through defendant 2. Taking this view, the learned Judge allowed the second appeal. The question in the present Letters Patent Appeal is whether the view of Cornish J. is right.

The learned Judge in support of his position relied upon the decision of the Judicial Committee in 6 Rang 29.[1] If that decision applies, this appeal is really unarguable, but the question is, does it apply? The facts of the Privy Council case are these. The plaintiff there, having bought a certain property which had belonged to the insolvent, sued to recover it. He alleged that a transfer by the insolvent before his adjudication to defendant 1, and transfers by defendant 1 and other defendants to one another successively, were all invalid. The suit was dismissed. The plaintiff appealed to the High Court, but failed to join defendant 1 as a respondent. It was held that

owing to the failure to make defendant 1 a respondent, there was no appeal from this finding which had consequently become res judicata as between the plaintiff and defendant 1 and must also be regarded as res judicata against the respondents, who claimed through defendant 1.

Now let us examine what this decision involves. It was from defendant 1 that the other defendants derived their title. The trial Court's finding was that the former had acquired a good title and it followed from this that each successive transfer was valid. For the plaintiff to succeed in the appeal, it was essential that the finding in favour of defendant 1 should be vacated and what do their Lordships hold? In the absence of the successful

1. Chockalingam Chetty v. Seethai Ache, (1927) 14 A I R P C 252=107 I C 237=55 I A 7=6 Rang 29 (P C).

party, it would be wrong on the part of the Appellate Court to reverse a decision in his favour. Such a reversal would not be binding upon him and would lead to two contradictory decisions. Their Lordships accordingly held that the first Court's decision, having become final in favour of defendant 1, must be taken to have equally become final in favour of the other defendants also—they deriving their title from the former.

The present case is the converse of what has been decided by the Privy Council. Here the finding was against the party not impleaded, i. e. Mada Kudumban, defendant 2. The latter having parted with his right, had no subsisting interest in the property, and defendant 1 as the appellant, in assailing the decree of the trial Court, must be deemed to assail it not only on his own behalf but on behalf of his vendor. If he succeeds in getting the decree reversed, the reversal would operate to the advantage not only of himself but also of the absent party. In short, the basis of the Privy Council decision is the fact that there was a finding in favour of defendant 1, there, who was not impleaded. Here, as already shown, the position is the exact opposite; the person who is not impleaded is the one against whom there is a finding. The difference may be thus illustrated. In the Privy Council the finding in favour of defendant 1 became final. Supposing the plaintiff should succeed in his appeal, what would be the effect? There would be a finding against the remaining defendants that they obtained no valid title. That would be inconsistent with the other finding in favour of defendant 1, which had been allowed to become final. On the finding of the Appellate Court, the other defendants would have a right of action against defendant 1 for breach of covenant of title; but, on the finding of the first Court, defendant 1 had and conveyed a valid title—the resulting position being inconsistent and incongruous. In the present case, by defendant 1 succeeding in the appeal (which in fact has happened), the absent party suffers no prejudice, but on the contrary gets a benefit. To this distinction we refer, to illustrate the vital difference between the Privy Council case and the present one, and to show that the principle applied by the Judicial Committee cannot be extended to a case of this sort. We are therefore of the opinion that the view taken by Cornish J. cannot be upheld.

Mr. A. Swaminatha Iyer, the plaintiff's counsel, has next endeavoured to show that he has other grounds to urge in the second appeal. which however he did not urge before Cornish J. by reason of the view the learned Judge took in his favour, on the question of res judicata. Having heard him, we must say that he has utterly failed to show that there is any other ground available to him. In the result, the judgment of Cornish J. is set aside and that of the Subordinate Judge is restored.

There is one small matter to which we must refer. One Perumal Kudumban was defendant 3 and it is said that although he did not appeal in the lower Appellate Court, the learned Subordinate Judge reversed the trial Court's decree in his favour also. That means we ought to decree the suit against defendant 3, but we wish to make it clear, that the plaintiff is entitled to the eastern plot alone, and what was held to belong to defendant 3 is the western part, with which the plaintiff can have no concern. We make these observations on account of some confusion that crept in the argument on this matter. The appellants' costs throughout must be borne by the respondent.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 502

BURN AND VENKATARAMANA RAO JJ.

Noor Mohammad and another —
Appellants.

v.

Mohammad Kareem and another —
Respondents.

Appeal No. 438 of 1935, Decided on 20th January 1938, against order of Dist. Court, Ganjam, D/- 29th November 1934.

Succession Act (1925), S. 295—Where there is contention, proceeding must take form of regular suit.

Under S. 295, where there is contention, the proceeding must take the form of a regular suit according to the Civil Procedure Code and in such a case it is not open to the Court to refuse to make full inquiry and to proceed to decide the matter in a summary fashion leaving his decision subject to modification in a suit to be filed afterwards.

[P 502 C 2; P 503 C 1]

S. Suryaprakashan — *for Appellants.*
B. V. Ramanarasu and Govt. Pleader —
for Respondents.

Judgment. — The order of the learned District Judge cannot be supported. It is not permissible for the Court to refuse to

make a full enquiry. Under S. 295, Succession Act, where there is contention the proceedings must take the form of a regular suit according to the Civil Procedure Code. There was certainly contention in this case and the learned District Judge could not proceed to decide the matter in a summary fashion, leaving his decision subject to modification in a suit to be filed afterwards. We allow this appeal and set aside the order of the learned District Judge. The case must be restored to file and dealt with according to law after directing the appellants and respondent 2 to file duly stamped caveats. Costs of this appeal to abide and follow the result.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 503

PANDRANG ROW J.

In re Muthammal and another — Appellants.

Second Appeal No. 1030 of 1937, Decided on 18th January 1938, against decree of Sub-Judge, Tinnevelly, in A. S. No. 43 of 1937.

(a) Mortgage—Marshalling—For marshalling, there must be two sets of properties, one subject to both mortgages and other only to earlier mortgage — Where only one and not two items are liable to be sold, doctrine does not apply—Right to contribution is not however lost.

Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other is subject to only the earlier mortgage. Where, at the time the doctrine is sought to be invoked, there are no two items of properties liable to be sold but only one item, the other having been released by the mortgagee, the doctrine cannot be applied. The right to contribution of the person claiming marshalling is not however lost and it can be worked out by a separate suit. [P 503 C 2 ; P 504 C 1]

(b) Transfer of Property Act (1882), S. 81—Property subject to two mortgages — Right of first mortgagee to release any part of security is not lost or made subject to right of marshalling.

Where a property is subject to two mortgages, the undoubted right of the first mortgagee to release any part of the security is not lost or made subject to the right of marshalling given by S. 81. The words in S. 81 "but not so as to prejudice the rights of the prior mortgagee" include the right of the prior mortgagee to release any portion of the hypotheca. [P 504 C 1]

R. S. Srinivasacharya and K. V. Rajagopalan — *for Appellants.*

Judgment. — This second appeal raises two questions, one a question of fact and the other a question of law. On the question of fact, namely whether Ex. D is a benami transaction, the finding of both the Courts below is to the effect that it is not benami and this concurrent finding is not open to attack in second appeal. The question of law which is the only one that has been argued before me relates to the doctrine of marshalling. The appellants are subsequent mortgagees of what may be described as Schedule 1 properties; they obtained a decree on the strength of their mortgage and have become the purchasers thereof. The other property included in the suit mortgage, namely Sch. 2 property, is no longer subject to that mortgage because it was released by the mortgagee before the suit was instituted for a cash consideration of Rs. 50. The suit was therefore only for recovery of the balance amount from Sch. 1 property which alone, according to the plaintiff, is liable to be sold in satisfaction of the amount claimed in the suit. In these circumstances I fail to see how the doctrine of marshalling can be invoked by the appellants. Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other is subject only to the earlier mortgage. At the time when the doctrine was sought to be invoked in the present suit, there were no two items of properties liable to be sold but only one item, that is to say Sch. 1 property. It is impossible for the plaintiff in the present suit to ask for sale of Sch. 2 properties, and it follows therefore that it is not open to the appellants to ask that they should be sold before Sch. 1 properties are sold.

It may be that certain observations found in 51 Mad 648[1] are not tenable in view of the omission of the words 'as against the seller' which appear in the old S. 56 as suggested in Mulla's Commentary at p. 445 of the 1933 Edition. This however does not affect the present question. In this case, the question is not whether the plaintiff's, that is the first mortgagee's, rights are going to be prejudiced by the application of the doctrine of marshalling, but whether the doctrine of marshalling can be invoked when there are no properties to be marshalled, the only properties liable to be sold being subject to both the mortgages. This point is, in my opinion, sufficient to dispose of this second appeal. As observed by the lower Appellate Court

---

[1] 1. Thanmul Sowcar v. Ramdoss Reddiar, (1928) 15 A I R Mad 500=110 I C 54=51 Mad 648 =55 M L J 358.

this does not mean that the appellants' right to contribution is negatived. That right, as observed by the lower Appellate Court, has to be worked out in a separate suit as between the appellants and respondents 2 and 3. So far as marshalling is concerned, in the present suit there can be none for the reason given by me. It is impossible to accept the contention that the undoubted right of the first mortgagee to release any part of the security is lost or is made subject to the right of marshalling given by S. 81, Transfer of Property Act. In the lower Appellate Court, the appellants' advocate did not controvert this position, namely that the mortgagee could release any part of the hypotheca and throw the whole burden upon the remaining portion of the hypotheca. The words found in S. 81 of the Transfer of Property Act, namely 'but not so as to prejudice the rights of the prior mortgagee' certainly include the right of the mortgagee to release any portion of the hypotheca. Such right cannot be deemed subject to the right of marshalling given in S. 81 which makes it expressly subject to the condition that there should be no prejudice to the rights of the first mortgagee. I am therefore of opinion that there is no substance in the contention on the question of law raised in this second appeal. The second appeal is therefore dismissed.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 504

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Sri Rajah Rai Sri Venkatraya Krishna Rangarao Bahadur — Appellant.

v.

Lanka Appayya and others —

Respondents.

Letters Patent Appeal No. 73 of 1936, Decided on 3rd January 1938, against Judgment of Pandrang Row J., D/- 15th April 1936.

Madras Estates Land Act (1 of 1908), S. 189 —Permanent right of occupancy conferred upon tenant cannot be fettered by any contract—Fact that such contract is result of bona fide settlement of disputed claim makes no difference.

By the Madras Estates Land Act, certain advantages are conferred upon the ryot and there are provisions which show that the tenants' freedom of contract has been in some respects taken away. The Civil Courts are under the Act deprived of jurisdiction in respect of 'estates.' The permanent right of occupancy conferred on the tenants is a statutory right, which cannot be fettered or controlled by any contract impeding or preventing its exercise, such a contract being prohibited both by the language as well as the spirit of the Act. The fact that such contract has been the result of a bona fide settlement of a disputed claim, makes no difference whatsoever. There is no exemption in the Act in favour of such a contract. [P 505 C 1]

Somasundaram — *for Appellant.*

D. Narasaraju — *Amicus curiæ.*

Venkatasubba Rao J. — The respondents are not represented and Mr. D. Narasaraju has at our request appeared as amicus curiæ. The suit was filed by the zamindar of Kirlampudi and the defendant was one of his ryots. The Subordinate Judge finding that the lands were situated in an estate held that he had no jurisdiction to hear it and ordered the plaint to be returned for presentation to the proper Court. His order has been confirmed by Pandrang Row J. and this Letters Patent Appeal is directed against his judgment. In view of a decision given by a Bench of this Court, the plaintiff's counsel has had to concede that the suit lands are in an estate, but he contends that the ryot is precluded from relying upon the ground, by reason of the arrangement to be presently referred to. In a certain litigation between the Maharajah of Pithapuram and his tenants, the question was raised whether the lands involved there were in an estate or not. The decision in that litigation would be decisive of the question whether the lands here answered the description of an estate. The District Munsif, who tried the cases of the Maharajah of Pithapuram, was of the opinion that the lands to which they related, did not form part of an estate, though later on the opposite view prevailed in the High Court.

After the Munsif had given his decision, but before the High Court reversed it, the zamindar of Kirlampudi i. e., the landholder in the present case and certain of his ryots entered into an arrangement. The effect of it was, that occupancy rights were conferred upon the tenants, who agreed in their turn to pay an enhanced rent. Mr. Somasundaram the plaintiff's learned counsel argues that this constituted a bona fide settlement of a doubtful claim; the position at the time was, he says, that under the prevailing decision the ryots had no occupancy rights, but nevertheless such rights were conferred upon them under the arrangement. He goes on to contend that it would be to beg the question to treat the

lands as forming part of an estate, when the parties by a special contract agreed to remove them from that category. The question then resolves itself into: is the agreement such as can be enforced in a Court of law?

By the Estate Land Act, certain advantages are conferred upon the ryot and there are provisions which show that the tenants' freedom of contract has been in some respects taken away. The Civil Courts are under the Act deprived of jurisdiction in respect of 'estates' and what is now contended is, that by private contract this statutory prohibition has been abrogated. The permanent right of occupancy conferred on the tenants is again a statutory right, which cannot be fettered or controlled by any contract impeding or preventing its exercise—such a contract being prohibited both by the language as well as the spirit of the Act. That the contract has in this case been the result of a bona fide settlement of a disputed claim makes no difference whatsoever. There is no exemption in the Act in favour of such a contract. In the result, the Letters Patent appeal fails and is dismissed.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 505

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Putta Veeranna — Appellant.

v.

Yedlapalli Mocharamma—Respondent.

Letters Patent Appeal No. 88 of 1936, Decided on 18th January 1938, from order of Pandrang Row J., D/- 14th September 1936.

Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 and 21 — Village blacksmith of ryotwari village alienating his service inam land dismissed and his widow appointed in his place —Suit by widow for recovery of possession against alienee held to be exclusively triable by Revenue Court and not by Civil Court.

The Madras Hereditary Village Offices Act does not contemplate concurrent jurisdiction, and what in each case has to be determined is whether in view of the nature of a given suit, the Act has vested jurisdiction in the Civil or Revenue Court to entertain it. S. 13 confers jurisdiction upon Revenue Courts. S. 21 enacts as to when the Civil Courts are forbidden to exercise jurisdiction. The two sections are complementary. Notwithstanding the generality of the language of S. 21, the jurisdiction of the Civil Court under it is taken away in those cases in which it is conferred upon the Civil Courts by S. 13. S. 21, expressly excludes the jurisdiction of the Civil Court inter alia to take into consideration or decide any claim to recover the emoluments of any of the offices specified in S. 3. Where it is necessary for the plaintiff to allege, in order to maintain his action, that the land in suit is an emolument of a service inam, the jurisdiction will remain with the Revenue Court under Section 13. The principle is that unless in a given case the jurisdiction is conferred upon the Revenue Court by S. 13, it should not be deemed to have been taken away under S. 21 from the Civil Court. [P 506 C 1, 2]

One *M*, a village blacksmith of a ryotwari village, having alienated a portion of his service inam lands was dismissed and his widow was appointed in his place. The widow brought a suit for possession against an alienee of the portion of the land:

Held that the suit was triable exclusively by the Revenue Court and not by the Civil Court: *33 Mad 208; A I R 1917 Mad 38; 30 Mad 126; A I R 1927 Mad 433 and A I R 1937 Mad 159, Rel. on; A I R 1933 Mad 279, Disting.*

[P 505 C 2; P 507 C 1]

D. Suryaprakash Rao — *for Appellant.*

D. Narasaraju — *for Respondent.*

Venkatasubba Rao J.—The appellant was a defendant in a suit brought under the Madras Hereditary Village Offices Act (3 of 1895). His defence was negatived by the Revenue Courts and a decree was passed against him. He thereupon applied to the High Court for a writ of certiorari alleging that the Revenue Courts had no jurisdiction to try the suit and that the proceedings were liable to be quashed. Pandrang Row J. refused the writ and in the course of his order observed thus:

> Whether the land itself or the revenue from the emoluments of a village office like this is obviously within the exclusive jurisdiction of the Revenue Court, and the petitioner has failed in my opinion to show that the Deputy Collector and the Collector of East Godawari had no jurisdiction to decide this controversy.

The passage quoted above as has been conceded by the respondent's learned counsel, proceeds upon a misapprehension. There was no issue in the case as wrongly assumed by Pandrang Row J. whether the land itself or the assignment of revenue formed the emoluments. The reasoning of the learned Judge cannot therefore be upheld, but still we are satisfied that the writ was rightly refused. The facts which led to the suit may be briefly stated. One Manikyam, the village blacksmith of Peddada (a ryotwari village), alienated to various persons portions of his service inam lands. He was thereupon dismissed and his widow Mocharamma was appointed to that office. The defendant as one of the alienees was in possession of a part of the land. Mocharamma brought the suit

in question before the Deputy Collector for possession, which was decreed by that officer. His decision was confirmed on appeal by the Collector. The question is, did they have jurisdiction to entertain the suit and the appeal under the provisions of the Act referred to above. Ss. 13 and 21 are the governing sections. It has been settled by authority that the Act does not contemplate concurrent jurisdiction so that what in each case has to be determined is, whether in view of the nature of a given suit, the Act has vested jurisdiction in the Civil or the Revenue Court to entertain it. S. 13 is the provision which confers jurisdiction upon Revenue Courts; S. 21 enacts in positive terms as to when Civil Courts are forbidden to exercise jurisdiction. These two sections, it has been held, are complementary. In 33 Mad 208,[1] the learned Judges observe :

> It is reasonable to hold, notwithstanding the apparent generality of the language of S. 21, that the jurisdiction of the Civil Court under that section is taken away in those cases in which it is conferred upon the Revenue Courts by S. 13.

This rule is based upon the general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication : 33 Mad 208.[1] S. 21 expressly excludes the jurisdiction of the Civil Court inter alia to take into consideration or decide any claim to recover the emoluments of any of the offices specified in S. 3. That the land in the present case answers the above description is not disputed: see the definition of "emoluments" in S. 4. Turning to S. 13, the relevant words are :

> any person may sue before the Collector for recovery of the emoluments of any such office, on the ground that he is entitled to hold such office and enjoy such emoluments.

The test for deciding whether the Revenue or the Civil Court has jurisdiction has been laid down in several cases. Where it is necessary for the plaintiff to allege in order to maintain his action that the land in suit is an emolument of a service inam, the jurisdiction will remain with the Revenue Court under S. 13 of the Act: 5 M L W 151.[2] Where the plaintiff sues on the ground of a trespass or on the ground that the land is his private property or upon the footing of a lease that has expired, there is no need for him to rely upon the fact of the land being an emolument of a service inam. In such cases the Courts have held that the suits are triable by the Civil and not the Revenue Court. And what is the principle underlying this?—that unless in a given case jurisdiction is conferred by S. 13 upon the Revenue Court, it should not be deemed taken away under S. 21 from the Civil Court. The appellant's counsel contends that S. 13 is confined to suits by persons claiming to be entitled to an office and does not apply to suits by those holding an office; in other words, as the present suit for emoluments is by a person holding an office, that is to say, by a person already appointed to it, the section does not apply. He relies for this position upon the observations of Waller J. in 56 Mad 366[3] at pp. 370 and 371. In that case there was a difference of opinion on a certain question—with which we are not concerned—between Waller J. and Krishnan Pandalai J. As Waller J. observes, the suit there was

> not one to recover the emoluments of an office, but to eject the persons who are alleged to have trespassed upon some inam land, which forms part of the emoluments of the office.

As already noticed, the case being one of trespass, that would have been a sufficient ground for holding that the Civil Court's jurisdiction was not taken away. As recognized by Waller J. himself (and that is evident from the introductory words "apart from") his observations that follow those words are obiter. In the judgment of Krishnan Pandalai J., there is no indication that he agrees with these obiter dicta. Wallace J., the third Judge to whom the case was referred, has said nothing by way of endorsing the opinion of Waller J. which, as that learned Judge himself points out, is in direct conflict with the decisions on the point. In 30 Mad 126,[4] the plaintiff was the holder of the office of karnam and the defendant resisted his claim on the ground that the land in suit was not the emolument of the office but was the private property of the plaintiff, which passed to the defendant in execution of a decree obtained by him against the former. The case was heard by three Judges, and Miller J. in the course of his judgment thus observes :

1. Seetharam Naidu v. Rami Naidu, (1910) 33 Mad 208=5 I C 137=20 M L J 91.
2. Pattayya v. Kutiah, (1917) 4 A I R Mad 38 = 37 I C 918=5 M L W 151.
3. Ramamurthi v. Narayana Gajapathi Raju, (1933) 20 A I R Mad 279 = 141 I C 307=56 Mad 366=64 M L J 361.
4. Kesiram Narasimhulu v. Narasimhulu Patnaidu, (1907) 30 Mad 126 = 16 M L J 514 (F B).

He (the plaintiff) can therefore only succeed by showing (1) that he is the karnam of the village entitled as such to enjoy the emoluments and (2) that the land for which he sues is the emolument of his office.

Here is a clear recognition that a person holding an office can sue under S. 13. In 5 M L W 151,[2] already referred to, the plaintiff who brought the suit was a person actually holding the office and Spencer and Phillips JJ. adopted the principle laid down by Miller J. in the earlier case. Again in 25 M L W 299,[5] where the suit was brought by certain hereditary blacksmiths, it was observed :

All suits for the emoluments of an office on the ground that the plaintiff is holding the office must primarily be brought in the Revenue Court: see page 302.

There appears no reason why the view uniformly held in these cases should now be departed from. The point again arose in (1937) 1 M L J 37[6] where K. S. Menon J. rightly treated the observations of Waller J. as obiter. As a question of construction, a plaintiff even when he happens to be a person actually holding an office, has to allege in his plaint "that he is entitled to hold such office"—which means no more than that he is the rightful office-holder, which in turn is the basis of his right to the emoluments claimed. The writ of certiorari was therefore rightly refused. The Letters Patent appeal fails and is dismissed. Each party will bear his or her own costs.

C.R.K./R.M. *Appeal dismissed.*

5. Kandappa Achari v. Singara Chari, (1927) 14 A I R Mad 433=99 I C 972=25 M L W 299.
6. Veeranna v. Venkayya, (1927) 24 A I R Mad 159=168 I C 945=(1937) 1 M L J 37.

A. I. R. 1938 Madras 507

PANDRANG ROW J.

Kollipara Venkata Manikyarao and others — Petitioners.

v.

Chitturu Bhadrachalam and others — Respondents.

Civil Misc. Petn. No. 4596 of 1937, Decided on 17th January 1938, to issue a writ of certiorari.

Election — Election Commissioner having jurisdiction to decide election disputes coming to conclusion that Election Officer has illegally rejected large number of votes and declaring election as void on this ground—Mere absence of finding that this has materially affected election result does not make his order one without jurisdiction.

Where an Election Commissioner having jurisdiction to decide election disputes comes to the conclusion that the Election Officer has illegally rejected a large number of votes with a view to favour one of the two parties contesting the election, that Election Officer must have played into the hands of one party and on these grounds declares the election as void, his order cannot be deemed to be without jurisdiction merely because he fails to record the finding that the illegal rejection of votes by the Election Officer has materially affected the result of the election. [P 507 C 2; P 508 C 1]

P. V. Rajamannar — *for Petitioners.*

K. S. Champakesa Aiyangar for Govt. Pleader and Ch. Raghava Rao for P. Sivaramakrishna Aiyar — *for Respondents.*

Order.—This is an application under Cl. 7 of the Letters Patent for the issue of a writ of certiorari calling for the record of the proceedings in O. P. No. 136 of 1936 on the file of the Election Commissioner (the District Munsif) of Bezwada, an election petition which dealt with a certain election dispute and for quashing his order declaring the election void. The main contention put forward in support of the application is that the absence of a finding by the Election Commissioner that the illegal rejection of certain votes by the Election Officer had materially affected the result of the election deprives the Election Commissioner of jurisdiction to decide the dispute. I am unable to accept this contention though it may appear to find some support in the cases relied upon by the petitioners' learned advocate. The jurisdiction to decide the election dispute in question was undoubtedly with the Election Commissioner and indeed no other person or tribunal had legal authority to decide that dispute. It cannot be said that the jurisdiction which existed at the outset was lost merely because the Election Commissioner did not record a particular finding. What is really meant by the decisions relied upon is that if a statutory tribunal performs its duties in disregard of the ordinary law or of the procedure and conditions imposed upon it by the law which gives it jurisdiction, the High Court can and should interfere to prevent an abuse of the power conferred by the statute ; but it does not follow that the tribunal which obviously is the only tribunal having jurisdiction loses it by such disregard. In this particular case I have no doubt that the decision of the Election Commissioner was right. The omission to record a finding is obviously due to oversight. The case was not contested before

the Election Commissioner and he decided it ex parte. The evidence on which his decision was based is sufficient to show that the result of the election was materially affected by the improper rejection not only of votes but also of nomination papers and indeed by reason of the exclusion of large number of persons entitled to take part in the election from the place in which the election was held.

The learned Election Commissioner has found that the Election Officer rejected these votes with a view to favour one of the two parties who were contesting the election. In another place he observes that the Election Officer must have played into the hands of the other party. When such were the conclusions he came to, it is mere hair-splitting to argue that because he did not in so many words say that the result of the election was materially affected by the rejection of votes and exclusion of voters, his order must be deemed to be without jurisdiction. The irregularity and indeed the illegality that attended the election was apparently so open and patent that the petition for setting aside the election was not contested and was heard ex parte. It is not alleged that the ex parte hearing of the petition was improper or unjust. It is clear that the petitioners who now desire to have the order of the Election Commissioner quashed were not prepared to appear before the Election Commissioner and contest the allegations made against the validity of the election. To encourage such persons would not, in my opinion, further the cause of justice. I do not think it is necessary or even desirable that this Court should exercise its special powers in order to assist persons who have profited by illegal practices. The application is therefore dismissed with costs of the contesting respondents. Advocate's fee is fixed at Rs. 50 (Memo of costs will follow).

C.R.K./D.S. *Application dismissed.*

A. I. R. 1938 Madras 508

VENKATASUBBA RAO J.

In re Srinivasa Naicker and another —Petitioners.

Criminal Revn. Case No. 618 and Petn. No. 581 of 1937, Decided on 28th January 1938, from order of Sessions Court, Ramnad Division at Madura, D/- 20th August 1937.

Treasure Trove Act (1878), S. 4—Certain persons finding treasure but deciding not to report it to Collector—*A* and *B*, though taking share in treasure, not present at finding and had no connexion with finder's non-reporting to Collector—*A* and *B* held not guilty of abetment of offence under S. 4.

Certain persons found a treasure and decided not to report the matter to the Collector. They divided the treasure so found with the accused *A* and *B*. *A* and *B* were not present at the finding and till the finders had finally decided not to report, neither *A* nor *B* had any connexion with the matter:

Held that whatever might be the offence *A* and *B* might have committed on the finding that they shared the treasure illegally, they were clearly not guilty of abetment of the offence under S. 4.

[P 508 C 2]

K. S. Jayarama Aiyar and C. K. Venkata Narasimham — *for Petitioners.*

A. S. Sivakaminathan — *for the Crown.*

Order.—Section 4, Treasure Trove Act (6 of 1878) enacts (to quote the relevant portion):

Whenever any treasure exceeding an amount or value of Rs. 10 is found, the finder shall as soon as practicable, give to the Collector notice in writing of the nature and the amount or the approximate value of such treasure.

It is alleged that P. Ws. 1 and 2 and accused 3 found a treasure but failed to make a report as provided by this section. The point to decide is whether accused 1 and 2 (the only appellants) were guilty of abetment of the offence of failure to report.

Both the Courts below act upon Ex. A the first information given by P. Ws. 1 and 2. On the facts as stated in that information, can a conviction be sustained? Neither accused 1 nor 2 was present at the finding of the treasure and until the three finders had finally decided not to report, neither of the two accused had any sort of connexion with the matter. It is not even suggested in the statement that any of three finders, when finally and definitely deciding not to report, had met accused 1 or 2 or had any conversation with either of them. Whatever other offence they may have committed on the finding that they shared the treasure illegally, they are clearly not guilty of abetment of failure to report. The conviction is set aside and the fines, if already paid, will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1938 Madras 509

PANDRANG ROW J.

Secretary of State — Appellant.

v.

Muniappan Chetty and others —

Respondents.

Second Appeal No. 722 of 1936, Decided on 3rd January 1938, against decree of Sub-Judge, Dindigul, in A. S. No. 5 of 1935.

(a) Irrigation — Raiyatwari lands—Raiyat is entitled to irrigate his registered wet lands by customary source until Government makes efficient alternative provision.

While the Government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the raiyat who is entitled to get water for his registered wet lands gets his accustomed supply of water. Hence a declaration that the raiyat is entitled to irrigate his fields from a customary source until the Government makes an efficient alternative provision is in accordance with law : *32 Mad 141 ; A I R 1931 Mad 284 and A I R 1936 Mad 923, Rel. on.* [P 509 C 2 ; P 510 C 1]

(b) Irrigation—Raiyat irrigating his wet fields from accustomed source—Government altering source causing diminution in accustomed supply —Raiyat is entitled to damages.

Where a raiyat is irrigating his wet lands from an accustomed source and the Government alters the source of supply thereby causing diminution in the accustomed supply, the raiyat is entitled to damages : *A I R 1936 Mad 692, Rel. on.* [P 510 C 2]

K. S. Krishnaswamy Iyengar, (Government Pleader) — *for Appellant.*

K. Rajah Iyer, T. P. Gopalakrishna Aiyar and T. R. Sangameswara Iyer — *for Respondents.*

Judgment.—This second appeal arises out of a suit instituted by one Muniappa Chettiar, who died during the pendency of the suit and who is now represented by his legal representatives, the respondents in the second appeal. The suit was for a declaration that the plaintiff was entitled to irrigate his registered wet fields with water flowing from what may be briefly described as sluice No. 3 and for refund of the penal water rate with interest that was collected from him by the revenue authorities for Fasli 1339. The source of irrigation. assigned to the wet fields in question was sluice No. 2 and the plaintiff's case was that it was impossible to irrigate his wet fields in this manner, namely from sluice No. 2, for the simple but sufficient reason that the level of the sluice as well as the channel taking from it was lower than the level of the wet fields. The plaintiff's case also was that he had been irrigating his wet fields for many years past according to custom, that the assignment of sluice No. 2 for his lands was objected to by him on several occasions and that the revenue authorities did not give him any redress. Both the Courts below have found that the substantial foundation of the plaintiff's case is true, namely that he is entitled as of right to take water from sluice No. 3, and that it is impossible to irrigate his registered wet fields with water from sluice No. 2, which was assigned to him by the revenue authorities. These concurrent findings of fact have not been questioned in this second appeal.

The points argued on behalf of the Secretary of State for India in Council are: (1) that no declaration should have been given in favour of the plaintiff because of the Crown prerogative to alter and to assign sources of irrigation at its pleasure and (2) that the respondents are not entitled to refund of the penal water cess collected from them because at the time the cess was levied the levy was legal as there had been no adjudication by a Civil Court as to the source of irrigation in respect of the plaint lands, and that at the most the respondents would be entitled only to damages. As regards the first point, there is really very little substance in it because the declaration given by the Subordinate Judge is not unconditional or absolute but subject to a condition, viz. that the respondents are entitled to take water from sluice No. 3 only so long as the Government does not make an efficient alternative provision. This declaration is in my opinion in accordance with law. It is well settled, (*vide* 32 Mad 141[1], 54 Mad 793[2] and A I R 1936 Mad 923[3]), that while the Government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the raiyat who is entitled to get water for his registered wet fields gets his accustomed supply of water. As was observed in 54 Mad 793[2] at page 798 :

> Government by undertaking the obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is by channel constructed

1. Fischer v. Secy. of State, (1909) 32 Mad 141=2 I C 325=19 M L J 131.
2. Basavana Gowd v. Narayana Reddi, (1931) 18 A I R Mad 284=133 I C 507=54 Mad 793=61 M L J 563.
3. Secy. of State v. Nageswara Iyer, (1936) 23 A I R Mad 923=166 I C 200=71 M L J 268.

either by Government or by the ryot or both, until and unless some other method is adopted.

Then again at page 799 it was observed that :

> While the wet ryot cannot insist as against Government that he has any right to have his supply carried by any particular channel and cannot object to Government altering the channel of supply, he has a right as against other wet ryots and even, subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply once it has passed into the channel at present ear-marked for his supply.

I am therefore of opinion that the declaration made by the lower Appellate Court namely that the plaintiffs are entitled to get water from sluice No. 3 subject to the condition mentioned therein, is according to law. As regards the second point, stress is laid by the learned Government Pleader on the words 'has been' found in Proviso 2 to S. 1, sub-s. (b) of the Madras Irrigation Cess Act. It is contended that the use of the perfect tense indicates that so long as there has been no actual adjudication by a Civil Court as to the source of irrigation for any particular wet land, the levy of a penal water cess would be legal even though it is subsequently decided by a competent Civil Court that what the ryot had done was merely to act according to his rights. Reference may be made in this connexion to the observations in (1898) 2 Q B 547,[4] regarding the partiality of legal draughtsmen for the use of the perfect sense. If this contention is accepted, it would mean that during the pendency of a suit in the Civil Court the ryot, who is found later on to have been merely exercising the right given to him by law, namely of irrigating his lands from the customary source, would be legally liable to pay penal water cess, and his only remedy would be to institute a suit for damages, after his right has been declared in a previous suit ; if the decision of the previous suit takes more than the time allowed by the law of limitation for the suit for damages even this remedy would be lost to him. The further result would be that the ryot would either have to raise a dry crop or leave the land waste if a dry crop cannot be grown and there would be loss to the public by reason of the less production of food grains, and the Government would certainly have to pay damages subsequently thus causing another and an additional loss to the public. Moreover, it appears to me prima facie that penal cess was not intended by the Legislature to be allowed to be levied in cases where the ryot is only exercising his undoubted rights ; in other words, that the ryot was to be penalized for doing nothing more than exercising his undoubted rights.

It is however not quite necessary for me to decide this question definitely and I shalll assume for the purpose of this second appeal that the contention of the learned Government Pleader is right and that at the time the cess was levied, it was not illegal. Even then it is not contended that the plaintiff would not be entitled to damages : in fact, the law as laid down by Wadsworth J. in A I R 1936 Mad 692,[5] (which decision was no doubt reversed on appeal on another ground altogether), has been accepted by the learned Government Pleader. Wadsworth J. was of opinion that :

> The words 'adjudged by a competent Civil Court' in S. 1 (b), Proviso 2, Madras Irrigation Cess Act, refer to an adjudication prior to the use of the water, and that it is not open to a Civil Court to say that, though there has been an unauthorized user of water, the revenue authorities ought to have authorized this user and therefore a decree will be passed against the Government.

He was of opinion that if as the result of a change in the source of supply made by the Government there was a diminution in the accustomed supply, the remedy of the plaintiff was not to take water in defiance of the order of the Government but by a proper proceeding to seek redress for the damages done by the change in the prescribed manner of irrigation. It is therefore conceded that the plaintiffs are entitled to damages. On the question of the amount of damages there is no finding by either of the Courts below, and in these circumstances the learned Government Pleader after addressing the Collector of Madura states that the damages payable to the plaintiffs would be Rs. 675-8-0 and no more. This amount is no doubt less by a small amount than the amont of the penal cess, the refund of which has been allowed by the lower Appellate Court. The learned advocate for the respondents has agreed to accept this amount of Rupees 675-8-0 as the correct amount of damages caused, as he thinks it is not worthwhile to have the matter sent down for a finding. As the respondents' advocate has

4. In re Athlumney, (1898) 2 Q B 547=79 L T 303=47 W R 144=5 Manson 322.

5. Secretary of State v. Narayanaswami Pillai, (1936) 23 A I R Mad 692=162 I C 97.

agreed to this amount, I shall allow only this amount instead of the amount allowed by the lower Appellate Court though, in my opinion, the attitude taken up on behalf of the Government is hardly to be commended. In fact the suggestion made by the learned Government Pleader was that the refund of Rs. 719 which was allowed by the lower Appellate Court might be affirmed provided the plaintiffs are made to pay the costs of the Government both in the original Court as well as in the lower Appellate Court and in this Court.

This suggestion is, if I may say so, quite unreasonable because there is no reason why the plaintiffs should not only not get their own costs but be made to pay the costs of the Government when they have succeeded and when it is clear that they have been the victims of arbitrary action by the revenue authorities who have assigned to them a source of irrigation from which no water can possibly flow to their fields, and who have given them no redress whatever in spite of the petitions addressed to them. It can hardly be doubted that the Legislature never intended that the powers given to the revenue authorities to levy penal water cess should be exercised in an arbitrary and unjust manner. However as the respondents' advocate has agreed, in order to avoid further trouble to accept the amount of Rs. 675-8-0, which according to the Government's case is the amount of damages, the decree of the lower Appellate Court will be modified by allowing this amount instead of Rs. 719 allowed by the lower Appellate Court; subject to this modification, the second appeal fails and is dismissed with cost. Leave to appeal is refused.

C.R.K./D.S. *Decree modified.*

A. I. R. 1938 Madras 511

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Arumugha Goundan — Appellant.

v.

Rangaswami Goundan and another — Respondents.

Letters Patent Appeals Nos. 67 and 68 of 1936, Decided on 11th January 1938, against Judgment of Venkataramana Rao J. reported in *A I R 1936 Mad 702.*

Easement — Right to cut trees — No right of easement can be acquired in respect of tree projecting over neighbour's land — Owner of tree has no right to prevent person in possession of land over which its branches are growing from cutting away so much of them as project over his land—Where right to project boughs is expressly conferred or transferred and right to lop off branches is not reserved, branches cannot be cut.

No right of easement can be acquired in respect of a tree which gradually projects over the neighbour's land insensibly and by slow degrees and the owner of the tree has no right to prevent a person lawfully in possession of land, in which or over which its roots or branches have grown from cutting away so much of them as project into or over his land. [P 511 C 2; P 512 C 1]

The land over which the tree stood formerly belonged to the defendants and to one *P* jointly as members of a joint Hindu family. During a family partition the land was divided between them. Although the land allotted to *P* stood away from the land where the tree stood, still *P* was given a half right in the tree and the other half right was given to the defendants to whose share fell the land in which the tree stood. Subsequent to the partition, *P* sold to the plaintiff a portion of the land falling to his share together with his right to the moiety of the tree and the defendants also later on sold to the plaintiff the portion of the land on which the tree was standing along with their half interest in the tree. The tree was tamarind tree, about 100 years old, whose growth had practically ceased. Thus it was not a case of mere transfer of land which in law carried with it the transfer of the tree but the tree itself had been made subject of the sale. The plaintiff claimed a right of easement for spreading of the boughs of the trees over the land owned by the defendants and not transferred by them :

Held that by common intention of the parties, at the time of the partition and the sales, the right to project the boughs was expressly conferred and transferred and that the defendants not having expressly reserved for themselves the right to lop off the projecting branches in the sale deed in favour of the plaintiff, they were not entitled to cut off the branches : *(1878) 12 Ch D 31 ; (1929) 2 K B 117 and (1894) 3 Ch 1, Ref.* [P 512 C 2]

T. M. Krishnaswamy Iyer and A. Balasubramania Iyer — *for Appellant.*

K. S. Desikan — *for Respondents.*

Venkatasubba Rao J. — Venkataramana Rao J. has held that the defendants are entitled to have so much of the branches of the tamarind tree cut off as project over their land. The plaintiff attacks this decision and his counsel has argued the appeal mainly as if the question involved were one of easement. That if the plaintiff's case rested on an easement right, it should fail, there can be no doubt. As the learned Judge rightly points out relying on (1895) A C 1,[1] no right of easement can

1. Lemmon v. Webb, (1895) A C 1=64 L J Ch 205=11 R 116=71 L T 647=59 J P 564.

be acquired in respect of a tree which gradually projects over the neighbour's land insensibly and by slow degrees. It is important in this case to ascertain the facts precisely in order to understand the correct principle applicable. Arguments based on a supposed easement right were advanced before us as before the learned Judge and this has imported considerable confusion into the case. A careful analysis of the facts will show that totally different considerations apply. We are concerned with three plots, namely 333, 338/2 and 338/1, which all belonged to a Hindu joint family. 338/2 adjoins on the south plot 333 and is contiguous to it; 338/1 is to the east of 338/2. At a family partition 333 and 338/2 (the two contiguous plots) fell to the defendants and 338/1 fell to the share of their coparcener Palani. On 338/2 was standing the tamarind tree, which has given rise to the present dispute. Although the right of Palani to the plot 338/2 was extinguished by the partition, a right was conferred upon him by its terms to a half share in the tree on that plot. In 1925, i. e. subsequent to the partition by Ex. A. Palani conveyed to the plaintiff (Arumuga) 338/1 together with his right to a moiety of the tree. In 1927 the defendants conveyed 338/2 to the plaintiff, including likewise that half interest in the tree in question. Thus it will be seen first that the plaintiff became the owner of 338/2, while the defendants continued to own the contiguous plot 333 and secondly that the plaintiff became the full owner of the tamarind tree in the plot 338/2.

Venkataramana Rao J. after stating that the encroachment of the boughs would be a nuisance, asks, has the right to commit the nuisance been granted? The right to overhang the branches is analogous to preservation of the prospect, and the learned Judge points out that in both these cases, the burden would be imposed over a vague, indefinite and possibly an extensive area. So the question is, was the right granted to the plaintiff either expressly or by necessary implication? It is the previous unity of title and its subsequent severance that has given rise to the question in its present form; otherwise the matter would be free from all difficulty. The law undoubtedly is, that the owner of a tree has no right to prevent a person lawfully in possession of land, into or over which, its roots or branches have grown, from cutting away so much of them as project into or over his land [per Lindley L. J. in (1894) 3 Ch 1[2] at pp. 12 and 14]. But here the question is, do the facts already mentioned lead or not to the necessary inference that the right to project the branches has been conferred? From the very beginning the tamarind tree played an important part. First, let us take the partition. Palani was allotted a plot away from the one where the tamarind tree stood, but still he was given a half right in the tree. Secondly, when Palani sold his land 338/1 to the plaintiff, his half share to the tree was specifically conveyed. And thirdly when the plaintiff purchased from the defendants 338/2, their half right in the tree was likewise expressly mentioned and conveyed. What we here have is not a mere transfer of land, which in law would carry with it the transfer of the tree whether mentioned or not; more than that, the tree itself has been made the subject of the sale; this is of vital importance. Nor was this tree at the time of the sale a tiny plant or a sapling; it was, as the learned District Judge points out, an ancient tree about 100 years old, whose growth had practically ceased.

It cannot be reasonably suggested that there has since been any additional burden imposed by the growing of the tree. It seems to us that the finding of the District Judge that by the common intention of the parties the right to project the boughs was transferred, ought not to have been disturbed. That the grantor shall not derogate from his grant, is a settled maxim. To allow the defendants to cut off the branches would be to violate the maxim. Venkataramana Rao J. observes that if the plaintiff intended to have the right he claims, that should have been specially provided for in the sale deed. But on the contrary, the true position on the facts is, that had the defendants intended to reserve themselves the right to lop off the projecting branches, they should have expressly reserved it: see by way of analogy the passage in Halsbury New Edition Vol. 11, S. 524, which is based on (1878) 12 Ch D 31,[3] and which has been cited by Sankey L. J. in (1929) 2 K B 117,[4] at p. 133. We therefore think that the learned District Judge, whose judgment has been reversed is right.

2. Lemmon v. Webb, (1894) 3 Ch 1=63 L J Ch 570.
3. Wheldon v, Burrows, (1878) 12 Ch D 31=48 L J Ch 853=41 L T 327=28 W R 196.
4. Aldrige v. Wright, (1929) 2 K B 117=98 L J K B 582=141 L T 352.

Venkataramana Rao J. has held that the plaintiff has a right to enter (a right, we presume, to be reasonably exercised) on the defendants' land for removing the produce so long as the branches are allowed to project. So also the learned Judge has, by restoring the Munsif's judgment, awarded to the plaintiff Rs. 10 as damages for the produce appropriated by the defendants from the projecting branches. The correctness of these orders has not been questioned. In the result, the judgment of the District Judge is restored in toto, and as to the costs incurred by the plaintiff in the High Court, the defendants will pay them. The costs are awarded in one only of the two appeals before us.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 513

VARADACHARIAR AND KING JJ.

Mathukumalli Ramayya and others — Appellants.

v.

Vuppalapali Lakshmayya and others— Respondents.

Appeals Nos. 571 of 1931 and 260 of 1932, Decided on 1st October 1937, against decree of Sub-Judge, Guntur, in O. S. No. 67 of 1927.

(a) Adverse Possession — Guardian — Hindu dying leaving widow—Her mother-in-law taking possession — Widow if minor at time of her husband's death, mother-in-law's possession must be presumed to be on behalf of her daughter-in-law.

Where a Hindu dies leaving his widow and her mother-in-law takes possession of the property, it is only when it is proved that the widow was a minor at the time of her husband's death, that the mother-in-law as a lawful guardian under the Hindu law of her widowed daughter-in-law must be presumed to have got into possession only on behalf of her daughter-in-law: *(1856) 2 K & J 79, Ref.* [P 516 C 2;P 517 C 1]

(b) Hindu Law—Reversioner—Hindu dying leaving widow—Her mother-in-law taking possession not immediately but only in pursuance of arrangement between her and her daughter-in-law—Cause of action in such case does not arise to widow as possession by mother-in-law in pursuance of agreement cannot amount to dispossession of widow—Reversioner's suit for possession brought after widow's death is not barred.

In the case of a succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud is not to be reckoned from the time when he succeeds to the estate but from the time at which it would have been reckoned against the widow if she had lived and brought the suit. For the application of this principle, it must therefore be shown that the widow had a cause of action to sue as on a dispossession : *9 W R 505, Explained; 2 I A 113 (P C), Foll.* [P 519 C 1]

Where a Hindu dies leaving a widow and her mother-in-law takes possession of the property not immediately but only in pursuance of an arrangement between her and her daughter-in-law, there is no reason to hold that any cause of action accrues to the widow against her mother-in-law as on a dispossession. The possession taken by the mother-in-law in pursuance of an arrangement cannot be said to amount to a dispossession of the widow as representing estate. If no cause of action therefore accrues to the widow, there is no question of the reversioner having to rely on a second cause of action. His only cause of action arises on the death of widow, on the contention that the arrangement entered into by the widow is not binding on the reversioner. [P 519 C 1, 2]

(c) Hindu Law—Widow — Surrender — Surrender by daughter-in-law in favour of her aged mother-in-law is against natural presumption and probability.

Consistently with the spirit of the Hindu law, it is possible to conceive of an elderly woman making a surrender in favour of one lower down in the line of inheritance or to the next male reversioner. But, it is very unnatural to assume that a daughter-in-law, who was not even aged 20 at the time, even assuming that she was a major, could be anxious to efface herself and surrender the estate in favour of her aged mother-in-law. [P 520 C 1]

(d) Hindu Law — Widow — Surrender — Arrangement between widow and her mother-in-law in nature of vibhaga — Mother-in-law taking larger share—Widow reserving to herself interest in remainder in certain items and also asserting her claim to certain share after arrangement—Arrangement cannot be treated as surrender by widow in favour of her mother-in-law.

Where a widow and her mother-in-law enter into an arrangement in the nature of a vibhaga or division, the fact that the mother-in-law takes a larger share than that taken by the widow cannot alter the nature of the arrangement and turn it into one in the nature of a surrender by widow. Similarly if the widow reserves to herself an interest in remainder in certain items of her husband's property and also asserts her rights to certain share as against the mother-in-law during her lifetime the arrangement cannot be treated as a surrender by the widow in favour of her mother-in-law. [P 520 C 1]

(e) Hindu Law—Widow—Accretion—Stranger coming into possession of portion of property by virtue of alienation by widow — His acquisitions out of income of such property cannot be treated as accretion.

It is impossible to extend the doctrine of accretion to cases where a stranger claiming title to a portion of a limited owner's estate by reason of an alienation by the widow, makes acquisitions out of the income of the properties thus coming into his possession; he is not a representative of the estate and no question of accretion can therefore arise. [P 521 C 1]

K. Kameswara Rao and A. Ramamurthy (in No. 571 of 1931) and B. Somayya (in No. 260 of 1932) — *for Appellants.*

B. Somayya (in No. 571 of 1931) and K. Kameswara Rao, P. Satyanarayana Rao and Kamaraju Krishnamurthy (in No. 260 of 1932) — *for Respondents.*

Varadachariar J.—These appeals arise out of a suit for recovery of possession of immovable properties and of mesne profits, instituted on the footing that the plaintiff is the nearest reversioner to the estate of one Ramachandrudu, on the death of his widow Achamma in 1926. In the Court below the defendants disputed the plaintiff's relationship; but before us the finding on that point in plaintiff's favour has not been challenged. A point was also raised in the Court below as to whether Ramachandrudu was the last male holder or he predeceased his father Dasayya. On this point also, the lower Court found that Ramachandrudu was the last male holder and this finding too has been accepted by all parties before us. They also accepted the lower Court's conclusion that Ramachandrudu died in 1859, though it is not possible to say exactly in what month. It must be some date between May and October 1859. Ramachandrudu left him surviving his mother Bangaramma and a young widow Achamma. The defendants in the case may be roughly grouped as those claiming under alienations made by Bangaramma and those claiming under alienations made by Achamma, though it also appears that some defendants are in possession of some items of properties under titles derived from both the ladies. Before dealing with the contentions raised before us in the appeal, we may add that as against some of the defendants and in relation to some of the properties, the matter was settled by a compromise even in the lower Court and this portion of the claim which is dealt with in para. 2 of the lower Court's decree no longer arises for consideration. As regards the claim of the alienees who purchased from Achamma, the lower Court held that the alienations were not effected for any purpose binding upon the estate and accordingly gave the plaintiff a decree for possession. But as against those who claimed under Bangaramma (without Achamma's intervention) the lower Court dismissed the suit, holding that to that extent the claim of the estate had become barred while Act 14 of 1859 was in force and that it was not revived by the enactment of the Limitation Act of 1871 or the later Acts.

There were other issues raised in the case, but in the view that the lower Court took on the question of limitation, it deemed it unnecessary to give findings on many of them. The alienees from Achamma have filed A. S. No. 571 in so far as the suit against them was decreed by the lower Court. The plaintiff has filed A. S. No. 260 of 1932 against so much of the lower Court's decree as dismissed his claim in respect of the properties alienated by Bangaramma. It will be convenient to deal at the outset with the question of limitation. Mr. Krishnaswami Aiyar who appeared for most of the contesting defendants contended that if the lower Court's view as regards the applicability of Act 14 of 1859 to one portion of the case is correct, even the defendants deriving title under Achamma would be entitled to the benefit of it, because Achamma's title itself was according to him in a sense derived from Bangaramma. We are not prepared to accede to the suggestion that this is the correct position; but in any event as we have got to deal with the question of limitation in A. S. No. 260 of 1932, it will be convenient to deal with it at this stage. Prima facie, the suit will be governed by the Limitation Act of 1908 which is the law in force at the time that the action was instituted. But if the defendants could show that the right of action had become barred under Act 14 of 1859, it will not be revived by the enactment of the subsequent Limitation Acts. It is however the duty of the defendants to establish beyond doubt that the remedy of the estate had become barred before Act 9 of 1871 came into force. That duty is particularly onerous in this case, because the interval between Ramachandrudu's death and the coming into force of Act 9 of 1871 is such that unless it is clearly established that limitation had commenced to run before a particular date it will not be possible to hold that the remedy of the estate became barred under the Act of 1859.

Mr. Somayya, the learned counsel for the plaintiff, went so far as to suggest that the remedy of the estate could not at all have become barred in this case before

Act 9 of 1871 came into force, because that Act came into force in July 1871 and the probabilities are that Ramachandrudu died only after July 1859; but we are not, as at present advised, prepared to accede to this contention. Though it is declared at the end of S. 1 of Act 9 of 1871 that that Act shall come into force on the 1st day of July 1871, an earlier clause in the same section provides that nothing contained in Ss. 2 and 3 or in parts II and III shall apply to suits instituted before the 1st day of April 1873. In this case, Mr. Somayya concedes that even calculating limitation from October 1859 a suit for possession instituted on behalf of the estate between October 1871 and April 1873 would be governed by Act 14 of 1859 and would be prima facie barred. But he maintained that as Act 14 of 1859 did not contain a provision for extinction of title similar to that enacted in S. 28 of the Acts of 1877 and 1908 there was nothing to prevent Act 9 of 1871 giving the reversioner a right of action in respect of a claim to possession sought to be enforced after that Act came into force. We do not think that this will be a sound position to take; but as we have for other reasons come to the conclusion that even taking April 1873 as the relevant date, the remedy of the estate to claim possession had not become barred under Act 14 of 1859, it is unnecessary to express any final opinion upon this point.

There is one other circumstance to which it is necessary to refer before discussing the question of limitation under Act 14 of 1859. The plea in that form was not only not raised in the written statement but is wholly at variance with the defence put forward in the written statement. For reasons best known to themselves, the story put forward by all the defendants was that Ramachandrudu died not in 1859 but more than 12 years before 1859, that Ramachandrudu and his father Dasayya died on the same day, Ramachandrudu predeceasing the father; that therefore it was Bangaramma who succeeded to the estate as the heir of Dasayya, that it was only after Bangaramma had been in possession for more than 12 years that some claim was made on behalf of Achamma, the widow of Ramachandrudu and that the same was met by Bangaramma making some kind of provision for the daughter-in-law. It is obvious that on this line of defence, the exact date when Bangaramma got into possession in 1859 would never have arisen for consideration at all, because the defendants' case was that she was in possession for 12 years before 1859. In the issues as originally framed, Issue 3 ran as follows:

> When Ramachandrudu died possessed of the suit items excepts items 11 to 14 and 16 and whether Achamma inherited them and got into possession of these properties.

Reading this issue in the light of the written statements, it does not at all suggest that a plea under Act 14 of 1859 on the ground of Bangaramma having got into possession in 1859 after Ramachandrudu's death was intended to be raised. The learned Subordinate Judge observes that in the course of the arguments, the defendants' counsel explained that that was the true position; and at that stage he added to Issue 3 as originally framed the following sentence "whether the suit is in time as regards any or all of the above said items." It is perhaps possible to suggest that it was not fair to the plaintiff to start that question at that stage as though it was an abstract question of law; but seeing that the evidence is largely documentary and that there is no serious suggestion of prejudice to the plaintiff by reason of this question having allowed to be raised at that stage, we do not propose to rest our conclusion on the ground that the lower Court ought not to have allowed the question to be raised in that form at that stage. It is certainly obvious that in dealing with the evidence, this consideration has to be borne in mind, namely that evidence was led on the side of the defendants to support the original assertion that Bangaramma had been in possession as Dasayya's heir for more than 12 years prior to 1859 and the attempt on the plaintiff's side was to meet that evidence. If as is shown by the documentary evidence and was admitted by the defendants before the lower Court that line of defence was wholly false, it will be unsafe to take particular pieces of evidence here and there and rely upon the same as supporting the version that if in fact Ramachandrudu died only in 1859 Bangaramma must have got into possession of his estate immediately on his death and that therefore adverse possession against the widow Achamma began to run from the moment of Ramachandrudu's death. Though the learned Subordinate Judge has discarded the evidence adduced on the defendants' side to prove that Bangaramma was in possession even prior to 1859, we

cannot help thinking that he has much too lightly jumped to the conclusion that Bangaramma must have got into possession on Ramachandrudu's death. We shall presently show the bearing of this conclusion upon the point of limitation.

In para. 7 of his judgment, the learned Subordinate Judge observes that "soon after Ramachandrudu's death, lands in his name were transferred to the name of his mother Bangaramma" and in another portion of the same paragraph "we find from Ex. J (1) that early in 1860 lands had been transferred to Bangaramma's name." We do not think that either of these statements is accurate. So far as we can draw any inference from the revenue papers it would appear that the patta was transferred to Bangaramma's name only in fasli 1271; and early in 1860 payments of kist are made, no doubt, by Bangaramma but only with the patta continuing in the name of Ramachandrudu. We may add that even if it was possible to hold that patta had been transferred to Bangaramma's name early in 1860, it would not be sufficient for the defendants' case of limitation, because the crucial date is the date of the undoubted arrangement between Bangaramma and Achamma, namely 16th October 1859. If it is clearly made out on the evidence that prior to 16th October 1859, Bangaramma had actually entered into possession there may be some justification for the contention that that gave to Achamma a cause of action to sue for possession and that as under the old law the reversioners could have had no independent cause of action at her death a suit to oust Bangaramma and those claiming under her must have been brought, if at all, only within 12 years of October 1859.

Even on this footing, a question might arise whether the arrangement of October 1859 would or would not change the character of Bangaramma's possession, but, for the purpose of this case, we are willing to assume that if limitation had already commenced to run, the plaintiff could not rely on the arrangement of October 1859 as bringing about a new state of things. The narrow margin between the probable date of Ramachandrudu's death and the date of this settlement (October 1859) makes it all the more necessary that the defendants must establish beyond doubt that Bangaramma had entered into possession prior to October 1859. So viewing the case, it cannot be denied that the false story with which the defendants came into Court, namely that Bangaramma was in possession for more than 12 years prior to 1859, makes it very difficult for the Court, except upon the clearest documentary evidence, to hold that the defendants have established Bangaramma's possession between the date of Ramachandrudu's death some time after May 1859 and the date of the arrangement in October 1859. It must be remembered in this connexion that both of them were ladies and that the lands appear to have been in the possession of cultivating tenants. In the ordinary course the question of possession by the ladies would arise only when the time for collection of rents arises and this could hardly have arisen between May and October because the previous cultivation season would have come to an end prior to May 1859 and the payment of rent for the next fasli would be ordinarily only after October 1859.

Mr. Somayya raised a contention that even if it were possible to hold that Bangarama got into some kind of possession prior to October 1859, she must be held to have taken possession only on behalf of Achamma, her daughter-in-law. There may be some justification for this contention if the evidence established that Achamma was a minor at the date of her husband's death. Presumably the age of minority at that time in the case of a Hindu would have been 16, because the Majority Act had not been enacted by that time. There are no doubt one or two statements in the evidence even of the defendants' witnesses suggesting that Achamma might have been a minor at the date of her husband's death, but we are unable to accept these statements as sufficient data in support of that conclusion because other parts of the same depositions do not fit in with that inference and because it was not any definite part of the plaintiff's case that Achamma was a minor at the date of her husband's death. It is only if the factum of minority had been clearly established that it would be possible for the plaintiff to invoke the doctrine of (1856) 2 K & J 79[1] and ask the Court to hold that Bangaramma who was the lawful guardian under the Hindu law of her widowed daughter-

1. Thomas v. Thomas, (1856) 2 K & J 79=25 L J Ch 159=1 Jur (NS) 1160=4 W R 135.

in-law must be presumed to have got into possession if at all only as the guardian of her daughter-in-law. Though we are not therefore prepared to make any presumption in favour of Achamma, no sufficient reason has been shown to justify the inference that Bangaramma must even at that time have intended to assert a kind of hostile claim and dispossess her daughter-in-law. We refer to that circumstance only in support of our conclusion that there is nothing in the evidence to establish that Bangaramma did take possession of Ramachandrudu's properties prior to the arrangement of October 1859.

This will also be a convenient stage to refer to one other matter on which Mr. Somayya rightly laid some stress. It is clear from the recitals in Ex. 11 that the arrangement of 16th October 1859 between Bangaramma and Achamma was embodied in a document and that the said document was handed over by Bangaramma, to her daughter's son in 1866 at the time of the execution of Ex. 11. This document is referred to therein as capable of serving as a title deed. In several portions of the argument on behalf of the contesting defendants, we have been asked to draw particular inferences as to the nature and effect of this arrangement of October 1859. It is true that in the absence of better information, the recitals in Ex. 11 as to the substance of the transaction may be useful; but if a person in possession of the original document of 1859 chose to withhold it, it certainly does not lie in his mouth to ask the Court to speculate as to its exact form or purport merely to suit his contentions. That some importance was attached even in the lower Court to the non-production by the defendants of this document of 1859 is clear from the cross-examination of D. W. 3, defendant 6. It was he that produced Ex. 11 and must presumably have been in possession of the document of 1859. In the witness box he stated that this agreement of 1859 was searched for before the written statement was filed but it could not be found though he had last seen it '7 or 8 years ago'. He could offer no reasonable explanation for its disappearance and when pressed with the omission to produce it, he had the audacity to suggest that the plaintiff who had access to his house might have walked away with it.

Whatever may be the ingenuity of the suggestion, we do not think there is anything to warrant it. Seeing that the witness admits that he became aware of its loss even before the written statement was filed, one could have expected that if he had any reason to suspect the plaintiff of having walked away with it, he would have put some questions to the plaintiff when he was in the witness-box to indicate his suspicion that the plaintiff had access to the place where the papers were kept and that the plaintiff might have walked away with it. We are surprised to find that without having put any such questions to the plaintiff in the box, D. W. 3 thought fit to suggest that the plaintiff might have walked away with it. On the other hand, the defendants had every motive to suppress the original of this agreement. It was unregistered and the plaintiff could not therefore get at a copy of it. It is quite likely if the document was forthcoming it would expose the falsity of the defendants' story that Ramachandrudu died more than 12 years before 1859 and that Bangaramma inherited the properties as heir to Ramachandrudu's father. Though that exactly is not the case now pressed before us, it clearly shows a motive on the part of the defendants to suppress that document. We must therefore deal with the case on the footing that the defendants have withheld direct evidence as to the terms of the arrangement between Bhangaramma and Achamma in October 1859.

In holding that the plaintiff's suit must be held to be barred because the remedy of the estate had become barred under Act 14 of 1859, the learned Subordinate Judge purports to follow the principle of the decisions in 9 W R 505[2] and 33 Mad 473.[3] Dealing with the latter case first, we may point out that the facts bearing on the question of limitation in that case were very different from those in the present case. The plaintiff there sued as the daughter of her father to recover her father's share in the Kangundi estate in the year 1903 ; but the plaintiff's father had already obtained a decree in O. S. No. 5 of 1876 against the defendants' father for a third share of the zamindari. It was the father's duty to have executed that decree and obtained possession but he

2. Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty, (1868) 9 W R 505=Beng L R Sup Vol 1008 (F B).
3. Timmaji Amma Garu v. Subbaraju, (1910) 33 Mad 473=5 I C 640=20 M L J 204.

died before execution was taken out and the widow who succeeded him preferred in consideration of a money payment to give up her right to execute the decree and entered up satisfaction. So far as the plea of limitation was concerned, the learned Judges, if we may say so, rightly point out that limitation had commenced to run even during the lifetime of the plaintiff's father, because the defendant's father was admittedly in possession before the suit of 1876 was instituted and that possession had never been disturbed. The plaintiff had accordingly put forward a further contention that the act of her mother in receiving a money payment and giving up her right to execute the decree obtained by her father amounted to an alienation and that therefore the plaintiff had a cause of action to impeach that alienation after her mother's death. This argument the learned Judges overruled on the authority of the decisions in 3 Beng L R App Cas 362,[4] 17 W R 11[5] and 5 All 532.[6] It is not necessary for the purpose of this case to say whether we should be prepared to concur in all the observations in this judgment. We may point out that in 48 M L J 461[7] at p. 463, Ramesam J. expressed his inability to concur in the view that the facts in 33 Mad 473[3] did not justify the contention that the widow's act amounted to an alienation. But as we shall presently show the question for decision in the present case is not whether the arrangement of October 1859 between Achamma and Bangaramma amounted to an alienation but whether before or after that arrangement Achamma as representing the estate had a cause of action at all against her mother-in-law to sue for possession of the husband's estate.

Mr. Somayya strongly relied on the decision in 10 Cal L R 337[8] supporting the contention that the plaintiff's suit in the present case could not be held to be barred by Act 14 of 1859; but as that decision had been dissented from in 33 Mad 473,[3] we do not propose to base our decision on the authority of the Calcutta Law Reports case.

4. Radha Mohan Dhur v. Ram Das Dey, (1875) 3 Beng L R App Cas 362=24 W R 86*n*.
5. Gunesh Dutt v. Mt. Lall Muttee Kooer, (1872) 17 W R 11.
6. Adi Deo Narain Singh v. Dhukaran Singh, (1883) 5 All 532=1883 A W N 117.
7. Nagappa v. Naranappa, (1925) 12 A I R Mad 731=87 I C 667=48 M L J 461.
8. Sheo Narain Singh v. Khurgo Koery, (1882) 10 Cal L R 337.

We must however add that the three decisions which the learned Judges purported to follow in 33 Mad 473[3] did not deal with the question of limitation at all. In all the three, the suit was instituted by the reversioner during the lifetime of the limited owner and the only question which the Court was called upon to decide was whether during the lifetime of the limited owner the reversioner had a cause of action to sue at all, merely by reason of the fact that the limited owner allowed some other person to remain in possession. Those decisions no doubt rest on the assumption that the reversioner might be injured if he should be denied a right of suit in those circumstances, because the stranger's possession would be adverse not only to the limited owner but also to the reversioner. But we do not think those decisions could be treated as direct authority on the question of limitation. In 5 All 532[6] it would have been impossible to come to a conclusion adverse to the plaintiff if the question of limitation had been raised in that case, because the last male holder himself died long after the coming into force of the Limitation Act of 1871. The observation in that case on the effect of the adverse possession against the widow have not been followed even in that Court, in the later Full Bench judgment in 14 All 154.[9] The learned Subordinate Judge refers in addition to the decision in 14 Bom 317[10] and observes that it is on all fours with the present case. This view ignores one fundamental difference, namely that the mother-in-law's possession in that case was not referable to any arrangement between the mother-in-law and the daughter-in-law but was merely held independently of the daughter-in-law.

Though in several cases the proposition is stated in general terms that under Act 14 of 1859 possession adverse to the widow would be adverse to the reversioner as well, we may point out with all respect that this is not exactly the effect of the decision in 9 W R 505[2] or the proper way of considering the application of Act 14 of 1859. As pointed out by the Privy Council in 2 I A 113[11] at page 121, the principle of that discussion is

9. Bindeshri Naik v. Ganga Saran Sahu, (1892) 14 All 154=1892 A W N 13 (F B).
10. Babu Sheik Ibrahim v. Bhikaji, (1890) 14 Bom 317.
11. Amirtollal Bose v. Rajonee Kant Mitter, (1875) 2 I A 113=15 Beng L R 10=23 W R 214=3 Sar 430 (P C).

that in the case of a succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.

The reasoning of the Full Bench was that the reversioner had no separate cause of action from the one which was available to the widow to sue the dispossessor. This will make it clear that for the application of the principle of that decision it must be shown that the widow had a cause of action to sue as on a dispossession. The inaccuracy of dealing with the case as one of adverse possession will be evident from the observations of the Judicial Committee in 23 Bom 725[12] at p. 736, that the effect of adverse possession against the widow even under S. 28, Lim. Acts of 1871 and 1908 will only be to extinguish the widow's title and not to affect the reversioner because the reversioner does not claim through the widow : *see also* 35 All 227[13] at p. 236.

The real question for consideration therefore is whether or not Achamma had at any time a cause of action to sue Bangaramma for possession, on the footing of dispossession. If, as surmised by the lower Court, Bangaramma had got into possession of the estate immediately on Ramachandrudu's death, it might be possible to hold that a cause of action had accrued to Achamma. If, as we have already held, there is no proof of any such possession having been taken by Bangaramma, it is only reasonable to infer that it was as the result of the arrangement of October 1859 that the parties agreed, as recited in Ex. 11, that Achamma should receive a certain amount of money and take an interest by way of remainder in certain lands, that Bangaramma should take the remainder of the lands and that Bangaramma got into possession of the lands which fell to her under that arrangement. If this is the true position on the facts, there is no reason to hold that any cause of action accrued to Achamma against Bangaramma as on a dispossession. Whether this arrangement is to be regarded as an alienation by Achamma or not, the possession taken by Bangaramma in pursuance of it could not certainly be said to amount to a dispossession of Achamma as representing estate. If no cause of action therefore accrued to Achamma, there is no question of the reversioner having to rely on a second cause of action. His only cause of action arises on the widow's death, on the contention that any arrangement entered into by Achamma with Bangaramma under which Bangaramma took possession is not binding on the reversioner. It is a separate question whether the arrangement was a bona fide one by way of settlement of disputed rights and as such binding on the reversioner. But this has no bearing on the question of limitation. We must accordingly hold that the learned Judge was not right in holding that the remedy of the estate to recover possession of the properties in Bangaramma's possession had become barred under Act 14 of 1859.

The alternative contention in the lower Court was that the settlement of 1859 was at least binding on the reversion as a bona fide settlement of disputed claims. This question was made the subject-matter of Issue 4. There are obvious difficulties in supporting the settlement on this footing. One serious difficulty in the way of the defendants is that, as we have already pointed out, they had kept back the document in which this settlement is embodied and we are not therefore in a position to say on what basis the settlement proceeded. If it was true, as the written statement suggested, that both the father and the son had died more than 12 years before 1859 and that they had died on the same day, it may be possible to suggest that there was bona fide room for doubt as to whether the father predeceased the son or the son predeceased the father and that therefore the widows had occasion to enter into a bona fide settlement. As this case is wholly false, there could not have been any vestige of a belief in Bangaramma that she had a bona fide claim to the estate as against her daughter-in-law. It was therefore thought inexpedient by the learned counsel for the contesting defendants to press his client's case on this footing before us. He accordingly adopted a different line. He contended that the arrangement of October 1859 might fairly be regarded as a surrender by the daughter-in-law in favour of the mother-in-law and on the authority of the decision in 57 Mad 749[14]

12. Runchordas v. Parvatibai, (1899) 23 Bom 725 =1 Bom L R 607=26 I A 71=7 Sar 543 (PC).
13. Soni Ram v. Kanhaiya Lal, (1913) 35 All 227 =19 I C 291=40 I A 74 (P C).
14. Sitanna v. Viranna, (1934) 21 A I R P C 105 =148 I C 828=61 I A 200=57 Mad 749 (PC).

he asked us to hold that limitation started against the reversioners in 1878 when the mother-in-law died. Not merely is this a new case, but it is wholly at variance with natural presumptions and probabilities.

Consistently with the spirit of the Hindu law, it is possible to conceive of an elderly woman, making a surrender in favour of one lower down in the line of inheritance or to the next male reversioner. It seems to us very unnatural to assume that a daughter-in-law, who was not even aged 20 at the time, even assuming that she was a major, was anxious to efface herself and surrender the estate in favour of her aged mother-in-law. If the documents or the other evidence in the case established beyond doubt that naturally or unnaturally the daughter-in-law did make a surrender, it might be a different matter. But, when we are asked to presume that that might have been the intention of the parties, it is not possible to ignore their relative position. Further, the defendants are here also met by the objection that they did not choose to produce the document which embodied this arrangement. It does not lie in their mouth to put forward imaginary hypotheses as to the true nature of the arrangement. So far as one can infer from the reference in Ex. 11 to this arrangement, it is noteworthy that the transaction is referred to as a vibhaga or something in the nature of a division between the mother-in-law and the daughter-in-law. It may be that for some reason, not disclosed by the evidence, the mother-in-law took a larger portion than the daughter-in-law but that cannot alter the nature of the transaction and convert it into one in the nature of a surrender. It may also be noticed that according to the recitals in Ex. 11 the daughter-in-law reserved to herself an interest in remainder in two of the items of property belonging to her husband's estate. It is not easy to say that this will fit in with the definition of surrender in the decided cases.

Mr. Krishnaswami Aiyar invited our attention to the decision in 47 Cal 466[15] and contended that no particular form of document is necessary if only the intention to surrender is clear on the facts. The observations in that case far from helping him seem to us to point to a different conclusion in the present case. Their Lordships in that case laid stress on the fact that for more than 30 years the widow had acted on the basis of the arrangement which was relied on as amounting to a surrender and had accepted maintenance; but here we find that, within seven or eight years of the arrangement of October 1859 the widow, far from showing herself as one who had been anxious to efface herself, asserted her rights against the mother-in-law's donee even during the lifetime of the mother-in-law and her claim had to be satisfied by giving her a one-third share in the estate (see Exs. 3 and 10). In these circumstances, we do not feel justified in accepting the suggestion that the transaction of October 1859 should be treated as a surrender by Achamma in favour of Bangaramma, merely for the purpose of giving the defendants the benefit of starting limitation against the reversioners in the year 1878. Issue 4 also refers to an arrangement in 1867 (Exs. 3 and 10) between Achamma and Bangaramma's daughter's son, the donee under Ex. 11. No serious attempt has been made before us to justify this arrangement on its own merits as one binding on the estate independent of the contention advanced in respect of the settlement of 1859. Under this arrangement of 1867, the disputes between Achamma and Bangaramma's daughter's son to whom Bangaramma had transferred by Ex. 11 whatever she got under the arrangement of 1859, were no doubt settled but the circumstances do not give rise to any basis for a plea of family settlement; the daughter's son of Bangaramma had no claim of right except what he derived from the gift in his favour by Bangaramma. Issue 6 raises the question whether Ex. 11 can be supported as one made for legal necessity and as such binding on the plaintiff. This issue must be found in the plaintiff's favour because Bangaramma was not in possession as heir to Ramachandrudu and could not therefore claim the right to alienate Ramachandrudu's estate even for necessity. Her right, whatever it was, could rest only on the arrangement of October 1859 and if that is held not to be binding on the reversioners, her alienee cannot stand in a better position. The only other question arising for decision in Appeal No. 260 of 1932 is that relating to items 11 to 14 and 16. It has not been suggested that these formed part of Ramachandrudu's estate before his

15. Bhagwat Koer v. Danukdhari Prasad Singh, (1919) 6 A I R P C 75=53 I C 347 = 46 I A 259=47 Cal 466 (P C).

death. The plaint includes these items only on the footing that they must have been acquired with the income of Ramachandrudu's estate subsequent to his death and that they must accordingly be treated as accretions to that estate. Whatever the position might be, if a female heir of Ramachandrudu made acquisitions while she was in possession of the main estate as heir it is impossible to extend the doctrine of accretion to cases where a stranger claiming title to a portion of a limited owner's estate by reason of an alienation by the widow makes acquisitions out of the income of the properties thus coming into his possession; he is not a representative of the estate and no question of accretion can therefore arise. The claim to items 11 to 14 and 16 is therefore unsustainable and must be dismissed.

The result is that except in respect of items 11 to 14 and 16 and except to the extent covered by the compromise already entered into by the parties in the lower Court, the plaintiff's claim in respect of the properties of Ramachandrudu which came to Bangaramma and through her passed to various defendants must be allowed. The fact that the donee under Ex. 11 had obtained Ex. 3 from Achamma in 1867 will not make his position stronger nor improve the position of persons claiming under him. The decree of the lower Court must be set aside so far as it dismissed the plaintiff's claim in respect of these properties; the plaintiff will have a decree for possession. The lower Court has not given a finding on the question of mesne profits in respect of these properties. The case will be sent back to the lower Court for the decision of that question and the passing of a decree for profits. As regards Appeal No. 571 of 1931, it is no longer possible for the appellants in this appeal to rely upon the alleged adverse possession of Bangaramma. The alienations Exs. 6 and 12 under which Achamma sold these properties on 26th June 1876 have been found by the learned Subordinate Judge not to be binding upon the estate. Mr. Krishnaswamy Aiyar laid much stress on the fact that they are ancient alienations and contended that every presumption must be made in favour of their validity.

We do not however feel justified in ignoring the several considerations adverted to by the learned Subordinate Judge in support of his view against the validity of these alienations. The argument based on the lapse of time does not seem to possess much significance in this case, because, as pointed out by the learned Subordinate Judge, the parties have been able to produce several old documents, and if, as was sought to be proved through some of the defendants' witnesses, the alienations under Exs. 6 and 12 had been made in satisfaction of pre-existing debts either due to the alienees themselves as some witnesses would say, or due to other persons, it is scarcely likely that those debt-documents would not be available with the defendants. It is noteworthy that the documents themselves do not recite that the alienations were made for any purposes of necessity or for the discharge of debts. While it may be that the absence of such recitals does not preclude the Court from holding on the evidence or probabilities that the alienations must have been made for a proper purpose, it is scarcely likely that such recitals would not have been made if in fact the alienations were made for discharge of debts and *a fortiori* if they were for debts due to the alienees themselves. We therefore see no reason to interfere with the conclusion of the lower Court against the validity of these alienations. Appeal No. 571 of 1931 must accordingly be dismissed with costs.

As regards costs in A. S. No. 260 of 1932 the appellant will be entitled to proportionate costs of the appeal from the respondents who are not concerned with items 11 to 14 and 16. The defendants interested in items 11 to 14 and 16 will be entitled to proportionate costs in this appeal from the plaintiff. As regards costs in the lower Court the plaintiff will be entitled to recover from the persons as against whom Appeal No. 260 of 1932 has been allowed his proportionate costs in that Court. By oversight, our attention was not drawn in time to the question of mesne profits in respect of the items covered by Exs. 6 and 12. Hence the matter had to be mentioned to day. It does not seem to us worth while in the circumstances of the case to interfere with the lower Court's refusal of mesne profits in respect of these items prior to the date of the suit. But there is no ground for refusing to award mesne profits to the plaintiff even in respect of these items from the date of the suit. It is not necessary to drive him to a separate suit. We accordingly direct the lower Court to hold an enquiry in respect of mesne profits

relating to the items covered by Exs. 6 and 12 as from the date of this suit and award a decree to the plaintiff for such amount as may be found due and as against such persons as may be found liable therefor.

C.R.K./D.S. *Case remanded.*

A. I. R. 1938 Madras 522

PANDRANG ROW AND KING JJ.

Sri Sri Durga Madhava Deo Garu — Appellant.

v.

Sri Sri Radhamohana Rajendra Deo Garu and others — Respondents.

Appeal No. 363 of 1931, Decided on 6th December 1937, against decree of Dist. Court, Ganjam, at Berhampore, in O. S. No. 32 of 1929.

Civil P. C. (1908), S. 34 (2)—Person obtaining decree for maintenance from date of plaint and future maintenance to date from certain date—Person filing frequent execution petitions and recovering maintenance after considerable delay — Suit to recover interest on maintenance amounts is barred by S. 34 (2).

A person obtained a decree granting him maintenance from the date of plaint and future maintenance to date from certain date. After certain year the decree-holder had frequently to file execution petitions and therefore realised his maintenance only after considerable delay. He filed a suit to recover from the defendant interest upon the amounts of maintenance which he had thus realized in execution:

Held that as the decree was essentially a decree for payment of money, S. 34 (2) applied and the suit was not maintainable. [P 523 C 1]

G. Lakshmanna and G. Chandrasekara Sastry — *for Appellant.*

B. V. Ramanarasu — *for Respondents.*

King J.—The appellant here is a junior member of the family of the zamindar of Chikati who in the year 1912 filed a suit for maintenance and obtained a decree granting him maintenance at Rs. 500 a month from the date of his plaint and future maintenance to date from 1st May 1912. For some years, apparently, this maintenance was paid without any need for the appellant to have recourse to execution, but after 1923 for some years the appellant's case was that he had frequently to file execution petitions and therefore realized his maintenance only after considerable delay. He accordingly filed the present suit, O. S. No. 32 of 1929, to recover from the defendant interest upon the amounts of maintenance which he had thus realized in execution. The principal defence to his suit was based upon S. 34 (2), Civil P. C. which runs as follows:

> Where such a decree (i. e. a decree for the payment of money) is silent with respect to the payment of further interest on such aggregate sum as aforesaid. . . . . the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

The learned District Judge of Ganjam upheld this plea and dismissed the suit. Hence the present appeal. In appeal it has been argued that S. 34 does not apply to the present decree partly because the decree directs the payment of money in the future as well as money immediately rendered due by the decree and partly because the decree creates a charge. We are unable to see how either of these two peculiarities in the decree make any real difference between it and an ordinary decree for money. What the plaintiff was asking for and what the decree granted him was certainly a relief in money. This is not a decree to enforce a charge. It merely creates a charge as an additional security or method by which the decree-holder can enforce his decree. We have also been referred to certain rulings, which incidentally have been elaborately discussed by the learned District Judge. One of these is 3 Cal 602[1] where their Lordships of the Priyy Council hold that they see no reason why a suit should not lie for the realization of subsequent interest which is not granted by a decree. This decision however was passed at a time before any provision analogous to the present S. 34(2) had been enacted, and in our opinion can for that reason afford us very little assistance, apart altogether from the fact that it was not necessary for the decision of that case for the particular passage in question to have been incorporated in the judgment. It is quite clearly obiter dictum. We have then been referred to a judgment reported in 53 Cal 42.[2] That judgment no doubt is in one sense of the word directly in point because it deals with a decree for maintenance in which no provision for interest was made and it is held that a decree-holder attempting to execute such a decree cannot recover interest in execution. The learned Judges of the Calcutta High Court then go on:

1. Seth Gokul Dass Gopal Dass v. Murli, (1877) 3 Cal 602=5 I A 78=2 C L R 156=3 Sar 802 (P C).
2. Naresh Chandra Bose v. Krishna Bhobini Dasi, (1926) 13 A I R Cal 505=94 I C 997=53 Cal 42.

The decree-holder must pursue the proper remedy which is by bringing a suit for damages for detention of the decretal amount.

Here again it is in our opinion unnecessary to have made such a pronouncement in order to have disposed of the case. All that was necessary to say was that any attempt to obtain interest in execution must fail. We do not understand the learned Judges to have considered the question carefully as to whether the alternative remedy by suit was maintainable or not. In any case there is in 53 Cal 42[2] no reference at all to S. 34 (2) which in our opinion would provide a complete answer to the obiter dictum to be found in the judgment. We are therefore without any assistance at all from any of the rulings as to the interpretation of S. 34 (2) and we must return to our own first impression that the section obviously applies to a decree of this kind which is essentially a decree for money. We are of opinion therefore that the learned District Judge was right in holding that the appellant's suit was not maintainable and this appeal must be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 523

VENKATARAMANA RAO AND
ABDUR RAHMAN JJ.

Chatlapalli Suryaprakasa Rao—
Appellant.

v.

Polisetti Venkataratnam and others —
Respondents.

Appeal No. 263 of 1936, Decided on 10th December 1937, against order of Sub-Judge, Coconada, D/- 12th October 1935.

Decree — Execution — Instalment decree— In case of default of two successive instalments whole decretal amount to be recovered — Decree not providing to whom money was to be paid — Default in first instalment — Judgment-debtor on date previous to fixed date obtaining chalan and fixed day being holiday paying second instalment in Bank on next day —Judgment-debtor held did not commit default in two successive instalments.

A compromise decree provided that the decretal amount should be paid in certain yearly instalments on certain fixed date of each year. The decree further provided that in case of default of two successive instalments the whole decretal amount should be recovered. The decree however did not provide to whom the money was to be paid. The judgment-debtor failed to pay first instalment. On a day previous to that on which the second instalment was due he obtained a chalan. The day on which the instalment was due being a holiday he paid the instalment next day in the Bank :

Held that in these circumstances the judgment-debtor did not commit default in payment of the second instalment and consequently there was no default of two successive instalments.

[P 524 C 1]

D. Narasaraju—*for Appellant.*

A. Satyanarayana—*for Respondents.*

Venkataramana Rao J.—The question involved in this appeal is whether the defendants-judgment-debtors committed default in payment of the instalments due and payable under the compromise decree obtained by respondent 1, decree-holder in this case. The decree was passed on 19th July 1932 in and by which it was provided that the amount due and payable under the decree should be paid in six instalments of Rs. 1000 each with interest at 6 per cent. on the decree amount, the first instalment falling due on 30th September 1933 and thereafter the instalments to be paid on the said date each year. It also provided that the amounts paid on the said date each year should be entered upon the decree and that if for any reason any two successive instalments are not paid the balance due with interest at the said rate should be recoverable from the defendants personally and from the properties charged under the said decree. The defendants failed to pay the first instalment on 30th September 1933. When the due date of the second instalment, i. e. 30th September 1934, was about to expire, on 29th September 1934 the defendants obtained a chalan. 30th September 1934 happening to be a Sunday, the money was paid into the Bank on 1st October 1934. The question therefore is whether owing to the non-payment of the amount on 30th September 1934 the defendants could be said to have committed default in payment of the second instalment and therefore committed default in the payment of two successive instalments in order to entitle the plaintiff-decree-holder to execute the decree for the entire amount payable thereunder. From the provisions of the decree above mentioned it will be seen that no provision is made as to whom the money is payable. All that the compromise decree provides is that the money under the decree shall be payable in certain instalments. Under O. 20, R. 1, all money payable under the decree shall be paid (a) into the Court whose duty it is to execute the decree or (b) out of Court to the decree-holder, or (c) otherwise as the

Court which made the decree directs. Clause (c) has no application to this case. Therefore the only clauses that do apply are clauses (a) and (b). The judgment-debtors have therefore the option either to pay the amount of the instalment into Court or out of Court to the decree-holder. In this case the judgment-debtors have exercised the option of paying the amount into Court and they are perfectly entitled to do so. The due date provided in the decree for the payment of the second instalment happening to fall on a Sunday they were entitled to deposit the amount the next day. Therefore the judgment-debtors could not be said to have committed any default in the payment of the second instalment. There is therefore no default as provided in the decree and no forfeiture incurred in order to entitle the plaintiff to execute the whole decree. We therefore set aside the order of the lower Court directing execution of the decree for the entire balance payable thereunder. But in the circumstances of this case we direct each party to bear his or their own costs of this appeal.

The order passed by us has reference to a state of facts which existed on the date of the order of the lower Court and will not affect any subsequent default committed by the judgment-debtors.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 524

PANDRANG ROW J.

In re Periaswami Goundan
Petitioner.

Criminal Revn. Cases Nos. 577 and 579 and Petns. Nos. 543 and 545 of 1937, Decided on 21st January 1938, from order of the Sub-Magistrate of Kangayam.

Madras Local Boards Act (14 of 1920), S. 223—Prosecution sanctioned by President—Complaint filed by section officer—Subsequent application by section officer to withdraw prosecution — Section officer held competent to apply for withdrawal.

A prosecution under the Madras Local Boards Act was sanctioned by the President, District Board, and a complaint accordingly was filed by the section officer. The section officer subsequently applied for the withdrawal of the prosecution but the Magistrate rejected the application on the ground that as the prosecution was originally sanctioned by the President, he alone could withdraw the complaint and hence the section officer had no power to withdraw the complaint :

Held that the order of the Magistrate was wrong. S. 223 did not refer to withdrawal of legal proceedings but only to their initiation. So far as the withdrawal of the prosecution was concerned the authority for withdrawal was conferred not by the Local Boards Act but by the Criminal Procedure Code. The complainant in the case was the section officer and he was competent to apply for the permission to withdraw the case. [P 524 C 2]

V. T. Rangaswami Ayyangar and K. Desikachariar — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—One of these petitions is to set aside the order of the Sub-Magistrate dismissing the petition presented by the accused praying that the complaint against him should be dismissed and he should be acquitted because there was no valid complaint against him as contemplated by S. 223, Local Boards Act ; in the other petition the order sought to be revised declined to allow the case to be withdrawn as prayed for by the section officer who filed the complaint on the ground that he had no power to withdraw the case as the prosecution was sanctioned by the President, District Board. It is clear from this statement of the facts that both the parties, namely the prosecution and the accused desire to put an end to the case but the Magistrate without giving any other reason than that the section officer had no power to withdraw the complaint has declined to put an end to the case according to the desire of both the parties. The Sub-Magistrate treated the section officer as the complainant both by examining him in support of the prosecution and also in his order on the petition for dismissing the complaint holding that the section officer who was examined by him was the complainant. The view of the Magistrate that because the prosecution was originally authorized or sanctioned by the President, District Board, only the President, District Board, can withdraw the complaint is not correct, because S. 223, Local Boards Act does not refer to withdrawal of legal proceedings but only to the initiation of legal proceedings.

So far as the withdrawal of the prosecution is concerned that is to say in cases instituted under the Local Boards Act, the authority for withdrawal is conferred not by the Local Boards Act but by the Criminal Procedure Code. In this case the authority is conferred by the Criminal Procedure Code on the complainant. The complainant in this case was the section officer and he was competent to apply for permission to withdraw the case.

As the learned Sub-Magistrate refused to grant permission not on the merits but on the ground that the section officer had no power to withdraw I see no reason why the permission should not have been granted. The order of the Magistrate has not expressly refused to grant permission but he has merely stated in his order that the section officer has no power to withdraw the case as the prosecution was sanctioned by the President, District Board. This view in my opinion is not justified by the circumstances of the present case and it is unnecessary in the circumstances to remit the case again to the Sub-Magistrate for fresh disposal. There is no reason why the permission should not be granted, and permission is hereby granted for withdrawing the case. The petitioner in these two petitions is one and the same. He is therefore acquitted.

C.R.K./D.S. *Petitioner acquitted.*

A. I. R. 1938 Madras 525

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

Raja Srimathu Muthu Vijaya Raganatha Doraisingam — Appellant.

v.

Karuthan Ambalam and others — Respondents.

Appeal No. 155 of 1932, Decided on 29th September 1937, against decree of Sub-Judge, Sivaganga, in O. S. No. 10 of 1928.

Deed — Construction — Grant — Terms not clear—Inconsistency between different parts of document — Circumstances prior and subsequent to grant may be looked at to discover whether any portion of instrument amounts to falsa demonstratio.

No doubt in a case where the boundaries are undisputed or can be definitely ascertained, the extent which is obviously wrong according to the boundaries can be deemed to be a *falsa demonstratio* and therefore ignored. But where the terms are not clear and unambiguous and there is some inconsistency between different parts of the same document the only way of solving the ambiguity, if any, is to look at the surrounding circumstances, namely the circumstance which led to the grant, and the circumstances subsequent to the grant in order to discover whether any portion of the instrument amounts to a *falsa demonstratio*: *(1906) A C 92 and (1919) A C 533, Rel. on.*

[P 526 C 1, 2]

K. Kuttikrishna Menon — *for Appellant.*

K. S. Venkatarama Iyer — *for Respondents.*

Pandrang Row J.—This is an appeal from the decree of the Subordinate Judge of Sivaganga dated 23rd October 1931 in O. S. No. 10 of 1928. The plaintiff therein was the zamindar of Sivaganga represented by the Estate Collector, Sivaganga, and he sued for a declaration that only plots 1, 2 and 3 as marked and described in Sch. A to the plaint and shown in the plaint plan constitute the lands granted on cowle by him to defendant 1 on 1st February 1916 and that the lands described in Sch. B of the plaint are not so included and belong to the plaintiff and that they were wrongly demarcated by the survey authorities as part of the holding of defendant 1. The plaintiff therefore prayed for correction of the survey register and for recovery of possession of such portions of the lands in Sch. B as had been encroached upon by the defendants after removal of the structures thereon, such portions being particularly marked and shown in Sch. C of the plaint. At all material times, the zamindari was under the management of the Court of Wards and negotiations for the grant of a cowle started early in 1908 with an application by defendant 1 on his own behalf and on behalf of several other ryots for the purpose of building houses for himself and the ryots. After inspection by one of the Estate Officials and measurement of the plots a sketch was prepared which was signed by defendant 1 and it was ascertained that three plots measuring respectively 9-6-0, 27 and 2 kurukkams (1 kurukkam =0.56 acre), respectively should be assigned on cowle to the ryots.

It is alleged that in November 1910 the Collector and agent of the Court of Wards sanctioned the assignment of these plots on payment of nazar calculated at so much per kurukkam, the rates being different for the different plots. The deed or cowle was however not executed till February 1916. The plaintiff's case was that what was actually conveyed and intended to be conveyed was the specific area of 38 odd kurukkams situated in three plots and not all the land that was included in the boundaries which were also mentioned in the description of the property in the cowle deed. This allegation of the plaintiff was disputed by the defendants and that forms the main controversy in the suit, namely what was the land that was conveyed by the deed of 1916, Ex. B. The learned Subordinate Judge has decided the

controversy in favour of the defendants, and the plaintiff appeals. The only point that has been argued in this appeal is the point referred to above, namely the actual extent of land that was conveyed by the cowle deed of February 1916. Unfortunately in this case the lower Court does not appear to have given sufficient consideration to all the evidence in the case and directed its mind to all the considerations that arise in deciding a dispute of this kind. No doubt in several places the learned Subordinate Judge observes that on a consideration of the entire documentary and oral evidence he has come to a certain opinion; but these general words may amount to nothing more than an unmeaning formula, and we are not satisfied that the learned Subordinate Judge considered the evidence with that amount of care which the importance of the case demanded. We have therefore had to go into all the details of the evidence ourselves and study the various plans filed in this case with some care. Before going into the details of the evidence it is perhaps desirable to say a few words on the question of law that was touched upon in the argument. A reference was made to 41 Cal 493[1] and 53 Bom 230,[2] on behalf of the respondents for the purpose of showing that it was not permissible to construe the cowle deed in the light of what happened before the actual deed was granted.

The learned Subordinate Judge relied on 41 Cal 493[1] in coming to the conclusion that the negotiations which led up to the grant of the cowle would not be evidence in a case where the question to be decided was the construction of the terms of the deed itself. It is however necessary to point out that 41 Cal 493[1] was a case where the boundaries were perfectly clear, three of the boundaries being the boundary lines of three different mouzas as per thak, the remaining fourth boundary being the boundary of another plot granted to another person. There was thus no difficulty in that case and no dispute even as to what the exact boundaries were. No doubt in a case where the boundaries are undisputed or can be definitely ascertained, the extent which is obviously wrong according to the boundaries can be deemed to be a *falsa demonstratio*, and therefore ignored. In the other case, 53 Bom 230,[2] the position was indeed more clear. The question there arose whether what was granted was a yearly sum of money (Rs. 4000) out of the two villages, Juhu and Vile Parla in the neighbourhood of Bombay, or the two villages themselves. The grant was very clear that it was in respect of the two villages named therein and it was admitted in that case that before this deed what was being given was a money payment and it was obviously the intention of the parties to substitute the previous money payment by something else. It was therefore held in the circumstances of the case that it was not open to the Government to rely on the previous correspondence which led up to the grant and to contend on the strength of such correspondence that what was really intended to be given was not the two villages but only a sum of money payable every year. It would therefore appear that these decisions will not give much assistance in deciding the controversy in this appeal. In construing the terms of a document, it is permissible not only to look at the terms of the document but also to the surrounding circumstances with a view to discover the intention of the parties as expressed in the deed. Thus, where the terms are not clear and unambiguous and there is some inconsistency between different parts of the same document the only way of solving the ambiguity, if any, is to look at the surrounding circumstances, namely the circumstance which led to the grant, and the circumstances subsequent to the grant in order to discover whether any portion of the instrument amounts to a *falsa demonstratio*.

The general question has been dealt with in (1906) A C 92,[3] and in a subsequent case (1919) A C 533,[4] in which the previous authorities have been reviewed. In the later case their Lordships of the Privy Council laid down the principle that even in the case of a modern instrument in which there is a latent ambiguity evidence may be given of user to show the sense in

1. Durga Prasad Singh v. Rajendra Narayana Bagchi, (1913) 41 Cal 493=21 I C 750=40 I A 223 (P C).
2. Bomanji Ardeshir v. Secretary of State, (1929) 16 A I R P C 34=114 I C 1=56 I A 51=53 Bom 230 (P C).
3. Van Dieman's Land Co. v. Table Cape Marin Board, (1906) A C 92=75 L J P C 28=93 L T 709=54 W R 498=22 T L R 114.
4. Watcham v. East Africa Protectorate, (1918) 5 A I R P C 280=(1919) A C 533=87 L J P C 150=34 T L R 481=120 L T 258.

which the parties to it used the language they have employed and their intention in executing the instrument as revealed by their language interpreted in this sense. They have laid down the further principle that even where the ambiguity was not latent but patent the same principle would apply, though without in any way conflicting with the well established principle that where the terms of a deed are clear and unambiguous the parties, whatever their intention, in fact, may have been, on entering into it are bound by its terms, and extraneous evidence cannot be received in explanation of it. In the case before us while no doubt the events which led up to the grant which is said to have been made in 1910 though not evidenced by any deed would appear to show that the intention of the parties was that only 38 odd kurukkams of land as delineated in the plan Ex. U were to be granted to defendant 1 and the other ryots, nevertheless there is not sufficient evidence to show that what was actually intended to be granted by the deed of February 1916 was only what was intended to be granted in 1910. No doubt the deed recites a letter of the agent of the Court of Wards of 8th November 1910; but that letter has not been produced by the plaintiff though referred to in the plaint and also referred to in defendant 1's written statement.

It was defendant 1's contention in the written statement that even according to what was granted to him in 1910 he was entitled to all the lands that are now claimed by him. It is possible that during this interval between November 1910 and February 1916 something might have happened which led the plaintiff's officials to grant more than what was originally granted or intended to be granted in 1910. That this is not a mere possibility is shown by the fact that a suit had been instituted in 1914 by one Palaniappa Chetti against the present plaintiff and defendant 1 in respect of the western portion of the land now claimed as part of plot 1 by defendant 1. It is extraordinary to find that even in the plaint the history of the events which led up to the grant shows a hiatus in more than one place. In para. 5 of the plaint, the history is taken up to 4th May 1908 when a sketch was prepared and statements were recorded. What happened thereafter till November 1910 is passed over in silence. As a matter of fact this silence as to the events that took place between 1908 and 1910 is suggestive; because, during this interval what happened was that though at first there was the idea of granting a cowle to defendant 1 and his fellow ryots subsequently the Court of Wards decided to sell the plots in public auction and actually sold them in public auction and one of the purchasers therein was the plaintiff in the suit of 1914. It is therefore obvious that before the Court of Wards decided to assign the lands to defendant 1 and the other ryots in November 1910 there was this difficulty in the way of the Court of Wards in making the grant brought about by these sales in auction to certain Chetti purchasers; and it is certainly possible that this difficulty might have led the Court of Wards to grant more than what was originally intended. In any case the order of the Collector and agent to the Court of Wards dated 8th November 1910 has not been produced and it is impossible to say in its absence what exactly was granted or intended to be granted by that order.

No satisfactory explanation is forthcoming for the omission as to why this important letter has not been produced in evidence. It is not alleged that it is not available. All that is alleged is that this omission might have been due to carelessness or a belief that it was unnecessary on the part of the legal advisers of the plaintiff in the Court below. The plea of carelessness is not, at its best, a plea entitled to much weight and when the circumstances are such that it is difficult to be certain that the plea of carelessness is not put forward in order to cover up a deliberate omission ; it is impossible to overlook an important omission of this kind. It is prima facie not likely that the legal advisers of the plaintiff would have failed to perceive the importance of filing this document in evidence, which was relied upon by defendant 1 also in his written statement. It is certainly not open to the plaintiff-appellant in these circumstances, i. e. in the absence of the letter in question, to contend that that letter conveyed exactly what was described in the plan Ex. U and no more. It may be mentioned in this connexion that no application was made at the time of the filing of the appeal or subsequently for permission to file this letter or order as additional evidence. The other hiatus in the plaint refers to the interval between November 1910 and February 1916.

During this interval the suit had been filed by one of the Chetti purchasers as mentioned already, and in that suit and in the defence of that suit the present plaintiffs and the present defendant 1 who were both defendants in that suit appear to have made common cause. It is possible therefore that this co-operation in the defence of that suit might have led the plaintiff to agree to give more than what was originally intended when the deed was actually executed in 1916. It is therefore not possible to say from a consideration of the events that led up to the grant that the intention of the parties was clearly to the effect that only the extent of 38 odd kurukkams as noted in the original plan Ex. U was to be granted and no more.

If really that was the intention nothing would have been easier than to affix the plan Ex. U or a copy of it to the grant Ex. B or to refer to that plan in describing the land that was granted. This was not done; and no reasonable explanation for this omission is forthcoming. It is not as if the plaintiff's zamindari was not well served, for it was under the management of the Court of Wards with an officer of the I. C. S., on the spot as Estate Collector; and it is difficult to believe that those who advised the plaintiff when the deed was executed in February 1916 would not have suggested a reference to the plan if the intention had been to grant only the plots as shown in the plan. On the contrary, there is the fact that in the cowle itself there is a specific provision as to what should happen if and when it is found that there is a greater extent included in the boundaries mentioned in the cowle. The fourth clause of the grant Ex. B runs as follows:

> If it is at any time found that the raiyat is in possession of larger extent than the said 38-6-0 kurukkams of land the raiyat shall pay to the landholder for such excess within the boundaries specified hereunder proportionate rent at the rate aforesaid, but shall make over free and unencumbered to the landholders the entire excess beyond the boundaries with damages of rent at the market rate for three faslis prior to the date of such discovery.

It is therefore provided in the deed as to what should happen if there were more extent found within the boundaries and without the boundaries mentioned in the deed. If the excess were within the boundaries the grantee was to enjoy the land on condition of paying rent for the excess area; if the excess were outside the boundaries he took nothing and had to hand over such excess to the grantor. This seems to indicate that the intention of the parties was that the boundaries were to be looked to for the purpose of deciding what was the land that was granted or the land to which the grantee would be entitled under the grant; in other words clause 4 of the deed shows that, whatever the extent of the land intended to be granted by the cowle might be, the entire extent of land within the boundaries given in the cowle was to be held by the grantee subject only to the condition that, if that extent was in excess of 38-6-0 kurukkams, rent should be paid for the area in excess; it is only if excess was found outside the boundaries, or, in other words, where the grantee had encroached beyond the boundaries upon the land of the grantor the grantee was bound to hand over possession of such excess with damages to the grantor. Ex. B, the grant, describes the land in clause 1 as follows:

> The Kudi right in the holding comprised within the boundaries hereunder mentioned in the village of Devasthanam Kattunachi, hamlet of Ayan Siruvayal village, Tirupathur Taluk, and measuring 38-6-0 kurukkams of dry lands has been assigned to the said ryot under the orders of the Collector of Ramnad and agent to the Court of Wards R. O. C. No. 639 Cor. of 1910 and 8-11-1910 for a consideration of Rs. 2480-10-0, subject to an annual rent of rupee one per kurukkam.

The third clause provides that the

> ryot shall enjoy the said land permanently at his own will and pleasure by using the same for agricultural horticultural and house building purposes.

At this point the comment may be made that where as 38 odd kurukkams were originally intended to be granted for building purposes only, the cowle mentions agricultural and horticultural purposes also in addition. The boundaries are described fully in the schedule and these will be considered when we come to deal with the case relating to each of the three plots. One general observation may be made before dealing with the case as regards each of the three plots, and that is, while some of the boundaries are very clear being well defined physical boundaries others are most uncertain and vague, and unfortunately in each of these three plots one of the boundaries and that one which matters most is undefined; for instance, in plot 1 the eastern boundary is described as Panni Vilundan Pallam, in other words, the pond or mire in which pigs use to wallow; in plot 2 the eastern boundary which is most material is described as a single palmyra tree; in plot 3 the western boundary, also

material, is described as an oil mill. (The judgment then dealt with the evidence relating to each of the plots, fixed their boundaries and then proceeded further.) The decree of the lower Court will therefore be modified as indicated above. In other respects the decree is confirmed and the appeal fails. The appeal abates as against respondents 2, 4, 12, 20 and 23 and so far as they are concerned the appeal is dismissed. As the appeal succeeds only in part, and that too mainly as against respondent 1, we direct that half the costs in this appeal of the contesting respondents, one set, be paid by the appellant, and that the appellant do get half his costs of this appeal from respondent 1.

C.R.K./D.S. *Decree modified.*

A. I. R. 1938 Madras 529

PANDRANG ROW J.

In re Gorrepaty Ramasubbayya

Petitioner.

Criminal Revn. Cases Nos. 21 and 22 of 1938 and Criminal Revn. Petns. Nos. 21 and 22 of 1938, Decided on 26th January 1938, from order of Sub-Divisional Magistrate, Bandar, D/-8th November 1937.

Criminal Trial — Practice — Calendar cases triable by First Class Magistrate — He cannot transfer them to Second Class Magistrate with direction to treat them as preliminary register cases even if calendar cases are counter to preliminary register cases and even if facts are complicated.

Calendar cases triable by a First Class Magistrate cannot be transferred to a Second Class Magistrate with a direction to treat them as preliminary register cases, with the intention of committing them to the Sessions Court for trial, even if such calendar cases are counter cases to preliminary register cases or that the facts of the calendar cases are complicated. His order of transfer of such cases to Second Class Magistrate practically amounts to a refusal to exercise his jurisdiction and to perform his duty. If he thinks that the cases should be tried by the Sessions Court, he should proceed to commit them to the Sessions Court under S. 347, Criminal P. C. : *A I R 1933 Mad 367 and 1934 M W N (Cr R) 56, Referred.*

[P 529 C 2; P 530 C 1]

K. S. Jayarama Aiyar and G. Gopalaswami — *for Petitioner.*

A. S. Sivakaminathan — *for the Crown.*

Order. — These petitions seek to revise the orders of the Sub-Divisional Magistrate of Bandar dated 8th November 1937, transferring P. R. C. No. 1 of 1937 from his file to the file of the Sub-Magistrate of Avanigadda for disposal and also transferring C. C. Nos. 63 and 65 of 1937 on his file to the Sub-Magistrate with directions to treat the latter cases as preliminary register cases, hold a preliminary enquiry and dispose of them according to law. So far as the transfer of P. R. C. No. 1 of 1937 is concerned, the petitioners do not take any objection but they take very serious objection to the transfer of the calendar cases which are triable by a First Class Magistrate to a Second Class Magistrate with a direction to treat them as preliminary register cases, the intention of such transfer being that the cases should be committed to the Sessions Court for trial. The petitioners are the accused in these calendar cases. It is not stated by the learned Sub-Divisional Magistrate that the offences disclosed in the calendar cases are so serious that he cannot give adequate sentences. He was under the misapprehension that these cases were in the nature of counter cases to P. R. C. 1 of 1937, a case of murder. As a matter of fact, it does not appear that they are really counter cases in the true sense of the term. They relate to an occurrence which took place at a different spot and subsequent to the murder. They may be connected with the murder case but they do not put forward a different version of the occurrence which forms the subject-matter of the murder case. Even if they were counter cases to the murder case, the order of the Sub-divisional Magistrate transferring these calendar cases which are triable by him to the Second Class Magistrate for the purpose of being committed to the Sessions Court was not proper. It is enough in this connexion to refer to 1933 M W N 98[1] and 1934 M W N Cr R 56.[2]

The other reason given by the learned Sub-divisional Magistrate, viz. that the facts of the calendar cases are complicated is certainly not a reason which can possibly justify the order. If the facts are complicated, the First Class Magistrate must be more competent to deal with them than the Second Class Magistrate, and in any case it is not alleged that the facts are too complicated for the First Class Magistrate to disentangle. The learned Sub-divisional Magistrate had really no power to direct the Sub-Magistrate to treat the calendar cases

1. Chinnaswami Nadar v. Emperor, (1933) 20 A I R Mad 367=1933 Cr C 550 = 141 I C 639 = 56 Mad 159 = 64 M L J 150 = 34 Cr L J 175 = 1933 M W N 98 (F B).
2. Majj Paidanna v. Emperor, (1934) M W N (Cr R) 56.

which were triable by a First Class Magistrate as Sessions cases. If he thought that those cases ought to be tried by the Court of Session he should have proceeded himself to commit them to the Sessions Court under S. 347 Criminal P. C. His order practically amounts to a refusal to exercise his jurisdiction and to perform his duty.

The learned Sub-divisional Magistrate makes a passing reference to the extra revenue work entailed upon him and the fact that he has no time for criminal work, and it is possible that it was this reason that led him to send back to the Sub-Magistrate P. R. C. No. 1 of 1937 which his predecessor has taken up. The learned Sub-divisional Magistrate must know that whether the facts are complicated or not, the cases which are triable by him must be heard by him and the work should not be transferred in the manner in which it has been done to the Sub-Magistrate. The order so far as it relates to the transfer of C. C. Nos. 63 and 65 of 1937 is set aside. The Sub-divisional Magistrate must get back the records in these cases from the Sub-Magistrate and dispose of the cases himself according to law.

C.R.K./D.S. *Order set aside.*

---

* A. I. R. 1938 Madras 530

PANDRANG ROW J.

In re Kumaraswamy Reddiar

Appellant.

Appeal No. 5 of 1938, Decided on 27th January 1938, against appellate order of District Judge, Madura, D/- 4th December 1937.

*** Civil P. C. (1908), S. 55 (4) — Certain persons executing surety bond undertaking to produce judgment-debtor on particular day— Mere fact that judgment-debtor is ill, does not absolve sureties from their liability, when his illness is not such as to render his appearance in Court physically impossible — Obligation under bond can be successfully avoided only by reasons akin to vis major.**

Where certain persons execute a surety bond undertaking to produce a judgment-debtor in the Court on a particular day, the mere fact that the judgment-debtor is suffering from fever on that day, does not absolve them from their liability, when the illness of the judgment-debtor is not so serious as to render his appearance in Court physically impossible, and when the bond does not provide for a contingency of this kind. The obligation under the bond can be successfully avoided only by reasons akin to *vis major* : *A I R 1922 All 390, Ref.* [P 530 C 2 ; P 531 C 1]

K. V. Srinivasa Iyer — *for Appellant.*

Judgment.—This is an appeal from the order of the District Judge of Madura dated 4th December 1937, in A. S. No. 75 of 1937 dismissing the appeal from the order of the District Munsif of Madura dated 27th February 1937. The appellants were sureties who undertook to produce the judgment-debtor in O. S. No. 320 of 1934 in Court on 1st October 1936. There is no doubt that they failed to produce the judgment-debtor on that date. Thereupon the executing Court directed execution to issue against them for enforcing the bond. The excuse put forward by the sureties for the non-production of the judgment-debtor in question was that he was suffering from fever and therefore was unable to appear in Court on the date fixed by the Court. The first Court was of opinion that this did not absolve the sureties from their liability especially in view of the fact that they did not appear in Court on 1st October and ask for further time to produce the judgment-debtor on account of the illness of the judgment-debtor. On the other hand, they were themselves absent on that date and offered no explanation for the non-production of the judgment-debtor. The learned District Judge, on appeal was of opinion that though personally he would have been willing to follow the decision of the Lahore High Court in A I R 1929 Lah 479,[1] the decision of a Bench of the Allahabad High Court reported in 44 All 174[2] was of greater authority.

He further stated that, even though it was permissible for him to follow the view of the single Judge of the Lahore High Court, he could not decide in favour of the appellants unless it was established by them that it was physically impossible for the judgment-debtor to appear in Court on the date fixed owing to illness. He observed that the evidence of the village physician who treated the judgment-debtor was to the effect that he was able to move about though suffering from fever and that this was not a case where the production of the judgment-debtor was an impossibility. As observed by the learned District Judge, it might have been inconvenient to produce him but the surety bond did not provide for a contingency of this kind that is to say, of illness which was not so serious as to render the appearance of the

1. Sardar Singh v. Imperial Bank of Rawalpindi Ltd., (1929) 16 A I R Lah 479=117 I C 910.
2. Rameshwar Das v. Sri Lal, (1922) 9 A I R All 390=65 I C 374=44 All 174=19 A L J 968.

judgment-debtor physically impossible, and he was of opinion that the obligation undertaken by the appellant could be successfully avoided only by reasons akin to *vis major*, the death of the judgment-debtor, civil commotion, etc. I am of opinion that the view of the learned District Judge is right and that this is not a case in which the sureties are not bound by the obligation which they incurred by executing the bond. The bond itself does not contain any provision which absolves them from the obligation in a contingency of the present kind, that is to say, when the judgment-debtor is ill, but not so ill that his production in Court is impossible. As observed by the learned District Judge, the attitude of utter indifference adopted by the sureties from 1st October 1936 onwards is such that they do not deserve that the law should be stretched to any extent in their favour. I therefore see no reason to interfere in second appeal with the order of the District Judge. The second appeal is therefore dismissed. Leave to appeal is refused.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 531

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Pichai Pillai Udayan — Appellant.

v.

Subbaraya Pillai and another — Respondents.

Letters Patent Appeal No. 90 of 1936, Decided on 27th January 1938, against Judgment of King J., *reported in A I R 1937 Mad 148.*

(a) Registration Act (1908, as amended in 1929), S. 17 (2) (vi) — Magistrate passing order in inquiry under S. 145, Criminal P. C. as result of compromise between parties and contained in their statements that one party had created mortgage of certain property in favour of other—Order passed prior to amendment of S. 17 (2) (vi) in 1929 — Suit instituted on basis of mortgage — Suit held maintainable — Order of Magistrate along with statements of parties, being exempt from registration prior to 1929 held admissible in evidence.

During an inquiry under S. 145, Criminal P. C. a Magistrate passed an order as a result of a compromise arrived at between the parties and contained in their statements to the effect that one of the parties had created a mortgage in respect of certain properties in favour of the other. The order was passed on 2nd February 1928, i. e. prior to amendment of S. 17 (2) (vi), Registration Act, in 1929 and was meant to be read along with the statements of the parties. The person in whose favour the mortgage was created brought a suit for sale of the properties covered by the mortgage :

Held that the suit was maintainable. The order of the Magistrate along with the statements of the parties having been excepted from registration before the amendment of 1929, were admissible in evidence and could be relied on by the plaintiff in support of his case. [P 532 C 1]

(b) Words and Phrases — "Lodge" — Meaning of.

The word "lodge" when used in regard to Courts is usually meant to convey a deposit of a formal document of information or complaint, etc. [P 532 C 1]

T. S. Raghavachary — *for Appellant.*

M. Patanjali Sastry — *for Respondents.*

Abdur Rahman J. — This is an appeal filed by the plaintiff, who had instituted a suit for sale of certain properties on the allegation that a mortgage or charge was created in his favour, under either an oral award or in consequence of certain statements and proceedings in a Criminal Court, when defendant 1 had filed a complaint against him under S. 145, Criminal P. C. The suit was decreed by the District Munsif of Ariyalur on the basis of the alleged oral award. The decision was affirmed on appeal by the Subordinate Judge of Trichinopoly, although not on the ground which had found favour with the District Munsif, but on the basis of statements made by the plaintiff and defendant 1 before the Magistrate to whom the complaint under S. 145, Criminal P. C. was sent for an inquiry. On an appeal to the High Court, our learned brother King J. took the view that the statements relied on by the plaintiff did not merely create a charge but a mortgage, which could not however be given effect to as they were inadmissible in evidence for want of registration. The appeal was therefore accepted by him and the suit dismissed. The plaintiff now appeals under the Letters Patent and the only question which has to be decided is whether a mortgage had come into existence which was legally enforcible. In view of the assumption that we have made as held by King J. that a mortgage as distinguished from a charge was created by the statements of parties made on 30th January 1923 (Ex. D) it could not be seriously disputed that if they were the only basis of this action, there would be no force in this appeal. The Subordinate Judge's order, although well considered, was rightly set aside on this ground. The real question however relates to the effect of the order of the Sub-divisional Magistrate

which he had passed in consequence of the compromise arrived at between the parties and contained in their statements.

Before we advert to that order in any detail, it might be stated that the order was passed on 2nd February 1923 (Ex. G-1) before S. 17 (2) (vi), Registration Act was amended in 1929 and the law as it stood before the amendment would have to be applied to the facts of this case. This position was admitted by the respondent's counsel although so far as this case is concerned the position would not have been different, if the orders were passed by the Magistrate after 1929 as the order made by him comprised no other property than that which was the subject-matter of the proceedings before him.

Coming now to the order passed on 2nd February 1923, it appears, as already stated, that this was passed by the Sub-divisional Magistrate after he had received the statements, made by the parties (Ex. G) and when he was satisfied that there was no further fear of the breach of peace. The order has been expressed in one compressed word "lodged"; but the word is pregnant and must have been meant to convey a good deal more than a mere order of dismissal. The word "lodge" when used in regard to Courts is usually meant to convey "a deposit of a formal document of information or complaint, etc." (See Oxford English Dictionary). Applying this meaning to the facts of this case, it appears to us that it was meant to incorporate the statements made by the parties and to convey that in view of those statements it was unnecessary to proceed any further. We are strengthened in this interpretation by the fact that without referring to the statements the order is incomplete and indeed incomprehensible.

It need hardly be repeated that an order of the Court was excepted from registration without any qualification before the amendment of 1929, and being thus admissible in evidence can be relied upon by the plaintiff in support of his case. This was the only ground on which the plaintiff's suit was dismissed by our learned brother King J. In view of our finding that the orders passed by the Sub-divisional Magistrate should be taken to incorporate the statements of parties, the judgment under appeal must be set aside and the decree of the Subordinate Judge restored. We order accordingly. The respondent will bear the plaintiff's costs both in this Court and in the second appeal.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 532

KING J.

S. M. R. Shanmughan Chettiar and another — Appellants.

v.

Official Receiver, West Tanjore — Respondent.

Second Appeal No. 613 of 1933, Decided on 30th November 1937, against decree of District Court, Coimbatore, in A. S. No. 145 of 1932.

Limitation Act (1908), Art. 62 — Assignment of decrees subsequently annulled on insolvency of assignor — Suit by Official Receiver against assignee for recovery of money received by assignee in execution of decrees assigned — Suit is governed by Art. 62 even in respect of money received by assignee between date of assignment and date of annulment.

If a man receives money which, at the time he receives it, he is legally entitled to receive he can still be said to be receiving it for the use of some one else who may subsequently be declared to be entitled to the money by some judicial decision: *A I R 1915 Mad 405; A I R 1929 Mad 409 and A I R 1935 Mad 354, Rel. on.* [P 533 C 1]

Where therefore an assignment of decrees made by a person is subsequently annulled on his becoming insolvent and the Official Receiver brings a suit against the assignee of the decrees for recovery of the money received by him in execution of the decrees, the suit is governed by Art. 62 even in respect of money received between the date of assignment and the date of annulment. No distinction can be drawn between the period from the date of assignment to the date of annulment and the period subsequent to the date of annulment.

[P 532 C 2; P 533 C 1, 2]

K. Rajah Iyer — *for Appellant.*

K. S. Desikan — *for Respondent.*

Judgment.—On 31st October 1922 one Swaminatha Chettiar was adjudicated an insolvent on a petition presented by a creditor of his on the preceding 24th April. On 31st March 1922 the insolvent had assigned a number of decrees to the appellant in this case. The Official Receiver filed an application to have this assignment set aside and on 22nd November 1924 the assignment was duly annulled by the Insolvency Court. Subsequently, in March 1930, after an appeal against the annulment to the High Court had been dismissed, the Official Receiver filed a suit to recover from the appellant whatever money he had actually collected in execution of the decrees which had been assigned to him. The only

question at issue in this appeal is one of limitation. Both the Courts below have held that a distinction should be drawn between the two periods (1) that between the assignment and the date of the order annulling the assignment and (2) the period subsequent to that order. With regard to the first period they held that the suit was governed by Art. 120 and with regard to the second period that it was governed by Art. 62. It is argued for the assignee in second appeal that Art. 62 ought to be applied to both periods. Art. 62 runs as follows :

For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use,

and time begins to run from the date when the money is received and the period of limitation is three years. It is argued for the respondent (the Official Receiver) who accepts the point of view which commended itself to the Courts below, that if a man receives money which at the time he receives it he is legally entitled to receive, he cannot be said to be receiving it for the use of some one else who may subsequently be declared to be entitled to the money by some judicial decision, and therefore that any money which in this case was received between the date of the assignment and the date of the order annulling the assignment could not be said to have been received by the appellant for the use of the Official Receiver. This argument is not without some force and not without its practical convenience, and it has been supported by certain authorities derived from the High Courts of Calcutta and Allahabad, upon which the District Judge also relied. But the trend of authority in this Court is distinctly against it. The cases cited by the appellant, 39 Mad 62,[1] 52 Mad 207[2] and 68 M L J 630[3] are all cases in which the defendant at the time of receipt of the money had a legal right to receive it, and, in spite of that fact, it was held by this Court in all those cases that Art. 62 applied to the suits. 39 Mad 62[1] and 52 Mad 207[2] are Bench decisions which are binding upon me in the hearing of this appeal. The learned advocate for the respondent has been unable to show me any subsequent decision of this High Court in which any doubt has been thrown upon any of the three decisions already referred to. That being so, I must hold that the learned District Judge was wrong in making the distinction which he made between the two periods concerned in this case and decide that Art. 62 applies to the suit as a whole and therefore that any money collected by the defendant-appellant at any date more than three years before the filing of the suit cannot be recovered in this suit.

The decree of the lower Appellate Court will be modified accordingly. Costs of this appeal and of the appeal before the District Judge must be paid by the respondent here out of the estate of the insolvent in his hands. Leave to appeal is refused.

C.R.K./D.S. *Decree modified.*

1. Baiznath Lala v. Ramadoss, (1915) 2 A I R Mad 405=26 I C 219=39 Mad 62=27 M L J 640.
2. Municipal Council, Dindigul v. Bombay Co. Ltd., (1929) 16 A I R Mad 409=120 I C 867=52 Mad 207=50 M L J 525.
3. Sivarama Raju v. Secretary of State, (1935) 22 A I R Mad 854=159 I C 750=68 M L J 630.

---

* A. I. R. 1938 Madras 533

PANDRANG ROW AND KING JJ.

Koti Bharma Lingappa — Appellant.

v.

S. Nilakantappayya Wadyar and others — Respondents.

Appeal No. 102 of 1933, Decided on 10th December 1937, against decree of Sub-Judge, Bellary, D/- 28th February 1933.

*** Registration Act (1908), Ss. 17 (1) and 49 —Receipts purporting to put an end to mortgage rights are compulsorily registrable — Mortgagor cannot rely on these receipts as evidence of payment of mortgage debts.**

Receipts purporting to put an end to the mortgage rights do not come within the exception embodied in S. 17 (2) (xi). It follows therefore that these receipts are compulsorily registrable under S. 17 (1). These receipts can be relevant only as evidence of payments of mortgage debts either in full or in part. Otherwise they would be irrelevant. And if they are relevant only for proving payments of the mortgage debts, they certainly would affect the mortgage debts by reducing them considerably. Hence the mortgagor cannot rely on these receipts as evidence of payment of the mortgage debts in question. [P 534 C 2]

B. Somayya and K. Umamaheswaran — *for Appellant.*

V. S. Narasimhachari and N. Appu Rao — *for Respondents.*

Judgment. — This is an appeal from the decree of the Court of the Subordinate Judge of Bellary dated 28th February 1933, in. O. S. No. 5 of 1932, a suit for recovery of possession of certain lands and for redemption of certain mortgages. There were three mortgages, one of 1917 for

Rs. 800, another of 1920 for Rs. 2850 and the third one of the same date as the first for Rs. 1400. The lands included in the mortgages were different. Over and above the lands included in these mortgages, two Survey Nos. 53 and 71, were alleged to be in the possession of the defendant under a certain arrangement whereby he was to be in possession for 13 years in lieu of a sum of Rs. 700 due to him. The plaintiffs pleaded that they had discharged all the three mortgages and also the debt of Rs. 700 and they produced three receipts, Exs. A.1, A.2 and A, in support of their allegation. These receipts amounting to Rs. 5700 were relied upon by the Court below in support of its finding that the payments alleged in the plaint were true though the lower Court was clearly of opinion that, but for these receipts, there was no satisfactory evidence of the payments. The execution of these receipts was admitted by the defendant but he alleged that he executed them at the request of the plaintiffs nominally with a view to assist the cause which was pending before the Board of Commissioners for Hindu Religious Endowments which had threatened to remove the plaintiffs from the trusteeship of the Mylar temple unless they paid off the debts due on the mortgages and recovered possession of the properties which had been mortgaged and which really belonged to the trust.

The defendant also relied on Ex. 6, a letter, which was said to have been executed in his favour by one of the plaintiffs 3 days after the date of Ex. A, the receipt for Rs. 3000, in which it was admitted that that receipt was executed out of confidence and nominally for the purpose of being produced before the Board. In short, the defendant's contention was that the receipts relied upon by the plaintiffs were executed nominally and did not evidence actual payments. It was further contended that these receipts, and especially Exs. A and A.2, were not admissible in evidence by reason of the provisions of Ss. 17 and 49, Registration Act. The main point for consideration in this appeal is whether the receipts in question are admissible because the learned Subordinate Judge who heard the oral evidence was clearly of opinion that, in the absence of the receipts, it would not be possible to find that payments had been made. We have been taken through the oral evidence ourselves and we are also of the same opinion, viz. that the oral evidence on the side of the plaintiffs to prove the alleged payments is worthless and cannot be made the basis of a finding in plaintiffs' favour if it is found that the receipts are inadmissible or that they were executed nominally.

So far as Exs. A.2 and A are concerned, they purport to put an end to the mortgage rights, and therefore they do not come within the exception embodied in S. 17 (2) (xi), Registration Act. It follows therefore that these two receipts are compulsorily registrable under S. 17 (1) of the Act. S. 49 provides that no document required by S. 17 to be registered, shall be received as evidence of any transaction affecting any immovable property referred to therein. These receipts can be relevant only as evidence of payments of mortgage debts either in full or in part. Otherwise they would be irrelevant. And if they are relevant only for proving payments of the mortgage debts, they certainly would affect the mortgage debts by reducing them considerably. In these circumstances, it is impossible, in our opinion, to contend that S. 49 does not stand in the way of the plaintiffs relying on these receipts as evidence of payment of the mortgage debts in question. These two receipts, Exs. A.2 and A, must therefore be excluded from the evidence and the result of this exclusion is, as indicated above, fatal to the plaintiffs' case, for the remaining evidence is unacceptable. It is unnecessary to go into the details of the oral evidence relating to the alleged payments because the learned Subordinate Judge who heard the evidence himself has said in so many words that it is very unsatisfactory. Apart from this, there is Ex. 6, which, no doubt, has been rejected by the learned trial Judge as not having been proved satisfactorily ; but we are of opinion, after going through the entire evidence that Ex. 6 is a genuine document and cannot be rejected. The circumstances clearly show that Ex. A, in any case, must have been executed nominally, and that no money could have been paid at the time. It is however unnecessary to base our decision on Ex. 6 because we have found that Exs. A.2 and A cannot be admitted in evidence and in their absence the remaining evidence about the alleged payments is quite unsatisfactory. We therefore find that the payments to which Exs. A.2 and A relate, viz. the alleged payment of Rs. 700 on 12th July 1928 and the alleged

payment of Rs. 3000 on 6th December 1930, are not true.

Then remains the other receipt, Ex. A-1. It is not seriously contended that this is excluded by S. 49, Registration Act. Even apart from it, the evidence afforded by the defendant 1's own account, Ex. 11-a, and his own report Ex. B, sent to the Hindu Religious Endowments Board in June 1928, shows beyond doubt that there was a sum of Rs. 2000 paid in October 1928 in respect of the mortgage Ex. 2. The defendant made some attempt during the trial, to show that this payment which he could not deny was made in respect of some other transaction, viz. the amount which was due to him according to the composition scheme in his capacity as surety for the plaintiffs and in respect of which it was agreed at one time that Survey Nos. 47, 48 and 49 should be in his possession for a number of years and which it was later on decided to abandon as the person already in possession as a usufructuary mortgagee, D. W. 1 was willing to pay the Rs. 2000 on condition of his being allowed to continue in possession for a longer period. D. W. 1 also supported this version, viz. that the amount was paid by him to the plaintiffs who paid it to the defendant. This story is however contradicted by the defendant's own account and his report made to the Religious Endowments Board, Exs. 11-a and B. There is no other evidence of the alleged liability of the plaintiffs on some other account to pay this Rs. 2000. The matter is really put beyond doubt by the entry in the defendant's own account. No attempt has been made to explain away this entry which clearly shows that the sum of Rs. 2000, which was paid in October 1926, was in respect of one of the suit mortgages, viz. Ex. 2. The defence, so far as this payment of Rs. 2000 is concerned, appears to be an afterthought and, so far as this payment is concerned, we accept and confirm the finding of the learned trial Judge.

There is a memorandum of cross-objections which has no substance. Very little has been said to us about it and it is enough to dismiss it with costs, without further discussion. It follows from what we have said that the appeal must be allowed in part and the decree of the lower Court varied in accordance with our finding, that is to say the plaintiffs will be entitled to recover possession of the properties mortgaged under Ex. 1, on payment of Rs. 800 of the properties mortgaged under Ex. 2, on payment of Rs. 850 and of the properties mortgaged under Ex. 3 on payment of Rs. 1400. Time for redemption is fixed at six months from this date. The decree of the lower Court so far as it relates to Survey Nos. 53 and 71, is set aside and the defendant-appellant will be entitled to recover possession thereof, by restitution, if necessary. As this appeal succeeds in part and fails in part, the parties will bear their own costs in this appeal and in the Court below.

C.R.K./D.S. *Appeal partly allowed.*

A. I. R. 1938 Madras 535

BURN J.

In re M. S. Ponnuswamy Iyer

Petitioner.

Criminal Revn. No. 768 and Petn. No. 720 of 1937, Decided on 16th February 1938, from order of Joint Magistrate, Negapatam, D/- 9th August 1937.

Madras District Municipalities Act (5 of 1920), S. 270-E—Buses belonging to petitioner taken to shed after their return from journey for letting passengers to alight and new passengers to get in for return journey—Such shed is cart stand.

Where the buses belonging to a person are taken to a shed on their arrival after journey and the passengers alight at the shed and new passengers for the return journey take their seats in the buses and the buses do not stop at the place for a shorter or longer time but they do "stand" there for the purpose of their owner's business in the sense in which the expressions "cab stand" or "taxi stand" or the like are used, the shed is a cart stand within the meaning of S. 270-E. [P 535 C 2; P 536 C 1]

K. S. Jayarama Aiyar and R. Swaminatha Aiyar — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—The learned Joint Magistrate's decision is in my opinion correct. He has quite properly declined to attempt a complete definition of the term "cart stand", as used in S. 270-E, District Municipalities Act. He has confined his attention to the particular facts of the case before him and has held that the petitioner's shed at Tiruvarur is a cart stand within the meaning of the Act. The finding is that the petitioner's buses are taken to the shed on arrival at Tiruvarur, that the passengers alight at the shed, and the new passengers for the return journey take their seats in the buses there. The buses do actually "stand" in the shed; by this is meant not

merely that they stop there for a shorter period or longer time but that they "stand" for the purposes of their owner's business in the sense in which we use the word in the expressions "cab stand", "taxi stand" and the like. There is nothing in the decisions quoted, 21 Mad 293,[1] 22 Mad 455[2] and 36 M L J 27[3] on the petitioner's behalf that conflicts with the findings of the lower Courts. I find no ground for interference in revision and dismiss this petition.

C.R.K./R.M. *Petition dismissed.*

1. Queen-Empress v. Ayyakkannu, (1898) 21 Mad 293=1 Weir 738.
2. Queen-Empress v. Ayyakannu, (1899) 22 Mad 455=1 Weir 739.
3. Public Prosecutor v. Muhammad Sheriff, (1919) 6 A I R Mad 316=49 I C 348=20 Cr L J 156=36 M L J 27.

A. I. R. 1938 Madras 536

BURN J.

Public Prosecutor — Appellant.

v.

Abul Rajak — Respondent.

Criminal Appeal No. 470 of 1937, Decided on 17th February 1938, against acquittal by Stationary Sub-Magistrate, Pattikonda, in C. C. No. 15 of 1937.

Penal Code (1860), S. 225-B — District Munsif in pursuance of High Court's order issuing order that warrants of arrest should thereafter be signed by head clerk — Escape from arrest is offence under S. 225-B even in absence of authorization by succeeding District Munsif to head clerk to sign warrant of arrest.

A District Munsif in pursuance of the High Court's order passed a general order to the effect that all warrants of arrest ordered by Munsif's Court should thereafter be signed by the head clerk. The successor of the District Munsif issued an order for arrest in execution of a decree. The warrant was signed by the head clerk. The judgment-debtor escaped from the arrest made by the process-server in pursuance of the warrant. The Magistrate acquitted the judgment-debtor on the ground that the head clerk was not authorized by the District Munsif issuing the warrant to sign it:

Held that it was not necessary that the District Munsif of the time should authorize a head clerk to sign the warrant of arrest. The delegation in this respect was formerly made by 'the Court' and not by the predecessor of the District Munsif of the time personally. The delegation was made to a head clerk and not to any particular head clerk. The issue of warrant signed by the head clerk was therefore not illegal and escaping from the arrest was an offence under S. 225-B.

[P 536 C 2 ; P 537 C 1]

G. Chandrasekhara Sastri — *for Respondent.*

Judgment.—This is an appeal by the Government from an order of acquittal. The facts are not disputed. The respondent was arrested by a process-server (P. W. 1) of the Court of the District Munsif of Kurnool on 3rd October 1936. The order for his arrest was passed by the District Munsif in execution of a decree of a Panchayat Court. The respondent signed on the warrant but did not go with the process-server to the Court. He told the process-server that he would pay the money and then went into his house and refused to come thereafter. The next day when the process-server went to his house again the accused was not to be found. The learned Sub-Magistrate found these facts established but considered that the respondent was not guilty of any offence because the arrest warrant had been signed by the head clerk of the District Munsif's Court. He found that the head clerk had been authorised to sign arrest warrants in the time of the former District Munsif. But the District Munsif in charge of the Court in September 1936 had not authorized his head clerk to sign arrest warrants and the learned Sub-Magistrate thought that the issue of warrants with the signature of the head clerk in the absence of an authorization by the existing District Munsif was illegal. On this view, he thought that the act of the accused did not amount to an offence of escaping from lawful custody. He therefore acquitted him. The learned Sub-Magistrate's view is erroneous. It is not necessary that the District Munsif of the time should authorise a head clerk to sign warrants of arrest. It was proved that on 4th June 1935, the then District Munsif, Mr. C. Rajagopalan, passed a general order Ex. C to this effect :

All the warrants of arrest ordered by this Court shall hereafter be signed by the head clerk. All the other processes shall be signed by the Deputy Nazir.

This order was passed in pursuance of the High Court's order in February 1935 amending the Civil Rules of Practice and Circular Orders. The High Court's order runs as follows :

Every warrant of arrest under O. 21, R. 24 (2), Civil. P. C. should be signed by the Judge or such officer as the Court may appoint in this behalf. The officer to whom this power may be delegated should ordinarily be the chief ministerial officer of the Court and not the Nazir or Deputy Nazir and the delegation should be made in writing and kept Court.

The important point to be noticed is that the delegation is made by 'the Court' and not by the District Munsif personally. The delegation is made to the head clerk and not to any particular head clerk. It is quite clear that the order which was made by Mr. C. Rajagopalan on 4th June 1935 is perfectly valid, and it remains in force until withdrawn authorizing the head clerk, whoever he may be, to sign warrants of arrest. The learned Sub-Magistrate perhaps has been under the impression that the order for arrest of the judgment-debtor was issued by the head clerk but that of course is not so. The head clerk has no power to issue orders for arrest but he has power to sign warrants of arrest when the order for arrest has been passed by the Court. The acquittal of the respondent is wrong and I set it aside and convict the respondent of the offence under S. 225-B, I. P. C. and sentence him to pay a fine of Rs. 10; in default of payment of fine to suffer rigorous imprisonment for fourteen days. In fixing the fine at this somewhat lenient figure, I am taking into account the fact that the respondent has been acquitted by the Court below and also that he is a police constable who may perhaps lose his appointment as a consequence of this conviction.

C.R.K./D.S. *Acquittal set aside.*

*** A. I. R. 1938 Madras 537**

PANDRANG ROW J.

Velappa Goundan and others — Petitioners.

v.

Ramaswami Goundan and others — Respondents.

Criminal Revn. Case No. 445 of 1937, and Criminal Revn. Petn. No. 413 of 1937, Decided on 24th January 1938, from order of Sub-divisional Magistrate Gobichettipalayam, D/- 31st March 1937.

*** (a) Criminal P. C. (1898), S. 147—Dispute regarding right to worship as pujari in temple comes within provisions of S. 147— Magistrate has jurisdiction to deal with such dispute.**

The policy of the Legislature has been consistently, in the past, to enlarge the jurisdiction of the Magistrate in respect of disputes connected with any kind of user of "land" in its widest sense. If the dispute is regarding a right which is inseparably connected with the use of any land or building it must be regarded as being within the purview of S. 147. Hence the dispute regarding the right to worship as pujari in a temple is a dispute regarding any alleged right of user of any land as explained in S. 145, sub-s. 2 and comes within S. 147 even if the dispute in actual fact may have more to do with what a man does in the temple after entering into it and not so much with his actual entry into the temple: *Case law referred.* [P 538 C 2]

(b) Criminal P. C. (1898), S. 147 — Dispute relating to offerings does not come under S. 147 *(Obiter.)*

There can be no doubt that a dispute which relates to offerings cannot be regarded as a dispute about the user of any land or building. [P 538 C 1]

K. S. Jayarama Aiyar and G. Gopalaswami — *for Petitioners.*

N. Somasundaram — *for Respondents.*

Public Prosecutor — *for the Crown.*

Order.—The petitioners seek to revise the order of the Sub-divisional Magistrate of Gobichettipalayam dated 31st March 1937 declaring under S. 147, Criminal P. C. that one Kamandi is the only pujari of the temple of Mariamman in Nallikavandanur who has the right to perform puja in that temple and forbidding all interference with the exercise of that right. The only ground of attack on the order is that the Magistrate had no jurisdiction or, in other words that the dispute about the right to worship as pujari in the temple is not a dispute which comes within the provisions of S. 147, Criminal P. C. It would appear that there was a dispute also about the management of the temple itself, but the learned Magistrate says that that was not the dispute regarding which he took action though the right of appointment as pujari is vested in the person or persons in whom the management vests. The simple point therefore that arises for decision is whether the dispute regarding the right to worship as pujari in a temple is a dispute regarding any alleged right of user of any land as explained in S. 145, sub-s. 2. There is no doubt that there is a divergence of opinion between the Calcutta High Court and this High Court. This divergence has been recognized in more than one reported case. The Calcutta decisions are 37 Cal 578,[1] 38 Cal 387[2] and 52 Cal 959.[3] The Madras decisions are 11 Mad 323,[4] 29 Mad 237,[5] 27 M L J

---

1. Guiram Ghoshal v. Lal Behari Das, (1910) 37 Cal 578=6 I C 182=14 C W N 611=12 C L J 22.
2. Ram Saran v. Raghu Nandan Gir, (1911) 38 Cal 387=9 I C 6=13 C L J 445=16 C W N 574.
3. Surendranath Bannerjee v. Soshi Bhushan Sarkar, (1926) 13 A I R Cal 437=92 I C 229 =42 C L J 127=52 Cal 959=27 Cr L J 239.
4. Muhammed Musaliar v. Kunji Chek Musaliar, (1888) 11 Mad 323=2 Weir 117.
5. Kader Batcha v. Kader Batcha Rowthan, (1906) 29 Mad 237=4 Cr L J 58.

587[6] and 48 M L J 528.[7] There is another Madras decision, viz. 34 I C 651,[8] in which Ayling J. doubted the correctness of the earlier Madras decisions. In A I R 1930 All 452,[9] it was held that the amendment of S. 147 in 1923 by Act 18 of 1923 has the result of giving effect to the Madras view as is seen from the following passage:

> There was a conflict of opinion between the Madras and Calcutta High Courts: *see* 29 Mad 237[5] in opposition to 37 Cal 578.[1] This conflict was, however, set at rest by Act 18 of 1923 amending the Criminal Procedure Code wherein the view of the Madras High Court was adopted. Originally the words were: "a right of use of any land or water including any right of way or other easement over the same." These words indicated to the Calcutta High Court certain rights which were confined to rights of easement and similar rights. In the amended section, the wider view of the Madras High Court was adopted and it was specifically noted that the provisions of that section would apply whether such right be claimed as an easement or otherwise.

It was held in this Allahabad case that after the amendment of the Code no doubt remained as to the provisions of that section attaching to disputes as regards entry into a temple or mosque. 38 Cal 387[2] does not apply to the present case because that dealt with a dispute about offerings, that is to say about moveable property. There can be no doubt that a dispute which relates to offerings cannot be regarded as a dispute about the user of any land or building. The decision in 37 Cal 578[1] is a direct decision on the point that a dispute concerning merely the right to act as a pujari in a temple is not within the scope of S. 147, Criminal P. C. One of the grounds on which that decision is based was that the expression "land" is not defined in the Criminal Procedure Code, and that for the purposes of the somewhat analogous provisions of S. 145 it is not referred to as necessarily including buildings. The present section however clearly incorporates the definition of land given in S. 145, sub.s. (2) into S. 147 according to which land includes buildings. The other ground was that though it is impossible to perform the duties of a pujari without entering upon the land on which the temple is built, it is the worship which is disputed and not the use of the land. This view commended itself to Ayling J. in 34 I C 651.[8] I think on the whole, though not without hesitation, that the better view is the view that has been adopted consistently in this High Court with the exception of the case reported in 34 I C 651.[8]

It seems to me that where the dispute is regarding a right which is inseparably connected with the use of any land or building, it must be regarded as being within the purview of S. 147. It may be that the dispute in actual fact may have more to do with what a man does in the temple after entering into it and not so much with his actual entry into the temple; nevertheless where the right regarding which a dispute exists is one which is inseparably connected with the right to enter a building and cannot be dissociated from it the dispute cannot be said to be not one regarding an alleged right of user of the building. In this particular case it would appear that the dispute was also concerned with the right of possession of a particular room kept locked in the temple in which the puja materials are kept. The possession of this locked room is inseparably connected with the right to worship as pujari, for without these materials which are kept therein it is not possible for anyone to perform puja as pujari. It would therefore appear that the present dispute includes a dispute regarding the possession of the locked room in which these paraphernalia of worship are stored. It also appears to me that the policy of the Legislature has been consistently, in the past, to enlarge the jurisdiction of the Magistrate in respect of disputes connected with any kind of user of "land" in its widest sense, and that it would be inconvenient if disputes which are really inseparably connected with lands or buildings were beyond the jurisdiction of the Magistrate. On the whole, therefore, I am inclined to the view that the Magistrate had jurisdiction to deal with the present dispute and that his order cannot therefore be regarded as being void for want of jurisdiction. The petition therefore fails and is dismissed.

C.R.K./D.S. *Petition dismissed.*

---

6. Chidambara Gurukkal v. Sengoda Gounden, (1915) 2 A I R Mad 84=25 I C 999=27 M L J 587=15 Cr L J 671.
7. Sinnaswami Chetti v. Palani Goundan, (1925) 12 A I R Mad 779=88 I C 2=26 Cr L J 1057 =48 M L J 528.
8. Palaniyandi Pandaram v. Palaniappa Thevan, (1917) 4 A I R Mad 840=34 I C 651=17 CrLJ 235.
9. Daya Ram v. Emperor, (1930) 17 A I R All 452=1930 Cr C 672=127 I C 422=31 Cr L J 1217.

*** A. I. R. 1938 Madras 539**
FULL BENCH

LEACH, C. J., VARADACHARIAR AND LAKSHMANA RAO JJ.

Katneni Venkatakrishnayya and another — Appellants.

v.

Garapati China Kanakayya — Respondent.

Appeal No. 82 of 1937, Decided on 24th January 1938, against order of Dist. Court, West Godavari, at Ellore, D/- 30-1-1937.

*** Civil P. C. (1908), O. 32, Rule 7 (1-A) (Madras amendment)—Guardian of minor under Hindu law can transfer decree passed in favour of minor without sanction of Court:** *41 M L J 75 =A I R 1921 Mad 587=63 I C 285, Overruled.*

The words "for taking any other action on behalf of a minor or other person under disability" do not take away the right of a guardian under Hindu law to transfer a decree passed in favour of the minor, as the transfer does not constitute a proceeding in the suit. The transfer of such decree by the guardian of the minors is something entirely outside the suit and the guardian has full power to effect the transfer without the leave of the Court: *A I R 1921 Mad 113, Approved; 41 M L J 75=A I R 1921 Mad 587= 63 I C 285*, **Overruled.** [P 540 C 1, 2]

Y. Satyanarayana and D. Dharmasuri — *for Appellants.*

T. V. Ramanatha Aiyar — *for Respondent.*

Order of reference (Buru and Venkataramana Rao JJ.) was delivered by—

Venkataramana Rao J.—This is an appeal against the order of the learned District Judge of Ellore allowing execution to proceed at the instance of a transferee-decree-holder. One of the objections to the recognition of the transfer that was urged before him was that the original decree-holders in the case being two minors and the transfer having been taken from the next friend of those minors without the sanction of the Court under O. 32, R. 7, Civil P. C. the learned Judge ought not to recognise the transfer and allow execution. But the learned Judge overruled the objection following the decision of a Division Bench of this Court reported in 40 M L J 124.[1] That was a decision of Abdur Rahim and Odgers JJ. and the view taken by those learned Judges in that case was that a decree being property, any transfer of a decree by a next friend of a minor would not come within the plain language of O. 32, Rule 7, which relates to an agreement or a compromise with reference to a suit. The learned Judges also considered the effect of the rule made by our High Court, namely O. 32, R. 7 (1-A) which added the words "for taking any other action on behalf of a minor." These words were construed to refer to an action taken in the course of the suit in the nature of a compromise or withdrawal or any agreement of that nature in favour of a minor and do not relate to any transfer of a decree. This decision was expressly dissented from in 41 M L J 75[2] by another Division Bench consisting of Spencer and Ramesam JJ. The reason given by the learned Judges in that case was that a transfer involves an agreement between the transferor and the transferee and therefore sanction of the Court under O. 32, R. 7, Civil P. C. must be obtained and the word 'suit' should not be understood as meaning only a suit in which a decree has not been passed. As this is a matter of frequent recurrence, we think that this matter should be set at rest, in view of conflicting decisions, by the decision of a Full Bench. We accordingly direct that the papers be placed before the Honourable the Chief Justice for constituting a Full Bench.

Judgment of the Full Bench

Leach C. J.—The appellants were the defendants in O. S. No. 27 of 1932 of the District Court of West Godavari, instituted by two minors through their mother, acting as their next friend. A decree was passed against them and this was subsequently transferred to the respondent by the mother, acting as the guardian of the property of the minors. The respondent then applied to be brought on the record in the place of the decree-holders and to be allowed to execute the decree. The learned District Judge allowed the application, and the appeal is from that order. The question for decision is whether a guardian of the property of a minor can transfer a decree passed in favour of the minor without first obtaining the sanction of the Court. In allowing the application the learned Judge relied on the decision in 40 M L J 124.[1] The appeal has been placed before a Full Bench as that decision was dissented from in 41 M L J 75.[2] O. 32, R. 7, Civil P. C. provides that no friend or guardian for the suit shall, with-

1. Govindarajulu Naidu v. Ranga Rao, (1921) 8 A I R Mad 113=62 I C 255=40 M L J 124.

2. Kanakayya v. Kotayya, (1921) 8 A I R Mad 587=63 I C 285=41 M L J 75.

out the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. The Rule Committee of this Court has added to Rule 7 this further rule :

(1-A). Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this schedule.

It is said on behalf of the appellants that the words "for taking any other action on behalf of a minor or other person under disability" prohibit the lawful guardian of a Hindu minor transferring a decree obtained by the minor without the sanction of the Court. In 40 M L J 124,[1] Abdur Rahim and Odgers JJ. held that these words did not take away the right of a guardian under Hindu law to transfer a decree in favour of the minor, as the transfer did not constitute a proceeding in the suit. A decree is property and there is no reason why the guardian of a Hindu minor should not exercise the same powers with respect to it as he is allowed to do with regard to other assets of the minor. Hindu law permits the guardian to alienate property under proper circumstances but the minor can challenge the alienation on attaining majority if the power has been improperly exercised. It was on this reasoning that the learned Judges held that the sanction of the Court was not required to a transfer. The same question came before Ramesam and Spencer JJ. in 41 M L J 75.[2] The learned Judges expressed their dissent from the decision in 40 M L J 124[1] and regarded the decision in 31 M L J 207[3] as being in conflict with 40 M L J 124.[1] With great respect we can see no conflict. In our opinion 31 M L J 207[3] has no bearing on the question. This was a case of an agreement adjusting a decree, the agreement which required to be recorded in Court being between the parties to the suit. We are here merely concerned with the transfer of a decree to a third party by a person who has in law the power to make the transfer. We consider that 40 M L J 124[1] was rightly decided and consequently the decision in 41 M L J 75[2] must be overruled.

When a transfer of a decree has been made in accordance with law, the Court is required to bring the name of the transferee on the record in the place of the decree-holder. When this has been done the decree may be executed in the same manner and subject to the same conditions as if the application were made by the decree-holder (O. 21, R. 16). The appellants object to the order placing the respondent on the record as the transferee of the decree on the ground that the minors when they come of age may challenge the validity of the action of the guardian. It is possible that they may do so, but if they do it does not mean that the appellants will be compelled to pay twice over. Payment made in accordance with the Court's order will protect them.

It is also said that the acceptance of the opinion expressed in 40 M L J 124[1] will have the effect of allowing a next friend or guardian ad litem when he happens to be the guardian under Hindu law to evade Rr. 6 and 7 of O. 32, which have been framed for the protection of the minor. R. 6 prohibits a next friend or guardian for the suit receiving without the leave of the Court any money or other moveable property on behalf of a minor by way of compromise before the decree or order, or under a decree or order in favour of the minor. This may be the effect of holding that R. 7 (1-A) only applies to matters in a suit or proceeding, but this is not a matter with which the Court is now concerned. We are here to interpret the law and not to make it. If it is considered that a transfer of a decree of this nature should be subject to the sanction of the Court the Legislature may say so; but as the law stands at present it is not subject to such sanction. The transfer of this decree by the mother of the minors was something entirely outside the suit, and in our opinion she had full power to effect the transfer without the leave of the Court. It follows that in our opinion the order of the learned District Judge is correct and the appeal consequently fails and must be dismissed with costs.

3. Shaik Davud Rowther v. Paramasami Pillai, (1917) 4 A I R Mad 409=35 I C 70=31 M L J 207.

Varadachariar J. — I agree that the leave of this Court is not necessary before a decree passed in favour of a minor plaintiff can be assigned; but I wish to add a few words indicating my reasons. In 41 M L J 75,[2] it seems to have been assumed by the learned Judges that the decision in 40 M L J 124[1] proceeded on a distinction between what happened before decree and what happened after decree. With due respect, I do not so read the judgment in that case. I understand the learned Judges to have emphasised the distinction between matters in dispute between the parties and matters outside the scope of the suit. Cl. 1 (b), R. 6, O. 32, makes it clear that the order as a whole is not restricted to proceedings prior to decree; and in view of the fact that the Code contemplates agreements or adjustments before parties either under O. 23, R. 3, which applies to the stage prior to decree, or under O. 21, R. 2, which applies to the stage after decree, it does not seem to me right to read the decision in 40 M L J 124[1] as turning on that distinction.

The real question, as indicated in the opinion delivered by my Lord, is whether there is sufficient in the provisions of O. 32 to interfere with the rights of a natural guardian or a legal guardian who also happens to be the next friend, in the matter of dealing with a decree as part of the property belonging to the minor. It does not seem to me that there is much force in the argument based upon Cl. 1-A, added to R. 7 by the rules made by this Court in 1910. That clause does not prescribe that the leave of the Court is necessary in any particular matter; it only prescribes the course to be adopted when an application is made to the Court for leave to do certain things. It assumes that under other provisions of O. 32 or some other law, an application for leave has to be made. Such applications are contemplated by R. 6 as well as the proviso added to it by this Court and also by R. 7. It does not therefore seem to me right to infer from Cl. 1-A, R. 7 that the scope of R. 7 has been extended. As regards R. 7 itself, the natural construction of the words used there namely "agreement or compromise," appears to be that the agreement or compromise is one between the parties to the suit as contemplated by O. 23, R. 3, or O. 21, R. 2.

It is no doubt possible that this view restricting R. 7 in the above sense may enable a next friend to evade the restrictions imposed by R. 6; but, as pointed out by my Lord, this is not a matter which the Court can take into account in interpreting R. 7. R. 7 deals with the conduct of a "next friend" as such, who, as pointed out in (1889) 22 Q B D 577[4] is an officer of the Court to conduct the suit; and the principle underlying R. 7 is that whenever he proposes to do anything beyond the normal conduct of the suit, he has to obtain the leave of the Court to do so. But when a decree passed in favour of a minor is sought to be assigned, the person making the transfer acts not in the capacity of next friend but in his capacity as the guardian of the minor's estate. It is true that in 36 Mad 295,[5] the Privy Council have laid down that to the extent to which the Code has imposed limitations upon the powers of a guardian under the Hindu law, those powers must be exercised in conformity with the provisions of the Code; but except to the extent to which the Code has expressly limited those powers, there is no reason to curtail them.

Lakshmana Rao J.—I agree with my Lord the Chief Justice and have nothing to add.

C.R.K./D.S. *Appeal dismissed.*

4. Rhodes v. Swithenbank, (1889) 22 Q B D 577 =58 L J Q B 287=60 L T 856=37 W R 457.
5. Ganesha Row v. Tulja Ram Rao, (1889) 36 Mad 295=19 I C 515=40 I A 132 (P C).

A. I. R. 1938 Madras 541

LAKSHMANA RAO J.

Public Prosecutor—Appellant.

v.

Srinivasa Rao and another—

Respondents.

Criminal Appeal No. 251 of 1937, Decided on 3rd December 1937, against acquittal, by Sub-divisional Magistrate, Saidapet, in Criminal Appeal No. 4 of 1937.

Madras Prevention of Adulteration Act (3 of 1918), S. 5 (1) (d) and Rr. 24, 28 and 29 framed under S. 20 (2)—Supply of sample to Sanitary Inspector under S. 14 is not sale.

A secretary and an accountant of a co-operative society supplying butter to the Sanitary Inspector under S. 14 cannot be convicted under S. 5 (1) (d) and Rr. 24, 28 and 29 framed under S. 20 (2) as supply of sample to the Sanitary Inspector under S. 14 is not a sale, nor can the secretary or the accountant be said to offer the butter to sale. [P 542 C 1]

A. S. Sivakaminathan—*for Appellant.*

K. V. Krishnaswami Iyer and C. Rangaswami Iyengar—*for Respondents.*

Judgment.—This is an appeal by the Public Prosecutor against an appellate order of acquittal and the question for determination is whether the accused are guilty of the offence under S. 5 (1) (d) read with Rr. 24, 28 and 29 framed under S. 20 (2), Madras Prevention of Adulteration Act. The accused are the Secretary and an Accountant of the Triplicane Urban Co-operative Society Ltd., and the undisputed facts are that on 22nd August 1936 the Sanitary Inspector of the Saidapet Municipality demanded sample of butter from the Saidapet Branch of the Society under S. 14 of the Act. The Accountant gave the sample and received the value, and the butter was on test found to be adulterated. The accused were prosecuted under Ss. 5 (1) (a) and (d) read with Rr. 24, 28 and 29 framed under S. 20 (2), Madras Prevention of Adulteration Act, and the trial Court convicted them under S. 5 (1) (d) read with Rr. 24, 28 and 29 of the rules framed under S. 20 (2) for selling the butter to the Sanitary Inspector.

The conviction was set aside by the Appellate Court on the ground that in the case of a society registered under the Madras Co-operative Societies Act there can in law be only a distribution of the articles among the members and no sale, but it is unnecessary to consider this question as on the facts themselves the order of acquittal is right. The supply of sample to the Sanitary Inspector under S. 14 of the Act is not a sale nor can the Secretary of the Society or the Accountant of the Saidapet Branch be said to offer the butter to sale. They cannot therefore be convicted under S. 5 (1) (d) read with Rr. 24, 28 and 29 framed under S. 20 (2) of the Act and the order of acquittal must stand. The appeal therefore fails and is dismissed.

C.R.K./D.S. *Appeal dismissed.*

---

* A. I. R. 1938 Madras 542

VENKATASUBBA RAO J.

Garapati Venkanna — Appellant.

v.

Mullapudi Atchutaramanna and others — Respondents.

Second Appeal No. 15 of 1932, Decided on 14th December 1937, against decree of Sub-Judge, Ellore, in A. S. No. 34 of 1929.

(a) Civil P. C. (1908), O. 7, R. 11 and Ss. 148 and 149—Time to make up deficiency must be given even if plaint insufficiently stamped is presented on last day of period of limitation or payment of insufficient fee was due to design—Once time is fixed, plaintiff cannot, as of right, claim extension which depends upon discretion of Court under Ss. 148 and 149—Court acting under these sections must be presumed to have really exercised discretion.

Where a plaint is written upon paper insufficiently stamped, the Court is bound to give the plaintiff time to make up the deficit; only when he fails to comply with the order, the Court can reject the plaint; that the plaint is presented on the last day of the period of limitation makes no difference, that is the effect of O. 7, R. 11, Civil P. C. Again, whether the payment of insufficient fee was by design or due to inadvertence, the Court is bound by the mandatory terms of it, to give effect to this provision. This being the law, the Court's action in giving the plaintiff time originally cannot be questioned. But once time is fixed, it is no longer open to the plaintiff to demand as a matter of right that the time should be extended. The power to grant extension vests in the Court either under S. 148 or S. 149, Civil P. C. Under either of those sections, the question is one of the Court's discretion and not the plaintiff's right. It is obvious that the Court must exercise its discretion not capriciously but judicially and reasonably. [P 543 C 2; P 544 C 1]

Where the Court acts under Ss. 148 and 149 it should, according to the maxim *omina praesumuntur rite esse acta* be presumed that there was a real exercise of discretion : *Case law referred.* [P 544 C 1]

(b) Agency—Termination—Power of attorney executed by several principals—One of them having distinct interest in subject-matter dying—Power of attorney terminates.

Where a power of attorney has been executed by several principals in favour of a person, and one of the principals having distinct interest in subject-matter of the power of attorney dies, the death terminates the power of attorney : *A I R 1917 Cal 436, Disting.* [P 544 C 2; P 545 C 1]

*** (c) Contract Act (1872), S. 202—Reversioners executing power of attorney in favour of stranger to conduct suit on their behalf—Power providing that when property in suit would be recovered, he would be entitled to certain share in it—Such authority is not one coupled with interest and S. 202 does not apply — Even if such transaction may be champertous third party cannot contend that assignors may have grievance against assignee.**

The principle of S. 202 applies only to cases, where authority is given for the purpose of being a security or a part of the security and not to cases where the interest of the donee arises afterwards and incidentally. In such cases there is no authority coupled with an interest; but an independent authority, and an interest subsequently arising : *(1848) 5 C B 895, Ref.* [P 545 C 1]

Some reversioners executed a power of attorney in favour of a stranger authorizing him to conduct a suit on their behalf and providing that when the property, the subject-matter of the suit, would be recovered he would be entitled to certain share in it.

Held that such authority was not coupled with interest and hence the principle of S. 202 did not apply. [P 545 C 1]

Held further that even if the transaction was an unfair and unconscionable bargain, that was a question between the assignors and the assignee, and so long as the deed stood, it was no concern of the third party that the assignors might have a grievance against the assignee. [P 545 C 1]

Held also that the document did not create an immediate transfer, but contemplated the coming into existence of a future deed which was to effect the transfer. [P 545 C 1]

M. Appa Rao — *for Appellant.*

V. Govindarajachari and K. Kameswara Rao — *for Respondents.*

Judgment.—It becomes necessary to state a few facts in order to make the questions of law raised intelligible. The suit may be shortly described as one brought by the reversioners of a deceased Hindu. One Brahamayya (senior) died somewhere about the year 1864 and was succeeded by his widow Subbamma, who died on 27th September 1914, i. e. about 50 years later. On her death the estate vested in two persons named Ramayya and Brahmayya (junior), sons of two brothers. After Ramayya's death his sons (plaintiffs 1 to 5) along with Brahmayya (junior) executed on 21st November 1916, the document Ex. F, in favour of plaintiff 6, a stranger. On 27th September 1926, i. e. on the last day of the period provided by the law of limitation, the present suit was brought. The plaint, which purports to have been filed by plaintiffs 1 to 6, was in fact signed and verified only by plaintiff 6 who describes himself as the authorized agent under Ex. F of plaintiffs 1 to 5. It must be mentioned that although the plaint contains the statement that the correct court-fee of Rs. 80 odd was paid the amount of court-fee actually paid was Re. 1. The plaint was then returned for various defects, two of which only concern us here : (i) Want of proof that plaintiff 6 was the duly authorized agent of plaintiffs 1 to 5; (ii) making good the deficient court-fee.

By way of curing the first defect Ex. F was produced, but the Court refused to recognize it as containing sufficient authorization. Then on 27th October 1926 plaintiffs 1, 2, 4 and 5 filed a verification and on their behalf a pleader entered appearance. So far as plaintiff 3 was concerned, nothing was done by him or on his behalf. As to the second defect, there was default made in the payment of the deficit court-fee within the time limited. Two further extensions were given and on 14th October 1926 the deficiency of Rs. 80 was made good. There is one other fact which must be mentioned. Brahmayya (junior) who, as stated above, was among those that executed Ex. F, having died previous to the suit, his sons were impleaded as defendants 6 and 7. The lower Appellate Court agreeing with the trial Court has passed a decree in favour of the plaintiffs and defendants 6 and 7. Defendant 2 who has been in possession of the estate, has filed the present appeal. He is the grandson of Subbamma's sister's daughter. On the merits he put forward a certain defence, which the lower Courts have refused to go into, on the ground that the plea was raised too late. Whether in doing so they have acted rightly or not, is a matter I need not consider, in the view I have taken as to the question of law raised.

The first contention advanced for the appellant is that the trial Court acted wrongly in extending the time for making good the deficiency in the court-fee. Where a plaint is written upon paper insufficiently stamped, the Court is bound to give the plaintiff time to make up the deficit; only when he fails to comply with the order, the Court can reject the plaint; that the plaint is presented on the last day of the period of limitation makes no difference, that is the effect of O. 7, R. 11, Civil P. C. Again, whether the payment of insufficient fee was by design or due to inadvertence, the Court is bound by the mandatory terms of it to give effect to this provision. There is some inconsistency between this rule and S. 28, Court-fees Act, as the latter provision does not extend to deliberate payment of insufficient fee. But the rule *generalibus specialia derogant*, must, I take it, apply as the section in the Court-fees Act refers to documents generally, whereas the rule in the Code to plaints alone. This being the law, the Court's action in giving the plaintiff time originally cannot be questioned. But once the time was fixed, it was no longer open to the plaintiff to demand as a matter of right that the time should be extended. The power to grant extension vests in the Court either under S. 148 or S. 149, Civil P. C. Under either of those sections, the question is one of the Court's discretion and not the plaintiff's right. S. 149, it may be noted, expressly provides for a defective document being retrospectively validated. It is obvious

that the Court must exercise its discretion not capriciously, but judicially and reasonably. There is nothing on the record to show that the Court in granting the extension, applied its mind to the question at all. The suit was filed on the last day of the 12 years' period, by one who was gambling in litigation. Then it is suggested that this plea was not taken in the Courts below. How are the defendants to blame when they were not apprised of the order made behind their back? However I do not propose to rest my judgment on this ground, as giving effect to the maxim *omnia præsumuntur rite esse acta*, I should presume that there was a real exercise of discretion: *see* 4 Pat 190,[1] 1 Pat L J 420,[2] 3 Pat L J 74,[3] 56 I C 47,[4] A I R 1937 Pat 550,[5] 24 C L J 88[6] and 51 M L J 90.[7]

This shows how necessary it is to provide by a rule (made by the High Court) that where the order has the effect of overriding limitation, the Court shall not make it without notice to the party to be adversely affected by it. In this case it is by a sort of fiction that the Court can be held to have exercised its discretion for, the order that has been made is of the routine type. If such a rule is made, it will incidentally have the effect of making the Court apply its judicial mind to the matter arising before it.

The more vital question is the one arising from Ex. F. In the first place, I am not prepared to agree with the appellant's learned counsel that it cannot be construed as a power of attorney. It provides for plaintiff 6 filing the suit himself and conducting it, and for the properties, when recovered, being divided in two equal moieties between him and the reversioners. I see no reason why a narrow meaning should be put upon this document. But there is a far more serious objection, which I think ought to prevail. The power of attorney was executed by six persons, of whom Brahmayya (junior) was one, he being entitled to one half of the property; but before the power could be acted upon, the latter died. Under S. 201, Contract Act, an agency is terminated by the death of the principal. The question that then arises is, where the agency was created by more than one principal, does the death of one or some of them terminate the agency? It has been held in several English cases that the death of one or more of the principals revokes the agent's authority, although it has been explained in a decision of the Calcutta High Court in 21 C W N 620,[8] that the rule is not one of universal application, the question being one of intention to be determined upon the terms of the document and from the surrounding circumstances. In (1812) 15 East 592[9] and (1817) 7 Taunt 453,[10] it was held that a joint warrant of attorney given to enter judgment "against us" does not authorize the entering up judgment, on the death of one, against the survivor only. In (1861) 6 H & N 575,[11] where the question was as to the effect of the death of a member of a partnership firm the Court held that the contract was subject to the condition that it was to be in force so long as all the parties lived. In Boustead's book it is stated that the agency is determined by the death of any one of the partners before the expiration of the period fixed. (Law of Agency, Edn. 7, 1924). In the Calcutta case, already referred to, the property belonged to a joint Hindu family and the intention of the joint power of attorney appearing to be to facilitate joint loans by the mortgage of the joint estate, it was held that the death of one member did not revoke the agency: 21 C W N 620.[8] But the facts here are entirely different. Brahmayya (junior) had a distinct half right in the property and I am unable to deduce from the terms of Ex. F that it was intended to be in force even in the event of his death.

---

1. Raghunandan Sahay v. Rama Sunder Prasad, (1925) 12 A I R Pat 299=85 I C 172=4 Pat 190=6 P L T 4.
2. Gaya Loan Office Ltd. v. Awath Behari Lal, (1916) 3 A I R Pat 136=37 I C 507=1 Pat L J 420.
3. Ram Sahay Ram Pande v. Lachmi Narain Singh, (1917) 4 A I R Pat 26=42 I C 675=3 Pat L J 74.
4. Suraj Pal v. Utim Pande, (1920) 7 A I R Pat 281=56 I C 47.
5. Baijnath Prasad v. Umeshar Singh, (1937) 24 A I R Pat 550=172 I C 138=16 Pat 600=18 P L T 665.
6. Priyanath v. Meajan, (1916) 3 A I R Cal 616 =29 I C 571=24 C L J 88.
7. Basavayya v. Venkatappayya, (1926) 13 A I R Mad 676=95 I C 439=51 M L J 90.
8. In re Setal Prasad, (1917) 4 A I R Cal 436= 41 I C 288=21 C W N 620.
9. Gee v. Lane, (1812) 15 East 592=13 R R 594.
10. Raw v. Alderson, (1817) 7 Taunt 453=1 Moore 145=18 R R 535.
11. Tasker v. Shepherd, (1861) 6 H & N 575=30 L J Ex 207=4 L T (N S) 19=9 W R 476= 123 R R 697.

But it is contended that this is an agency coupled with interest and is saved by S. 202, Contract Act. This argument cannot prevail. Ex. F contemplates the agent incurring costs in future for the filing and the conducting of the suit. The principle applies only to cases, where authority is given for the purpose of being a security or a part of the security, and not to cases where the interest of the donee arises afterwards and incidentally; in such cases there is no authority coupled with an interest; but an independent authority, and an interest subsequently arising: (1848) 5 C B 895.[12] Illus. (b) to the section refers to a consignment made after the factor's advance and with an express request by the principal to repay himself out of the price of the goods: see Pollock and Mulla, commentaries under S. 202, and the Indian cases cited there. I am therefore of the opinion that plaintiff 6's agency had become revoked before the date of the suit and that the plaint that he filed is thus an invalid and ineffectual document. That would be sufficient to dispose of the appeal as in this view the suit fails.

Another contention however that has been raised may be noticed. I may at once state that the argument put forward in the lower Courts, that plaintiff 6 cannot maintain the suit as the agreement is champertous cannot prevail. Granting that this transaction is an unfair and unconscionable bargain, that is a question between the assignors and the assignee, and so long as the deed stands, it is no concern of the defendants that the assignors may have a grievance against plaintiff 6: 32 I A 113[13] and 35 I A 48.[14] But the more important question is, whether what was assigned was a mere right to sue in which case it amounts to gambling in litigation (see S. 6 (d), T. P. Act), or whether there was a present transfer of a moiety of the reversioners' interest. On a reading of the document, I am clearly satisfied that it does not create an immediate transfer but contemplates the coming into existence of a future deed which is to effect the transfer. The document says:

> If we should come out successful finally in the High Court, we both parties should take in equal shares and should execute documents necessary therefor.

In the next sentence the consideration is described to be the agreeing to give a moiety of the estate (the Court translation in this particular is wrong). On this ground again, the plaint, having been filed in time by plaintiff 6 alone, cannot avail the plaintiffs. In the result the decree of the lower Appellate Court is set aside and the suit is dismissed with costs throughout. Leave to appeal is refused.

C.R.K./D.S. *Decree set aside.*

A. I. R. 1938 Madras 545

PANDRANG ROW AND KING JJ.

Madras Automobiles and another — Appellants.

v.

Modern Bank Ltd., Coimbatore — Respondent.

Appeal No. 76 of 1933, Decided on 7th December 1937, against decree of Sub-Judge, Coimbatore, D/- 21st October 1932.

Contract Act (1872), S. 178 (before amendment)—'Good faith'—Meaning of—Suit for recovery of car by motor dealer against his salesman and latter's pledgee (bank)—Salesman in possession of car and depositing with bank receipt for price of car granted by motor dealer to salesman—Other enquiries also pointing salesman as owner of car—Car bearing trade number but bank not insisting on production of 'C' certificate—Certificate held not the only evidence of ownership—Bank held acted in 'good faith' and entitled to protection under S. 178.

The words 'good faith' in S. 178, Contract Act before its amendment bear the same meaning as is given in sub-s. 20 of S. 3 of General Clauses Act, though in terms that sub-section may not apply to any Act earlier in date than the General Clauses Act. The general rule of English law is also to the same effect. [P 547 C 1]

In a suit by a motor dealer against his salesman and latter's pledgee (a bank) for recovery of car or its value it was found that the salesman was in possession of the car and that he had at the same time shown and deposited with the bank a receipt granted by the motor dealer to the salesman for the price of the car and that the enquiries made by the bank also showed that he (the salesman) was the owner of the car. There was nothing to put the bank on its guard. It was argued that the fact that the car bore a trade number should have put the pledgee on its guard and the bank by not insisting on the production of the 'C' certificate which would have shown the name of the owner was guilty of negligence and had therefore not acted in good faith:

Held that there was nothing suspicious in the conduct of the salesman so as to make any

12. Smart v. Sanders, (1848) 5 C B 895=17 L J C P 258=12 Jur 751=75 R R 849.
13. Lal Achal Ram v. Raja Kazim Hussain Khan, (1905) 27 All 271=32 I A 113=8 C C 155=8 Sar 772 (P C).
14. Raja Rai Bhagavat v. Debi Dayal Sahu, (1908) 35 Cal 320=35 I A 48=12 C W N 393=7 C L J 335 (P C).

reasonable man suspect that he had no authority to pledge the car. The receipt granted by the motor dealer was sufficient evidence of the ownership of the car by the salesman and the 'C' certificate though prima facie evidence of ownership of the car not being the only evidence, the bank was not guilty of negligence in not insisting on the production of it and that defendant 2 had acted in good faith and was therefore entitled to protection under S. 178. [P 547 C 1, 2]

W. Kothandaramiah — *for Appellant.*

M. Krishna Bharathi and S. Seshadri — *for Respondent.*

Pandrang Row J. — The only point raised in this appeal is whether the respondent in this appeal, i. e. the Modern Bank Ltd., Coimbatore, was a bona fide pledgee of a certain motor car belonging to the appellant. The appeal arises out of a suit instituted by the appellant against the bank as defendant 2 and against one Ramaswami Iyer as defendant 1 to recover either the car and the difference between the original price of the car and its present value or, in the alternative, the value of the car with interest. Defendant 2 was impleaded because the car was pledged by defendant 1 with defendant 2 bank in December 1928, for a sum of Rs. 2200 odd. The suit was resisted on several grounds by defendant 1 but it is unnecessary to refer to his contentions, because there is no appeal by him from the decree passed against him. The present appeal by the plaintiff is from the decree dismissing the suit as against defendant 2. The main point on which defendant 2 succeeded was that defendant 2 acted in good faith in taking a pledge of the car in question. That contention was upheld by the learned Subordinate Judge, who tried the case and heard the witnesses and the claim as against defendant 2 bank was accordingly dismissed.

So far as the evidence on the point is concerned, we see no reason to take a different view of it from that taken by the trial Judge; and in fact, no serious attempt has been made to throw doubt on the veracity of the witnesses examined on behalf of defendant 2. It has however been contended that that evidence is not sufficient. It is urged that the onus of proof lies on defendant 2 and that the onus has not been discharged by the evidence adduced on behalf of defendant 2. The evidence on the point consists of that of the head clerk of defendant 2 bank D. W. 2, and that of the salesman and cashier of the U. M. S. motor firm at Coimbatore. The evidence makes it quite clear that before the pledge was taken of the car and money advanced by defendant 2 bank, sufficient enquiry was made about the ownership of the car and it was only after it was ascertained that defendant 1 was the owner of the car, that it was taken as a pledge and money was advanced. The car was brought to the bank by defendant 1 who also produced at the same time a receipt, Ex. 13, as evidence of his ownership. That was a receipt granted by the plaintiff firm acknowledging receipt of Rs. 3485 on account of a car and in favour of V. Ramaswamy Iyer, 116 Salivan Street, Coimbatore. The plaintiff's case is that defendant 1 was only his agent for the purpose of sale of motor cars and that he did not sell the car to defendant 1. Nevertheless, the receipt, Ex. 13, is drawn up in such a way that no one, after reading the receipt, would be led to suspect that defendant 1 was not the owner of the car but was merely an agent for sale. Enquiries were made from D. W. 3 before the pledge was taken and D. W. 3 assured the head clerk and the secretary of the bank that the loan could be given as defendant 1 was the owner of the car, and that the car was in his name with the "floating" number M. C. 2-A, as he was a dealer in cars for the plaintiff. He also stated that according to the custom in Madras, dealers in cars would not entrust their cars to sub-dealers unless some money is advanced as security. It is clear from the evidence that every reasonable precaution was taken by defendant 2 bank to make sure that the car was the property of defendant 1 as represented by him. It is not as if the bank acted merely on his own statement or representation. They made sufficient enquiry and there can be no doubt that they acted honestly. That they acted honestly in the matter has not been seriously disputed before us. In other words, they had no intention of causing wrongful loss to any one or making any wrongful gain to themselves by taking the pledge.

The question therefore is whether the honesty of the bank in this transaction is not a sufficient answer to the claim of the plaintiff against the bank. The question has to be decided with reference to S. 178, Contract Act as it stood before it was amended by the Act of 1930. The material portion of the section runs as follows:

> A person who is in possession of any goods . . . . may make a valid pledge of such goods; provided

that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly.

The further proviso need not be quoted here because it is conceded that it does not apply to the present case. The words 'good faith' found in this section have been generally understood to bear the same meaning as is given in sub.s. 20 of S. 3, General Clauses Act, though, in terms, that sub-section may not apply to any act earlier in date than itself. The general rule of English law is also to the same effect, viz. that a thing should be deemed to be done in good faith if it is in fact done honestly, whether it is done negligently or not. Pollock and Mulla, in their Commentaries on the Contract Act, also rely on the definition of 'good faith' found in S. 3, sub-section 20, General Clauses Act of 1897. It is however argued that even assuming that whatever was done, was done honestly and therefore in good faith, nevertheless S. 178, Contract Act, as it stood before it was amended, required that the circumstances surrounding the transaction must be such as would not raise a reasonable presumption that the pawnor was acting improperly and that, in this connexion, any negligence of the pawnee may have to be taken into consideration. The negligence that is attributed to defendant 2 bank is entirely confined to the fact that the car in question bore a trade number and that the bank did not insist upon the production of the C certificate relating to the car which would have shown in whose name the car was registered. We do not think that, in the circumstances and especially in view of the fact that enquiry had shown that defendant 1 himself was a sub-dealer in cars, the fact that the car bore a trade number would have put any reasonable pledgee on his guard. The omission to ask for the C certificate is not, in our opinion, such a serious omission as to warrant an inference that it must have been deliberate or that it must have been due to recklessness.

So far as the conduct of defendant 1 is concerned, there was nothing suspicious about it so as to make any reasonable man suspect that he had no authority to pledge the car, or, in other words, that he was not the owner of the car. It must be remembered in this connexion that, though the rules under the Motor Vehicles Act, require that the owner of the car must obtain a C certificate in respect of the car, and that after every transaction of sale the seller must communicate the fact of sale to the licensing authorities and the buyer should take out a certificate in his own name, nevertheless these provisions of law do not really affect the question of ownership. It may be that the possession of a certificate is prima facie evidence of ownership, but it is not the only evidence of ownership. In this particular case, the receipt, Ex. 13, appears to have been regarded, and not unreasonably, as documentary evidence of a satisfactory character of the ownership of the car by defendant 1; and it was perhaps because this receipt was produced and deposited with the bank that it was not thought necessary to enquire about the certificate of registry. On the whole, we do not see sufficient reason to differ from the finding of the learned Subordinate Judge that defendant 2 bank was a bona fide pledgee of the car and that it is entitled to the protection given by S. 178, Contract Act. This is the only point in appeal and this has been found against the appellant. The appeal must therefore fail and it is accordingly dismissed with costs.

C.R.K./V.B.B. *Appeal dismissed.*

*** A. I. R. 1938 Madras 547**

WADSWORTH J.

C. Krishnaveni Ammal and another — Plaintiffs.

v.

P. S. Subrahmanyam Chetty and others — Defendants.

Civil Suit No. 351 of 1934, Decided on 7th December 1937.

*** (a) Mortgage—Equitable—Deposit of title deeds as collateral security for loan—Terms of loan already agreed upon some days before—Deposit of title deeds followed by memorandum evidencing deposit and not itself being complete record of mortgage transaction—Memorandum does not require registration.**

It is settled law that where a deposit of title deeds as collateral security for a loan is evidenced by a writing which is not intended to be itself the embodiment of the contract, but is a mere memorandum of previously completed transaction, that writing is not an instrument affecting immovable property and need not be registered. In deciding whether the writing is such a memorandum of a completed transaction or the embodiment of the actual contract, the use of the past or present tense in reference to the deposit may be an indication of the intention of the parties but cannot of itself be the sole criterion of the nature of the

document. The important point to consider is whether having regard to the recitals of the document and the evidence, circumstantial or otherwise, of the manner of its execution, it can be stated that the document was regarded by the parties as the embodiment of the bargain or as a mere memorandum of a completed oral contract which had an existence independent of the memorandum. If the former, it is inadmissible if not registered. If the latter, it does not require registration as it is not an instrument affecting immovable property. [P 549 C 1]

A memorandum was executed after the deposit of title deeds was made as collateral security for a loan. The terms of the loan were agreed upon some days before the deposit and title deeds remained as security for a loan which had already been agreed to be advanced subject to satisfactory title. The title was approved by the document writer some days before the execution of the memorandum. Besides this, the memorandum did not recite the date of the deposit and did not give the rate of interest:

Held that there was already a completed mortgage agreement anterior by some days to the memorandum. The memorandum therefore was not itself a complete record of the contract and hence did not require registration. [P 549 C 2]

(b) Hindu Law—Alienation — Mortgage by manager for family business is binding on family.

A mortgage raised for the purpose of a family business by the manager of the joint family is binding on the family. [P 549 C 2]

(c) Mortgage—Substituted securities — Priority — After partition rights in substituted security of two rival claimants should be proportionate to value of original security standing on date of partition—S. 48, T. P. Act has no application to such case.

As between the two substituted security rights no question of priority arises, for S. 48 applies only to successive mortgages on the same property. After partition, the rights in the substituted security of two rival claimants should be proportionate to the value of the original security as it stood on the date of partition : *6 C L J 46, Ref.* [P 550 C 1]

K. Krishnaswamy Iyengar for Srinivasaraghavan and Thyagarajan—*for Plaintiffs.*

M. A. Srinivasan, N. K. Mohanarangam Pillai and K. Narasimha Iyer for T. V. Subramania Iyer — *for Defendants.*

Judgment. — Plaintiff sues on a series of mortgages. The following geneological tree will help to make the facts clear :

MUNISWAMI CHETTY

Sadasiva (Died 1934)	Gangadhara (died) : Visalakshi D. 4
	Thayumanaya D. 3. (died after suit)
Subramaniam D. 1. (Insolvent)	Somasundaram D 2.

Defendant 5 is the Official Assignee representing defendant 1. Defendant 6 is another mortgagee. He has died and his executor is defendant 7. Thus the Official Assignee, and defendant 2 now represent Sadasiva's branch and defendant 4 represents Gangadhar's branch. Sadasiva and Gangadhara had a rice mill at Ponneri and a provision business in Madras. On 2nd August 1930, Sadasiva executed a promissory note, Ex. A, for Rs. 1900 in favour of the plaintiffs, and he is alleged also to have deposited the title deeds of 16 Audiappa Chetty Street, item 1 in the plaint schedule, as security. Ex. B dated 2nd August 1930 is the collateral security document and its admissibility is one of the main questions in issue. On 22nd August 1931, Sadasiva (for himself and as manager and guardian of his minor nephew defendant 3) and his son, defendant 1, mortgaged two other family properties, viz. 41 Guruvappa Chetty Street and 105 Egmore High Road, to defendant 6 for Rs. 2000 by deed. On 19th April 1932, Sadasiva and defendant 1 executed two mortgage deeds in favour of plaintiff: (1) Ex. C over item 1 for Rs. 2000, including Rs. 1900 due on Ex. A., (2) Ex. D over item 4 (the Ponneri property) for Rs. 500.

On 24th March 1931, a partition suit, C. S. No 471 of 1931, was filed in which it was held that there was a separation between Gangadhara's branch and Sadasiva's branch in October 1930. Plaintiffs here were not parties to that suit. The result of this suit was to allot to defendant 3's (Gangadhara's) branch not only the properties covered by Exs. B, C, and E but also the properties covered by defendant 6's mortgage. The Ponneri property covered by Ex. D was allotted to Sadasiva's branch. In 1934 defendant 6 filed a suit on his mortgage claiming substituted security over the properties allotted to Sadasiva. The present plaintiffs were not parties to that suit, which resulted in a decree by virtue of which defendant 6 purchased those properties except for the Ponneri property item 4, which was sold to a stranger subject to plaintiff's mortgage Ex. D.

The first question to be decided in the present suit relates to the validity of the plaintiff's equitable mortgage for Rs. 1900 dated 2nd August 1930. This depends largely on the admissibility of Ex. B, with reference to the provisions of Ss. 17 and 49, Registration Act, and S. 91, Evidence Act. I have had occasion to discuss the case law on the subject in a very recent judgment (C. S. No. 394 of 1933) and I do not think

it necessary to do more than restate my conclusions. It is settled law that where a deposit of title deeds as collateral security for a loan is evidenced by a writing which is not intended to be itself the embodiment of the contract, but is a mere memorandum of a previously completed transaction, that writing is not an instrument affecting immovable property and need not be registered. I have held in the case just referred to that in deciding whether the writing is such a memorandum of a completed transaction or the embodiment of the actual contract, the use of the past or present tense in reference to the deposit may be an indication of the intention of the parties but cannot of itself be the sole criterion of the nature of the document. The important point to consider is whether having regard to the recitals of the document and the evidence, circumstantial or otherwise, of the manner of its execution, it can be stated that the document was regarded by the parties as the embodiment of the bargain or as a mere memorandum of a completed oral contract which had an existence independent of the memorandum. If the former, it is inadmissible if not registered. If the latter, it does not require registration as it is not an instrument affecting immovable property.

Applying these principles to the present case, one is confronted with some confusion of the evidence, due partly to the reluctance of counsel on both sides to press for greater precision when the legal result of such precision might be adverse to the party who applied the pressure. The actual recitals of the document are not very decisive. It is described as a "collateral security letter," and it begins by reciting the names and addresses of the lenders and the name, father's name, religion, occupation, and address of the borrower. It continues as follows :

> On this date I have executed a promissory note in your favour and received Rs. 1900. I have deposited with you as security the title deeds of the premises No. 16 Audiyappa Chetty Street belonging to me. At the time when I pay the said promissory note I shall receive back this letter and also the title deeds. To this effect is the collateral letter given with my consent.

Then follow the signatures of the borrower and the attestor and a list of eight documents. It will be noted that this document does not recite the date of the deposit and does not give the rate of interest. It is not therefore a complete record of the contract.

The evidence of plaintiff 2 and of the attestor makes it clear that the title deeds were handed over at least five or six days before the date of Exs. A and B, that the terms of the loan were agreed on and the money drawn from the fund some days before the title deeds were handed over and that when the title deeds were handed over it was understood that plaintiff 2 was to have them scrutinized by a document writer. Plaintiff 2 says that the document writer approved the title some five or six days before the date of Exs. A and B. There is no evidence contra. It is reasonable to infer from these circumstances that after this individual had approved of the title, the deeds remained with plaintiff 2 as security for a loan which he had already agreed to advance subject to a satisfactory title. If this is the fact, then there would be a completed mortgage agreement anterior by some days to the writing of Ex. B, and the consequence is that Ex. B is admissible in evidence though unregistered. I find that the mortgage for Rs. 1900 dated 2nd August 1930 is valid.

The next question is whether it was binding on the joint family of Sadasiva and Gangadhara which existed at the time of its execution. Here again the evidence is not very detailed. Ex. A does not state the purpose of the loan. Plaintiff 2 states that Sadasiva and Gangadhara were members of a joint family and were running two businesses, one a shop at Madras, the other a mill at Ponneri, managing them by turns. He also states that Sadasiva signed as the manager of the joint family and that the borrowing was for the paddy business — paddy being purchased and milled at Ponneri and the rice sold at Madras shop. He says that he did not take Gangadhara's signature because the latter was at Ponneri and he did not think it necessary. P. W. 4, the attestor, says that these two businesses were owned by the family from the time of Munisami, the father of the two brothers. It appears that in the partition suit Sadasiva asserted that the Madras shop belonged to his brother-in-law and the Ponneri property belonged to a stranger; but on the materials before me it seems unlikely that this assertion was true. In the absence of any other evidence I must hold that the mortgage of 2nd August 1930 was raised for the purpose of family business by the manager of the joint family and was binding on the family.

It follows that Ex. C, the mortgage for Rs. 2000 executed on 19th April 1932 after the separation, is binding on the joint family property to the extent of Rs. 1900. It has not been shown how the plaintiff's mortgage right has become extinguished and Issue 3 is found in favour of the plaintiffs. As to the equities between plaintiffs and defendants 6 and 7, it seems to me clear that plaintiffs are entitled to substituted security to the extent of Rs. 100 with interest over the share of Sadasiva's branch and defendants 6 and 7 are entitled to substituted security to the extent of Rs. 2000 with interest, both these rights being subject to the plaintiff's mortgage Ex. D for Rs. 500 over item 4. As between the two substituted security rights, no question of priority arises, for S. 48, T. P. Act, applies only to successive mortgages on the same property. It has been held in 6 C L J 46[1] that the rights in the substituted security of two rival claimants should be proportionate to the value of the original security as it stood on the date of partition. If this rule be applied, the plaintiffs would be entitled to one-twentieth of the value of item 1 as it stood at the time of partition and defendants 6 and 7 to the whole of the value as on the date of partition of the two items mortgaged to them: provided that if the whole of the property available as substituted security is insufficient to meet both claims, they will be reduced pro rata.

The decree will provide as follows: Item 1 will be sold to discharge Rs. 1900 of the amount due under Ex. C with interest thereon from 19th April 1932 at 14 annas per cent. per mensem till the date fixed for payment, viz. three months hence and proportionate costs and subsequent interest at 6 per cent. on the aggregate amount till realization. Item 4 will be sold to realize the amount due on the mortgage Ex. D with interest at the contract rate till the date fixed for payment, viz. three months hence, and proportionate costs and subsequent interest at 6 per cent. on the aggregate amount till realization. Items 2 and 3 will be sold and any balance left over from the sale of item 4 will be utilized to discharge the amount found to be due to plaintiffs and defendants 6 and 7 by reason of their claims to substituted security calculated in the manner set forth in the previous paragraph with interest at the contract rate to the date fixed for payment, viz. three months hence, and proportionate costs of subsequent interest at 6 per cent. till realization. Defendant 7 as the purchaser of the equity of redemption in these two items will be entitled to avert the sale by paying the amount found due on those items to the plaintiffs.

C.R.K./D.S. *Order accordingly.*

1. Hakim Lal v. Ram Lal, (1907) 6 C L J 46.

A. I. R. 1938 Madras 550

BURN J.

In re Bontanathila Naranappayya and others — Petitioners.

Criminal Revn. No. 460 and Petn. No. 428 of 1937, Decided on 23rd February 1938, from Judgment of Sub-divisional First Class Magistrate, Mangalore, in Criminal Appeals Nos. 17, 18 and 20 of 1937.

Madras Gaming Act (3 of 1930), S. 5—No form is prescribed for warrants under S. 5 —All that S. 5 requires is that "Magistrate shall have reason to believe"—If he has, he can issue warrant under S. 5 — No necessity to record reasons.

There is no prescribed form for warrants under S. 5. S. 5 does not require the Magistrate to record any where his reasons for believing any information the police may have given him, nor even the fact that he had reason to believe that any place is used as a common gaming house. All that it requires is that "the Magistrate shall have reason to believe." If he has, he can issue his warrant, not in any particular form, but his warrant giving authority to a police officer to do certain things. [P 550 C 2; P 551 C 1]

K. Y. Adiga and S. Ramayya Nayak — *for Petitioners.*

K. Venkataraghavachari for Public Prosecutor — *for the Crown.*

Order.—The contention that the Stationary Sub-Magistrate's warrant was not issued under S. 5, Gaming Act cannot be accepted. The contents of the warrant show, as the learned Joint Magistrate has very properly observed, that it was in fact issued under S. 5, Gaming Act. I may remark that there is no prescribed form for warrants under S. 5, Gaming Act, and moreover that section does not require the Magistrate to record anywhere his reasons for believing any information the police may have given him. It does not even require him to record the fact that he has reason to believe that any place is used as a common gaming house. All that it requires is that "the Magistrate shall have reason

to believe ...."; if he has, he can issue his warrant, not in any particular form, but his warrant giving authority to a police officer to do certain things. The requirements of S. 5 are here complied with, and the learned Joint Magistrate decided rightly that the presumption of S. 6 of the Act was available to the prosecution. There was other evidence also on which the findings of the lower Courts could be based. I can find no ground for interference in revision and I dismiss this petition.

C.R.K./R.M. *Petition dismissed.*

---

* A. I. R. 1938 Madras 551

PANDRANG ROW J.

In re Nemichand Parakh -- Petitioner.

Criminal Revn. No. 747 and Petn. No. 700 of 1937, Decided on 26th January 1938, from Judgment of Third Presidency Magistrate Egmore, Madras, in C. C. No. 565 of 1937.

*** Penal Code (1860), S. 405 —Sub-pledge by pledgee of goods pawned to him to the extent of his interest therein is not criminal breach of trust.**

What a man does within the limits of the right given to him by the law cannot amount to a criminal offence. A pawnee or a pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest therein. Hence a sub-pledge by the pledgee of the pawned goods for the same amount as the debt for which the original pledge was made is not criminal breach of trust. Even assuming that this view is not correct, the pledgee making such sub-pledge in the ordinary course of business must be deemed to have acted honestly under the mistaken belief as to the extent of his rights as pledgee, and the sub-pledges of the pledged goods cannot be regarded as amounting to criminal breach of trust : *(1866) 1 Q B 585, Rel. on.* [P 551 C 2; P 552 C 2]

V. T. Rangaswamy Aiyangar and P. S. Kothandapani — *for Petitioner.*

Crown Prosecutor — *for the Crown.*

Order. — The petitioner in this case, Nemichand Parakh, was convicted of criminal breach of trust on three counts and sentenced to undergo rigorous imprisonment for six months on each count, the three sentences to run concurrently. The charge against him was :

That you on or about the undermentioned dates at Madras being entrusted with properties stated below committed criminal breach of trust (i) on or about 4th April 1935 gold chain of the value of Rs. 175 belonging to P. W. 1; (2) on or about 18th September 1935 ruby necklace of the value of Rs. 50 belonging to P. W. 8, and (3) on or about 21st March 1936 ring of the value of Rs. 12-8-0 belonging to P. W. 1.

The dates given in the charges are the dates on which the actual pledges were made of these jewels by the prosecution witnesses concerned with the accused. It is not pretended that the receipt of the pledged jewels was itself a criminal breach of trust. Presumably the criminal breaches of trust alleged against the accused were the sub-pledges effected by the accused of the same jewels, for the same amounts, and on the same dates as the pledges with his financiers or khatadars Kanhiya Lal P. W. 6 and Amir Chand P. W. 7. It is unfortunate that the charge should have been so badly drawn up as not to indicate clearly to the accused what it was that was charged against him as criminal breach of trust. It is however now conceded that what was charged against the accused was that the accused's sub-pledging all the jewels on the same dates for the same amounts amounted to criminal breach of trust. This raises a pure question of civil law, i. e. whether such sub-pledging to the same extent, that is to say, for the same amount as the debt for which the original pledge was made, is a wrongful act, for, if such sub-pledging was within the rights of the pledgee, that is the petitioner, any sub-pledging by him cannot be regarded as amounting to a criminal offence, as it is obvious that what a man does within the limits of the right given to him by the law cannot amount to a criminal offence. The question was perhaps at one time not entirely free from doubt, but it is clear to me that the authorities on the point are in favour of the petitioner's contention, namely that as pledgee he had a right to sub-pledge to the extent of his interest in the pledged properties. The law on the subject in this country is to be found in S. 179, Contract Act, 9 of 1872 which runs as follows :

Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

The words 'a person' found in this section would certainly include a pledgee, if it can be said that he has a limited interest in the goods pledged with him. The leading English case on the point is (1866) 1 Q B 585.[1] In that case the following passage from Story on Bailments is quoted without dissent, namely :

The pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe

1. Donald v. Suckling, (1866) 1 Q B 585=7 B & S 783=35 L J Q B 232=12 Jur (N S) 795=14 L T 772=15 W R 13.

custody without consideration ; or he may sell or assign all his interest in the pawn ; or he may convey the same conditionally by way of pawn to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property for a debt beyond his own. . . . . it is clear that in such a case he would be guilty of a breach of trust and his creditor would acquire no title beyond that held by the pawnee.

This statement of the law in Story on Bailments and (1866) 1 Q B 585[1] which was a case of 1866 were in all probability the source from which the rule laid down in S. 179, Contract Act of 1872 was taken. In any case, it is not contended that the Indian law on the subject is different from the English law. In (1866) 1 Q B 585[1] it is clearly laid down that the pawnee has a special property in the pawned goods, that is, he is invested with a right which is something more than the mere right of possession as in the case of a lien. Cockburn C. J. describes it as a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time ; it is also described as inchoate right of property conferred upon him by the contract. In Halsbury's Laws of England, Vol. 25, Hailsham Edition, it is stated that :

The pawnee's special property in the thing pledged may be assigned to a third party by way of assignment of the pawnee's interest or of a sub-pledge by him. Such a transfer is not inconsistent with the contract of pawn so long as it purports to transfer no more than the pawnee's interest against the pawnor. the pawnee in the meantime being responsible for due care being taken for the custody of the property.

It is unnecessary in my opinion to go further into the matter as the authorities already quoted are sufficient to show that the pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest, and that is exactly what the petitioner did in the present case. My attention has been called by the Crown Prosecutor to the proceedings of the High Court in 1871 reported in 6 M. H. C. R. App. 28 in which it is stated that a person who pledges what is pledged to him may be guilty of criminal breach of trust where the disposal is in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged and when such disposal is done with a dishonest intention. There is nothing in the present case to show that there was any express contract taking away the right given by the ordinary law to make a sub-pledge and there is certainly no other evidence to show that the sub-pledges were made with a dishonest intention. On the other hand, there is no reason to suppose that the defence of the petitioner on this point, namely that he was doing this in the regular course of business is not true. Apparently the petitioner is not a man with a large capital and he carries on his money-lending business by lending money or pledge of jewels and getting the capital necessary for the purpose of sub-pledging the same jewels with his financiers for the same amounts at a lower rate of interest. There is nothing to show that this course of business was followed with any dishonest intention. The High Court in the proceedings mentioned above also stated that great caution ought to be used in drawing the inference of dishonesty from a breach of duty imposed by civil law and that whether it should be drawn or not is a question to be decided in each particular case. The High Court also added that :

When the law bearing upon the case is doubtful, (1866) 1 Q B 585,[1] it would be most indiscreet to raise the inference of dishonesty against a man who has mistaken it, simply because he has mistaken it.

It would therefore follow that even if the view that I have taken of the rights of the petitioner in this case is not correct, still the petitioner must be deemed to have acted honestly under the mistaken belief as to the extent of his rights as pledgee, and the sub-pledges of the pledged goods cannot be regarded as amounting to criminal breach of trust. It is unfortunate that this aspect of the case was not dealt with by the learned Magistrate but it is quite possible that this omission is due to the fact that this aspect was not brought to his notice either by the prosecution or by the accused. In any case, the unfortunate result is the conviction of a man in respect of acts done by him within the exercise of his rights, and the only consolation is that he was let on bail very soon after he was committed to jail as a result of the conviction. In my opinion, he ought never to have been prosecuted. If the prosecution had informed itself of the law on the subject, as it ought to have done, there would have been no prosecution at all, as it would have been found that, according to the case for the prosecution itself, no offence had been committed. The conviction and sentence are set aside and the petitioner is

acquitted honourably. His bail bond is cancelled.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1938 Madras 553

BURN AND VENKATARAMANA RAO JJ.

T. M. Subramanyan Tirumurupu and others — Appellants.

v.

T. E. Naraina Tirumurupu and another — Respondents.

Appeal No. 282 of 1936 and Letters Patent Appeal No. 44 of 1937, Decided on 21st January 1938, against order of Sub-Judge, South Kanara, D/- 12th February 1936.

(a) Madras Marumakkathayam Act (22 of 1933), S. 38 — Share of junior member in tarwad can be attached in execution of decree against him for his personal debts.

Under the law of partnership, a partner cannot without the consent of his co-partners alienate his share so as to introduce a stranger but it is open to a creditor to seize and sell his share and the same principle would be applied to the shares in a joint undivided estate without unduly interfering with the peculiar rights of the co-parceners in such an estate. Thus the foundation of the right of a creditor to seize the share of a co-parcener rests on the fact that he has a right to claim partition and convert his share in the joint property into separate property. S. 38 having conferred in unmistakable terms upon a member who constitutes a tavazhi the right to demand partition and have his share in the joint estate converted into a separate estate, a creditor is entitled to attach and sell his share in execution of decree obtained for his personal debt. There has been a deliberate departure from and alteration made by the Legislature of the previous state of the law by the conferment of this right of partition and once this right is conferred, all the necessary legal consequences must follow therefrom. [P 554 C 2; P 555 C 1]

(b) Limitation Act (1908), Art. 182 (5) — Application for issue of notice under O. 21, R. 22, Civil P. C. is step-in-aid.

An application for the issue of a notice to the judgment-debtors under O. 21, Rule 22, Civil P. C. is a step-in-aid of execution and the order made on such an application furnishes a starting point for limitation under Art. 182 (5). [P 555 C 2]

K. Kuttikrishna Menon — for Appellants.

K. Narayana Marar — for Respondents.

Venkataramana Rao J. — This is an appeal against the order of the learned Subordinate Judge of South Kanara directing attachment of the shares of the petitioners in the property of the tarwad of which they are the junior members in execution of a decree in O. S. No. 37 of 1931 on the file of the same Court obtained against them for their personal debts. The learned Subordinate Judge took the view that whatever might have been the law before the passing of the Marumakkathayam Act of 1933, after the passing of that Act, their interest is attachable by virtue of S. 38 of the said Act. This view is canvassed by Mr. Kuttikrishna Menon. His contentions are that under the Marumakkathayam law by which the appellants are governed, there was no interest of the appellants in the property capable of attachment, that the Act has not in any way effected an alteration of the law in this respect, that the only right which a junior member has is a claim for partition under S. 38 if he fulfils the conditions but not otherwise, and that unless that right is exercised and he obtains the property by virtue thereof, he has no disposable interest therein. To appreciate the contention, it is necessary to define precisely what the interest of a junior member is in the property of the tarwad to which he belongs and how the Act has effected an alteration in regard to his rights in the said property. Under the Marumakkathayam law, no member of a Malabar tarwad has got any definite share but the property of the tarwad is vested in all the members comprising the tarwad. The tarwad is impartible except with the consent of all the members or probably with the consent of the adult members of the family and by reason of this limitation no individual member can alienate the property nor can his interest therein be seized and sold in execution by a creditor for his personal debt. This incapacity is due to the fact of there being no right of compulsory partition and therefore no right to have the interest separated for separate enjoyment. Nevertheless the interest is proprietary and a vested interest though joint. It is to remedy this incapacity that an Act was passed to amend the law of partition in certain respects in order to confer a right of partition on the members of a tarwad under certain conditions and to enable them to have their interests separated so that they can deal and dispose of them subject to the conditions specified in the Act. It is to give effect to this object that S. 38 was enacted and the relevant portion, so far as is applicable to the present case, runs thus :

(1) Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad: provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to such tavazhi and to any other tavazhi or tavazhis of the tarwad, except with the consent of such ancestress, if she is a member of the tarwad.

(2) The share obtained by the tavazhi shall be taken by it with the incidents of tarwad property.

Explanation.—For the purpose of this chapter a male member of a tarwad or a female member thereof without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad.

It will thus be seen that a male or female member of a tarwad constituting a tavazhi within the meaning of the explanation is entitled to claim partition and separate from the tarwad. The right of partition is therefore in unambiguous terms conferred upon an individual member who constitutes a tavazhi and it is conceded in this case that appellants 1 and 2 fulfil the conditions imposed by the explanation and constitute a tavazhi. Therefore on the date of the attachment in question, appellants 1 and 2 were entitled to claim their shares in the property of the tarwad and separate therefrom. If this right is thus vested in them by virtue of the Act, the creditor is entitled to seize and sell the interest which they have and which is capable of separation and definition. Under the Mitakshara law it is well settled that in certain provinces a member of a joint family is incapable of alienating his share for separate debts without the consent, express or implied, of all the other members, but this incapacity was held not to prevent a creditor from seizing and selling his share in execution of a decree obtained against him. This was definitely settled by the Judicial Committee of the Privy Council in a very early decision reported in 3 Cal 198.[1] They pointed out the distinction between the sale of a share in a joint estate under an execution and an alienation by the voluntary act of a cosharer and referred with approval to the observations of Peacock C. J. in 3 Beng L R 31.[2] In that case one Bhagwan Lal who was a member of a joint family along with his nephew governed by the Mitakshara law, died without leaving any male issue. During his lifetime he executed a possessory mortgage in respect of his undivided share in order to raise money on his own account and not for the benefit of his family. A question arose after his death whether the nephew could recover the property without redeeming the same. Their Lordships held that he could do so, as Bhagwandas had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account and not for the benefit of the family. In dealing with this question, Peacock C. J. observed that the case of an involuntary alienation might be different. He remarked thus :

> It is unnecessary for us to decide whether, under a decree against Bhagwan in his lifetime, his share of the property might have been seized. According to the decision in Stockes' Reports, it might have been seized, but the case as against Bhagwan and that against the survivors is different. So long as Bhagwan lived, he had an interest in this property which entitled him, if he had pleased, to have demanded a partition, and to have had his share of the joint estate converted into a separate estate.

These observations were cited with approval by the Judicial Committee in 3 Cal 198[1] above quoted and made the basis of their decision. In that case, their Lordships instanced the case of a partnership in support of the view they were enunciating. Under the law of partnership, a partner could not without the consent of his co-partners alienate his share so as to introduce a stranger but it is open to a creditor to seize and sell his share and the same principle would be applied to the shares in a joint undivided estate without unduly interfering with the peculiar rights of the co-parceners in such an estate. Thus it will be seen that the foundation of the right of a creditor to seize the share of a co-parcener rests on the fact that he has a right to claim partition and convert his share in the joint property into separate property and this position was made clear in a later decision in 18 Cal 157[3] where their Lordships explain the scope of this principle at page 161 thus :

> Anyone of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for

1. Deendoyal Lal v. Jugdeep Narain Singh, (1877) 3 Cal 198=4 I A 247=3 Sar 730=3 Suther 468=1 C L R 49 (P C).
2. Sadabart Prasad Sahu v. Poolbash Koer, (1869) 3 Beng L R 31=12 W R 1 (F B).
3. Madho Parshad v. Mehrban Singh, (1891) 18 Cal 157=17 I A 194=5 Sar 586 (P C).

his own purposes; but as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution.

It will be seen that the attachment of a member's undivided share in execution of a decree was put on the same footing as severance effected by an agreement by the members to hold the property in definite shares for the purpose of justifying a sale by a creditor, the whole basis being rested on the undoubted right of a member to demand partition and have his demand complied with, if necessary, by legal process. S. 38 of the Act having conferred in unmistakable terms upon a member who constituted a tavazhi the right to demand partition and have his share in the joint estate converted into a separate estate, a creditor is entitled to attach and sell his share. There has been a deliberate departure from and alteration made by the Legislature of the previous state of the law by the conferment of this right of partition and once this right is conferred, all the necessary legal consequences, must follow therefrom. Mr. Kuttikrishna Menon relied on S. 50. We are not able to see how that section helps him. What S. 50 of the Marumakkathayam Act says is:

Nothing contained in this Act shall be deemed to affect any rule of Marumakkathayam law, custom or usage, except to the extent expressly laid down in this Act.

But the rule of Marumakkathayam law which prevented a compulsory partition has been abrogated to the extent indicated in S. 38 of the Act and it is in virtue of that section a junior member of a Malabar tarwad has got the right to demand partition and a creditor acquires the right to have it enforced for his benefit.

The next point urged by Mr. Kuttikrishna Menon is that the learned Subordinate Judge erred in directing an attachment of all the shares of the appellants whereas the shares of appellants 1 and 2 alone could be attached. This contention is correct. The order of the lower Court must therefore be modified by directing attachment of the shares of appellants 1 and 2 only. The last point urged by Mr. Kuttikrishna Menon is that the execution application is barred by limitation. There is no substance in this contention as the present execution petition is made within three years of the order made on a prior execution petition wherein relief was prayed for the issue of a notice to the judgment-debtors under O. 21, R. 22, Civil P. C. An application for such a relief is a step-in-aid of execution and the order made on such an application furnishes a starting point for limitation under Art. 182 (5), Lim. Act. We therefore overrule this contention. In the result, the decision of the lower Court is confirmed subject to the modification above indicated. We direct each party to bear his own costs. The Letters Patent Appeal No. 44 of 1937 is also dismissed but without costs.

C.R.K./D.S. *Order modified.*

A. I. R. 1938 Madras 555

BURN AND VENKATARAMANA RAO JJ.

V. P. Krishnan — Petitioner.

v.

Payankalath Narayanan Nayar — Respondent.

Civil Revn. Petn. No. 550 of 1936, Decided on 21st January 1938, from order of Sub-Judge, Ottapalam, D/- 10th December 1935.

(a) Madras Marumakkathayam Act (22 of 1933), Ss. 43 and 46 — Attachment of judgment-debtor's share in tarwad property — Pending attachment, registration of tarwad as impartible — Court's order refusing to proceed further with execution is revisable.

Where a Court taking a wrong view of the law assumes jurisdiction or declines to exercise jurisdiction it will be a matter for interference in revision. [P 556 C 2]

Where judgment-debtor's share in tarward property is attached in execution and pending attachment the tarwad is registered as impartible under Ss. 43 and 46, the Court acts illegally in declining to exercise its jurisdiction by refusing to proceed further with the execution and order sale in pursuance of the attachment. Its order is therefore revisable. [P 556 C 1, 2]

(b) Madras Marumakkathayam Act (22 of 1933), S. 43 — Attachment by creditor of judgment-debtor's share in tarwad property — Attachment does not terminate by subsequent registration of tarwad as impartible.

The expression "at any time" in Cl. (1) of S. 43, cannot be held to have a retrospective effect so as to defeat the rights of the attaching creditor. The said expression and Cl. (4) of S. 43 must be so construed as not to defeat the rights which third parties had acquired before registration of the

tarwad is effected or at any rate before the application for registration is made. Where therefore a creditor has attached his judgment-debtor's share in tarwad property the attachment does not cease by subsequent registration of the tarwad as impartible. The creditor by his attachment acquires a right which would entitle him to bring the share of his judgment-debtor to sale and the property of the tarwad in hands of other members can only be held by the tarwad subject to the right of the attaching creditor. The right of the creditor is not a bare right to sue for partition but a definite interest in the property. The only thing uncertain about it is the extent of the property which he would acquire in working out that interest by means of a suit for partition.

[P 557 C 2; P 558 C 2]

K. Kuttikrishna Menon—*for Petitioner.*

P. Govinda Menon — *for Respondent.*

Venkataramana Rao J. — This is an application to revise the order of the learned Subordinate Judge of Ottapalam confirming the order of the District Munsif of Ottapalam dismissing the execution petition for attachment and sale of the share of the respondent in the property of the tarwad to which he belonged. The petitioner obtained a decree in S. C. S. No. 382 of 1933 on the file of the District Munsif of Ottapalam on 29th November 1933 against the respondent on a personal debt incurred by him. In execution of the same the respondent's share in the tarwad property, which is stated to be one-ninth, was attached on 28th August 1934. A claim was preferred on behalf of the tarwad on 10th September 1934 objecting to the attachment. While the execution petition and the claim petition were both pending, four out of the five members of the tarwad presented a petition to the Sub-Collector of Malappuram under S. 43, Marumakkathayam Act for registering the tarwad as impartible and it was accordingly registered on 15th December 1934. This fact was brought to the notice of the District Munsif, who held that, as the order of the registration had become final under S. 46 of the Act, he had no longer any jurisdiction to deal with the petition, and as before the sale the registration was effected, further proceedings in execution could not be had. He therefore dismissed the execution petition. This order was confirmed by the learned Subordinate Judge. It is this order that is canvassed as illegal in revision by Mr. Kuttikrishna Menon on behalf of the petitioner.

A preliminary objection has been taken by Mr. Govinda Menon that this order is not liable to be revised under S. 115 Civil P. C. on the ground that no question of jurisdiction is involved in the case. It seems to us that the lower Court acted illegally in declining to exercise its jurisdiction by refusing to further proceed with the execution and order sale in pursuance of the attachment. Both the lower Courts fell into error in thinking that by virtue of S. 46 once the registration of the tarwad is effected, the Court has no jurisdiction to proceed with the execution. The petitioner was not questioning the finality of the order of registration. The question is whether in spite of registration the creditor in pursuance of the attachment is not entitled to bring the property to sale. Where a Court taking a wrong view of the law assumes jurisdiction or declines to exercise jurisdiction, it will be a matter for interference under S. 115 Civil P. C. : *vide* 46 Mad 536.[1] The very case relied on by Mr. Govinda Menon, namely 40 Mad 793,[2] is a case in which on a wrong view of a particular section of Act 20 of 1863, jurisdiction was assumed and the Court interfered in revision. We therefore overrule the preliminary objection. The question in this case is, has the attachment which has been effected ceased to subsist on the subsequent registration of the tarwad as impartible? Mr. Govinda Menon sought to contend that the share of a member is incapable of attachment but in the judgment just delivered in C. M. A. No. 282 of 1936,[3] we have held, it is capable of attachment and it is unnecessary to deal with that matter at length by virtue of the Marumakkathayam Act, the position of a tavazhi is assimilated to that of a member of a Mitakshara family in provinces where he is under an incapacity to alienate but nevertheless he has a right to claim a partition of his share. The position of such a member is, to use the language of Wallace J.,

> that he has at any definite period of time a present vested interest in the fractional share which would be his, if a partition was then and there made, and which would, by a partition at his will and pleasure, be converted into a separate interest.

The question is what is the effect of an attachment by a creditor of that share and what are the rights of a creditor which

1. Ramaswami Goundan v. Muthu Velappa Goundan, (1923) 10 A I R Mad 192 = 71 I C 1039 = 46 Mad 536 = 44 M L J 1.
2. Balakrishna Udayar v. Vasudeva Aiyer, (1917) 4 A I R P C 71=40 I C 650=44 I A 261=40 Mad 793 (P C).
3. Subramanyan v. Naraina, *Reported in* (1938) 25 A I R Mad 553.

flow from such an attachment both in relation to the debtor and to other members of the family? The effect of such an attachment in consequence of the death of such a member of a joint family as the one indicated above, subsequent to the attachment was considered by their Lordships of the Privy Council in 5 Cal 148.[4] Their Lordships held that the executing creditor would acquire a valid charge upon the land to the extent of the member's share and interest therein which could not be defeated by his death before the actual sale. Thus, in spite of his death it was held that the execution creditor would be competent to bring that share and interest to sale and the purchaser at such a sale would be entitled to have that share separated by means of a suit for partition. It was on the basis of this decision our High Court took the view in 49 M L J 616,[5] that even an attachment before judgment would prevent the right of survivorship operating to the prejudice of a creditor who had effected an attachment if a decree was subsequently obtained in the suit. In that case no doubt it was held that the share would still survive to the other members of the family but only subject to the rights of the attaching creditor. It is unnecessary to consider whether the survivorship is completely lost or lost to the limited extent indicated in that judgment. But, it is clear from the Privy Council decision that the cessation of interest of a debtor in consequence of his death would not affect the right of a creditor to have the property sold for the satisfaction of the debt by virtue of the attachment effected by him, that is the attachment confers upon him a right which could not be put an end to.

If this is the view taken in relation to the cessation of interest in consequence of the death of a member, it follows that the right acquired by the attaching creditor is not a defeasible right and no act of the debtor or any other member of the family which brings about the termination of that interest would operate to the prejudice of the said right. Therefore, on the date of the registration of the tarwad as impartible, the petitioner had acquired a right which would entitle him to bring the share of the respondent to sale, and the property of the tarwad in the hands of the other members can only be held by the tarwad subject to the rights of the attaching creditor. The expression "at any time" in Cl. (1) of S. 43 cannot be held to have a retrospective effect so as to defeat the rights of the attaching creditor. The said expression and Cl. 4 of S. 43 must be so construed as not to defeat the rights which third parties had acquired before the registration of the tarwad was effected, at any rate, before the application for the registration was made. In 59 Mad 693,[6] the view was expressed that if a member of a family expresses his intention to become separated from the family the intention so expressed would operate as severance of status from the family and the subsequent registration of the tarwad as impartible would not prevent the disposal of his interest by him as his separate property; otherwise the construction of S. 43 would render the right granted under S. 38 illusory. The language of S. 43, Cl. 4 lends support to this view. What it says is, it is only on registration that the provisions of Ch. 6 will not apply, that is until registration the rights of a tavazhi under S. 38 would not be affected and if such rights were exercised and the law attaches to such exercise certain legal consequences, they cannot be rendered nugatory by the subsequent registration. Mr. Govinda Menon contends that we ought not to apply the principles deduced from decisions dealing with cases under Mitakshara law to cases arising under Marumakkathayam law and for that purpose relies on the observations in 21 M L W 215[7] at p. 219 which are to this effect:

> It seems to me that Malabar law being essentially Customary law, the process of solving questions, as they arise for decision, by extending the operation of a custom by analogy or by applying "inferences" from the Hindu law, unless in the utter absence of evidence as regards custom is bound to create a divergence between the Court made law and the Customary law as observed by the people.

In the first instance, we are not seeking to extend the operation of any custom by analogy or applying an inference drawn from Hindu law. The principle of the

4. Suraj Bunsi Khan v. Sheo Pershad Singh, (1880) 5 Cal 148 = 6 I A 88 = 4 Sar 1 = 4 C L R 226 (P C).
5. Sankaralinga Mudaliar v. Official Receiver of Tinnevelly, (1926) 13 A I R Mad 72=92 I C 504=49 M L J 616.
6. Kunchi Amma v. Meenakshi Amma, (1936) 23 A I R Mad 155=160 I C 594=59 Mad 693= 70 M L J 114.
7. Gopala Nair v. Raghava Nair, (1925) 12 A I R Mad 460=86 I C 620=21 M L W 215.

decision in 5 Cal 148[4] is not based upon any peculiar doctrine of Mitakshara law because by that law alienation, either voluntary or involuntary, is prohibited and in fact their Lordships applied certain general principles which would follow from certain admitted legal relationships. From the admitted right of a co-parcener to claim partition their Lordships applied the principle deducible from the law of partnership that it is open to a creditor to attach the share of a member who at law can claim partition and have his share separated, and once that share is brought under the control of the Court, their Lordships held that a creditor would acquire a charge or a lien which would enable him to have that lien worked out by selling the property in satisfaction of his debt. We therefore do not think that any Customary law is infringed by the application of the principles deducible from the said decision. They follow from the rights which the members have now acquired by statutes which have modified the customs of Malabar.

It is next contended by Mr. Govinda Menon that even assuming that the said decisions are applicable, what could be attached, sold and purchased is an equity to file a suit for partition and before a suit is filed and the share is separated, the right comes to an end and there would be nothing to sell. In support of this contention he relied on certain cases, namely, 38 Mad 684[8] at p. 686, 39 Mad 265[9] and particularly the observations of Bakewell J. in 38 Mad 684,[8] which were approved and made the decision of a Division Bench in 56 Mad 534.[10] So far as the decisions in 38 Mad 684[8] and 39 Mad 265[9] are concerned, they hold that where there is an alienation of the share of a member of a joint family, either voluntary or involuntary, the alienee does not become a tenant-in-common with the other members of the family and until partition is effected, he will not be entitled to claim any mesne profits from the date of the alienation. It is not necessary for us to go into this question because that does not arise here and it is open to argument that this view is not in any way inconsistent with the principle laid down in the decisions adverted to by us because their Lordships in 3 Cal 198[1] clearly indicated that the rule of partnership law which enables a creditor to seize and sell the share of a partner can be applied to the shares of the members of an undivided estate without unduly interfering with the peculiar status and rights of the coparceners in such estate. But he laid considerable emphasis on the observations of Bakewell J., in 38 Mad 684[8] at p. 692 which are to this effect :

> Since the transferee only acquires an equity to compel a partition he has only a right in personam and not a right in rem. . . . . .

Jackson J. in 56 Mad 534[10] cites with approval this observation and holds that according to the true view an alienor cannot part with more than he has got and as the right of alienor becomes extinct upon his death the right of the alienee becomes extinct also; but however he is precluded from taking this view in cases of death on account of the definite pronouncement of the Privy Council by which he is bound, but he is not prepared to import other exceptions. With great respect to the learned Judges we may observe that the view taken proceeds on a complete misapprehension of the decisions on which the said observations are based. It is not possible to understand what exactly was meant by the words "a transferor only acquires a right in personam and not a right in rem". If a right in personam is understood to be a right available against certain persons only and not against all the world, of course the right of an alienee to file a suit for partition is only a right in personam against the members of the family, but it is a right in rem in so far as he has got a vested right in the interest acquired by him available against all the world. If the decisions of the Privy Council are closely examined, it will be seen that what is sold and what the purchaser acquires is not a bare right to partition but a definite interest in the property; the only thing uncertain about it is the extent of the property which he would acquire in working out that interest by means of a suit for partition. In 3 Cal 198[1] the declaration itself was to the effect that the purchaser at the execution sale has acquired the share and interest of the member in the property which was attached and sold

---

8 Nanjayya v. Shanmugha, (1914) 1 A I R Mad 440=22 I C 555=38 Mad 684=26 M L J 576.

9. Maharajah of Bobbilli v. Venkataramanujulu Naidu, (1915) 2 A I R Mad 453=25 I C 585 =39 Mad 265=27 M L J 409.

10. Muthu Kumara v. Sivanarayana Pillai, (1933) 20 A I R Mad 158=141 I C 122=56 Mad 534 =64 M L J 66.

and that he was entitled to take such proceedings as he was advised to have that share and interest ascertained by partition. In 5 Cal 148[4] their Lordships observe thus:

> The effect of the execution sale was to transfer to the respondents the undivided share in eight annas of Mouza Bissumphurpoore, which had formerly belonged to Adit Sahai (the member whose share was attached) in his lifetime; and their Lordships are of opinion that notwithstanding his death, the respondents are entitled to work out the rights which they have thus acquired by means of a partition.

In fact the declaration was made to the following effect:

> An order declaring that, by virtue of the execution sale to them, the respondents acquired only the one undivided third share in the eight anna share of Mouza Bissumphurpoore, in the pleadings mentioned, which formerly belonged to Adit Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime; and ordering that the appellants be confirmed in the possession of the said eight anna share of Mouza Bissumphurpoore subject to such proceedings as the respondents may take in order to enforce their rights above declared.

In 10 Cal 626,[11] Sir Richard Couch, who delivered the judgment of the Judicial Committee, after referring to 3 Cal 198,[1] made the following observations:

> The interest which is purchased is not, as Mr. Doyen argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made.

These observations have sometimes been misunderstood as leading to the conclusion that the purchaser did not acquire any share at all but a bare right to partition. But the subsequent observations of Sir Richard Couch make the position very clear. In that case, the position was that if there was no partition, the father and son would each be entitled to a half but if a partition was effected, the wife would be entitled also to a share, so that if a partition be deemed to have taken place at the date of the transfer, the property would have to be divided into three shares and what the alienee would get would be only a third and not a half. That is why their Lordships made the observation that "the interest which is purchased is not, as Mr. Doyen argued, the share at that time in the property." Emphasis will have to be laid on the words "at that time." The effect of these Privy Council decisions is very clearly stated by Bhashyam Aiyangar J. in 25 Mad 690[12] at p. 716, thus:

> According to the theory of an undivided Hindu family, each member has a present vested interest, which, by a partition at his will and pleasure, can be converted into a separate interest. The judicial decisions have recognized that such interest is transferable either in whole or in part for value and that the transferee therefore takes a vested present interest. What is transferred to him is thus a present vested interest and not a future contingent interest, uncertain and fluctuating, until the transferee actually effects a partition—even assuming that such contingent and possible future interest could legally be transferred: (vide S. 6 (a), T. P. Act). The transfer in question operates upon the vested interest which the transferor had in the family property just before the alienation and the same is converted for the benefit of the transferee into the separate share and interest of the transferor by a partition of the family property at the time of such alienation. The estate that is transferred to and vested in the alienee is not an "equitable interest" as understood in the English law, but a "legal estate" which has to be reduced into possession by the alienee standing in the shoes of the transferor and effecting a partition on the footing on which the family and the property both stood at the time of the transfer.

It is unnecessary to deal with the view taken herein or by the Division Bench in 56 Mad 534,[10] as to whether the actual share to be allotted to the alienee is to be determined as on the date of partition as held in 14 Mad 408,[13] or as on the date of the alienation as held in 35 Mad 47,[14] because that question does not arise at present. Mr. Govinda Menon next relies on S. 64, Civil P. C. and on the decision of the Privy Council in 13 Lah 702[15] and contends that the only thing prohibited by the attachment is a private transfer and that the subsequent registration of the tarwad is not affected by it. We are inclined to consider that this contention is irrelevant and unsound. S. 64, Civil P. C., has in our opinion no, bearing on the question under discussion. It does not say when an attachment terminates; for example, death does not terminate an attachment and after the death of a judgment-debtor, further proceedings can be had by bringing the

11. Hardi Narain Sahu v. Ruder Perkash Missir, (1884) 10 Cal 626=11 I A 26=4 Sar 510 (P C).

12. Aiyagari Venkataramayya v. Aiyagari Ramayya, (1902) 25 Mad 690 (F B).

13. Rangasami v. Krishnayyan, (1891) 14 Mad 408=1 M L J 603 (F B).

14. Chinnupillai v. Kalimuthu Chetti, (1912) 35 Mad 47=9 I C 596=21 M L J 246.

15. Mohammad Afzal Khan v. Abdul Rahman, (1932) 19 A I R P C 235=139 I C 85=59 I A 405=13 Lah 702 (P C).

legal representatives of the judgment debtor on record without a fresh attachment. The question in this case is whether the subsequent registration terminates the attachment pending on the date of the registration. Again the case in 13 Lah 702[15] only decides that where the interest of one of several cosharers in some of the properties held jointly by them is attached in execution of a decree against him and those properties are subsequently allotted to the other cosharers in pursuance of a decree passed in accordance with an award effecting partition in an arbitration without the intervention of the Court, it would not amount to a private transfer within the meaning of S. 64, Civil P. C. It therefore has absolutely no bearing on the facts of this case. We are therefore of the opinion that the subsequent registration of the tarwad as impartible does not preclude the Court from proceeding with the execution petition and directing a sale of the property. We accordingly set aside the orders of the lower Courts and remand the petition to the Court of the District Munsif of Ottappalam for disposal according to law in the light of the observations contained in this judgment. Costs will abide the result.

C.R.K./D.S. *Petition remanded.*

A. I. R. 1938 Madras 560

MADHAVAN NAIR AND STODART JJ.

Durairangam Pillai — Appellant.

v.

Govindarajulu Naidu and another — Respondents.

Appeal No. 248 of 1932, Decided on 29th November 1937, against decree of Sub-Judge, Tanjore, in O. S. No. 28 of 1931.

Civil P. C. (1908), O. 7, R. 11 (c) and S. 149 —Plaint insufficiently stamped filed on last day of period of limitation—Court allowing certain time for payment of deficit court-fee — Proper court-fee paid within time allowed but beyond period of limitation for suit—Suit is not time-barred.

Where a plaint insufficiently stamped is filed on the last day of the period of limitation and is returned by the Court allowing certain time for payment of the deficient court-fee, the suit is not barred if the proper court-fee is paid within the time allowed by the Court but beyond the period of limitation for the suit, because reading O. 7, R. 11 together with S. 149 the payment of the deficient court-fee within the time allowed by the Court has the same effect as if the court-fee had been paid in the first instance, that is on the date when the plaint was first presented : *A I R 1917 P C 179, Disting.* [P. 562 C 1]

S. V. Venugopalachari — *for Appellant.*

K. Venkataraman — *for Respondents.*

Madhavan Nair J.—Defendant 2 is the appellant. He is the surviving son of one Ramaswami Pillai who died in October 1926. The plaintiff instituted a suit against the appellant and his brother for the recovery of a sum of Rs. 5250 for principal and interest due on a promissory note dated 4th October 1925 executed by their late father. The promissory note was for Rs. 3750. The plaintiff's case is that the money was lent to Ramaswami Pillai and that the promissory note was executed by him at Tanjore between 8 and 9 A.M. on 4th October 1925. The promissory note recites that the money was borrowed by the deceased for his contract business. The deceased was a P. W. D. and Abkari Contractor, on a large scale with his head quarters at Cuddaliore in the South Arcot District. The appellant, his brother, contended that the promissory note was a forgery, that their father had no necessity to borrow money and that the plaintiff had no means to lend the money. They also contended that the suit was barred by limitation. The lower Court held that Ramasami Pillai executed the suit promissory note and borrowed money thereunder from the plaintiff. It also held that the suit was not barred by limitation. We will first deal with the case on the merits and then deal with the question of limitation.

The promissory note is Ex. A. It is executed by a Ramaswami Pillai and is attested by five persons all of whom have been examined except one, Venkatesa Aiyer, who is dead. The witnesses examined are P. Ws. 1, 2, 3, 4 and 5. P. W. 4 is also the writer of the document. P. W. 1 is the plaintiff, the promisee under Ex. A. All of them speak about the execution of the promissory note by Ramaswamy Pillai and the payment of money thereunder in their presence. P. W. 2 knew Ramaswami Pillai since 1918 (the date 1928 in the evidence must obviously be a mistake) and the latter wrote to him Ex. K series dated January and March 1925. There were joint decrees against this witness and Ramaswami Pillai. He knows his signature well as he has seen him signing on many occasions. He swears that the signature in

the promissory note is that of Ramasami Pillai. Plaintiff and his other witnesses also swear that the promissory note bears the signature of Ramasami Pillai. The most important piece of evidence given by the plaintiff in support of his case consists of two documents, Exs. E and E-1. These are postcards alleged to have been written by Ramasami Pillai to the plaintiff. In Ex. E, dated 28th March 1926, he says that he has been ill, that it was not therefore possible for him to collect the amounts due to him and that "I shall discharge the note within June, July." In Ex. E-1 dated 6th July 1926 he says that he received the card written by the plaintiff, that his ill health still continues and that he is "very anxious to settle your amount as early as possible." These cards, if they were written by Ramasami Pillai, would considerably strengthen the truth of the plaintiff's case.

The case of the defendants on this point is that the signatures appearing in the cards are not those of Ramasami Pillai. They sought to show that these letters must have been forged because they were not produced with the plaint in the suit and that the postal seal may well have been affixed on the cards without the knowledge of the postal authorities. These suggestions cannot be accepted. Though not produced with the plaint, evidence shows that these documents were produced within the time allowed by the Court; and there is no evidence to show that they did not pass through the Post Office, though with respect to Ex. 3, a document produced in the case by the defendants, such a complaint is not unfounded. P. W. 2, who knows the signature of Ramasami Pillai, says that Exs. E and E-1 bear his signature and these letters were written by him. P. W. 1 is another witness who says that Exs. E and E-1 bear his signature. Ex. H series are letters written by Ramasami Pillai to one Sadasivam Pillai. P. W. 1 says that they also bear the signature of Ramasami Pillai. P. W. 6, the kariasthan of Ramasami Pillai, says that Exs. E and E-1, A and H series and K series bear his signature. The evidence of P. W. 2 and P. W. 6 with regard to the signature of Ramasami Pillai appearing in the documents, is very important as the one knew him well and the other was his kariyasthan for four or five years. P. W. 2 says that Ex. E was written by Venkatarayya Pillai. No doubt this person appearing as D. W. 3 denies that he wrote Ex. E; but it is very significant that he does not say that the letter does not bear the signature of Ramasami Pillai. Here, we may say that there is no evidence on the defendant's side to show what the actual signature of Ramasami Pillai according to them is. There has been no attempt on their part to show that what is stated to be the signature of Ramasami Pillai as appearing in these documents is not his signature, nor have the defendants, the sons of Ramasami Pillai, who may ordinarily be expected to know their father's signature, gone into the box to deny that the signature appearing in Ex. A is their father's signature. We have compared the signature in Ex. A with those appearing in Exs. K series, H, E and E.1 and are considerably impressed with their similarity.

If the above large volume of evidence adduced on behalf of the plaintiff can be accepted, then it must be held that the plaintiff has proved his case. But the defendants contend that the whole case is false mainly for two reasons: (1) that the plaintiff at this time could not have had any money to lend to Ramasami Pillai, and (2) that at the time when the promissory note was said to have been executed, Ramasami Pillai was at Cuddallore and not at Tanjore. (After discussing evidence the judgment proceeded further.) Taking the evidence as a whole the position is this. The evidence that the defendants have adduced to show that the plaintiff was in impecunious circumstances at the time of the execution of the promissory note, that he received a cheque from the District Board Engineer at Cuddallore on the date of the promissory note and that he did not enter the amount in his account books, is not strong enough to disprove the plaintiff's case, which is established by the testimony of various witnesses who saw the actual execution of the promissory note and the payment of money thereunder. The evidence of the plaintiff, oral and documentary, also proves that Ex. A bears the genuine signature of Ramasami Pillai. We entirely agree with the opinion of the learned Judge that the suit note is genuine, and it was executed by the deceased Ramasami Pillai, father of the defendants.

The next point for decision is whether the suit is barred by limitation. The facts relating to this point are as follows. The plaint was presented on 4th October 1928,

the last day of the period of limitation, with a one rupee stamp thereon. It was returned with an endorsement on 5th October 1928 giving two weeks' time for payment of the deficient court-fee. It was re-presented on 19th October 1928 praying for a further two weeks' time to comply with the requirements. It was granted on 20th October 1928 and the plaint was re-presented on 3rd November 1928 paying the required court-fee. Full court-fee having been paid only on 3rd November 1928, it is argued that in the circumstances the suit is barred by limitation. O. 7, R. 11 (c), Civil P. C., suggests that the Court may admit a plaint though it is written on paper insufficiently stamped if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by it. That is what has been done in this case. Under the Code of 1882, there was a conflict of decisions on this point. This conflict has now been set at rest by the enactment in the new Code of S. 149, which runs as follows:

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court, may in its discretion, at any stage, allow the person by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

It follows from this section that when in circumstances like the present the deficient court-fee was paid and accepted by the Court, the document should have the same effect as if the court-fee had been paid in the first instance, that is, on the date when the plaint was first presented. This date was before the expiry of the period of limitation though it was on the last day of the period. We must therefore hold that the suit is not barred by limitation. The whole point is very clearly considered in Mulla's Commentaries on the Code of Civil Procedure in Point No. 3 under Cl. (c) of O. 7, R. 11, to which reference may be made in this connexion. As in the circumstances of this case no question of limitation arises, the decision in 41 Mad 412[1] relied on by the appellants' learned counsel does not apply. We may also draw attention to the decision in 24 C L J 88[2] which says that discretion exercised by the Court below according permission for paying the deficient court-fee should not be interfered with by a Court of Appeal. Reading O. 7, R. 11, with S. 149, Civil P. C., it is clear that the contention that the suit is barred by limitation should be overruled. For the above reasons, the appeal fails on both the points argued before us and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

1. Krishnasami Panikondar v. Ramasami Chettiar, (1917) 4 A I R P C 179=43 I C 493 =45 I A 25=41 Mad 412 (P C).
2. Priyanath, v. Meyan (1916) 3 A I R Cal 616= 29 I C 571=24 C L J 88.

A. I. R. 1938 Madras 562

PANDRANG ROW AND VENKATARAMANA RAO JJ.

Samanthan Karakkattitahil Kammaran Nambiyar and another—Appellants.

v.

Patappayil Koman and others—Respondents.

Appeal No. 476 of 1931, Decided on 13th September 1937, against decree of Sub-Judge, Tellicherry, in O. S. No. 22 of 1929.

(a) Malabar Law — Kanom — Redemption—Deed distinctly providing that amount borrowed thereunder should be paid at the time of redemption of prior kanom — Prior mortgage cannot be redeemed unless mortgagor offers to redeem both.

Where a mortgage deed distinctly provides that the amount borrowed thereunder should be paid at the time of the redemption of the prior kanom, the mortgagor is not entitled to redemption unless he offers to redeem both the mortgages : *A I R 1927 P C 32, Rel. on.* [P 564 C 1]

(b) Mortgage—Redemption—Mortgage sought to be redeemed specified, but property misdescribed—Suit should not be dismissed.

By reason of a mere misdescription of the property in the plaint by the plaintiff suing for redemption of certain specific mortgage, the Court should not visit the plaintiff with the extreme penalty of dismissal. [P 564 C 2]

(c) Malabar Law — Kanom — Mortgage of undivided share — Suit for redemption without partition is maintainable.

A tenant-in-common can mortgage his undivided interest in a property. Where an undivided half is mortgaged by a person who owns that undivided half, it is not open to the mortgagee to resist redemption and he is bound to deliver, on tender of the mortgage amount, the title deeds relating to the mortgaged property and such possession as he took from the mortgagor in respect of the undivided half, though the mortgagee is himself the mortgagee of the other half. It is wrong therefore to maintain that a suit for redemption of such mortgage cannot lie without partition.

[P 564 C 2 ; P 565 C 1]

P. Govinda Menon — *for Appellants.*

A. Atchuthan Nambiar and O. T. G. Nambiar — *for Respondents.*

Venkataramana Rao J.— This is an appeal from the decree of the learned Subordinate Judge of Tellicherry dismissing the plaintiff's suit for redemption of three mortgages in favour of defendant 1. The mortgages are described in para. 5 of the plaint as follows : (1) an othi dated 14th February 1863 for a sum of Rs. 3000, (2) a kanom dated 17th April 1871 for a sum of Rs. 350 and (3) a kanom dated 2nd February 1889 for a sum of Rs. 400. The properties secured under these mortgages originally belonged to Etakkalavan tarwad which became divided into two tavazhi tarwads known as Thekkinakoor and Patinhattakoor. This division is admitted by all the parties to the suit. The case of the plaintiff is this. Items 1 to 16 of the plaint schedule, which have been described as certain specific halves of certain hills, fell to the share of Patinhattakoottil tarwad and they were mortgaged on 7th September 1883 by the then karnavan in favour of one Koroth Veettil Krishnan. The said Krishnan filed a suit (O. S. No. 467 of 1889) on the file of the District Munsif's Court at Kavvai on the said mortgage, obtained a decree and in execution thereof brought the properties to sale and purchased them himself. Subsequent to the said purchase, he assigned the said properties to a predecessor-in-title of the plaintiff by a deed dated 8th June 1892. On the basis of that assignment, the plaintiff filed a suit for recovery of possession but he was met by the plea taken on behalf of the defendant 1 that he should sue for redemption before asking for possession. He had therefore to abandon the said suit and this suit has been subsequently filed. It may be noticed that the othi and the two kanoms referred to above were executed in favour of defendant 1 by the Patinhattakoottil tarwad. Excepting items 1 and 16, the remaining items 2 to 15 appear to be the subject-matter of one or other of the mortgages in favour of defendant 1 along with certain other items in the plaint schedule which did not form the subject-matter of the deed of assignment in favour of the plaintiff's predecessor-in-title.

Defendant 1, while alleging that the othi and the two kanoms in his favour do subsist and that they are liable to be redeemed, pleads that the properties mortgaged under these three deeds were not specific items with specific boundaries but undivided halves owned and possessed by the Patinhattakoor tarwad in the items which from the subject-matter of the said mortgages and therefore the suit for redemption without a partition of the said items is not sustainable. He also alleged that there was a Purankadom dated 3rd December 1887 in and by which a sum of Rs. 410 was due and payable and according to the stipulation in that deed the amount was payable at the time of the redemption of the kanom dated 2nd February 1889. The plaintiff denies his liability to redeem the said mortgage and this is also one of the subject-matters in issue between the parties. Defendant 2 inter alia pleaded that items 1 and 16 were never owned either by Patinhattakoottil tarwad or Thekkinakoor tarwad, that one half of the hills referred to in items 2 to 10, 13, and 15 out of the properties mentioned in the plaint schedule were owned by Thekkinakoottil tarwad which is now vested in him, that he is not willing that the suit property should be partitioned but should the Court be of opinion that the plaintiff's suit is sustainable, relief can be granted without partitioning the properties. He also owns Jenmi interest in items 17 to 23. Defendant 4 opposed the claim for redemption of item 1 on the ground that there was an othi in favour of his tarwad created by the original Etakkalavam tarwad in or about 1883 and the suit for redemption of that othi is time-barred and the plaintiff has no cause of action to sustain the suit. Defendant 5 set up an independent title in respect of items 16.

The learned Subordinate Judge on a consideration of the oral and documentary evidence in the case came to the conclusion that items 1 and 16 did not form part of the subject-matter of the mortgages in favour of defendant 1, that the defendant 4's claim in respect of item 1 should be allowed, as also the claim of defendant 5 in respect of item 16. In regard to the other items, his finding was that there was division of the original Etakkalavan tarwad into two tarwads, Patinhattakoottil and Thekkinakoottil, that each possessed an undivided moiety in the properties which formed the subject-matter of the mortgages and that each separately mortgaged its undivided half to defendant 1. He therefore thought that the plaintiff had misconceived his remedy and that he ought to have sued for partition and redemption of one half of the properties and that he not having chosen to do so, this suit was liable to be dismissed and he accordingly

dismissed the suit. The learned Subordinate Judge also ascertained the amount found due and payable including the Purankadom amount as Rs. 6183.13.11 and this finding has not been challenged in this appeal subject to the appellant's liability for the Purankadom amount. Plaintiff 2 preferred this appeal and he having died during its pendency, his legal representative, who has been brought on record, continues the same.

So far as items 1 and 16 are concerned, the finding of the learned Subordinate Judge cannot be disputed and it is supported by the documentary evidence in the case. The principal attack of Mr. Govinda Menon is as regards the dismissal of the suit by the learned Subordinate Judge. His argument is that the learned Subordinate Judge should on the evidence on record have held that there was a division by metes and bounds between the two tarwads Pattinhattakoor and Thekkinakoor and even assuming his finding that only an undivided half was mortgaged in favour of defendant 1 by the Patinhattakoor tarwad to be correct, the suit is not liable to be dismissed but the learned Judge should have at least permitted an amendment of the plaint and given the appropriate relief on the result of the finding arrived at by him. He also attacked the finding of the learned Subordinate Judge in regard to the declaration of the plaintiff's liability to pay the Purankadom amount. This second contention can be disposed of briefly. The deed dated 3rd December 1887 distinctly provides that the amount borrowed thereunder should be paid at the time of the redemption of the prior kanom and when there is a stipulation in the deed to the said effect, the mortgagor is not entitled to redemption unless he offers to redeem both the mortgages. The law certainly is that he is bound to redeem : *vide* 50 Mad 180[1]. We think the learned Subordinate Judge is right in the view he has taken. Therefore the finding in regard to the amount declared to be due by the learned Sudordinate Judge including the amount due under purankadom must therefore be confirmed.

In regard to the question whether there was a division by metes and bounds of the various properties possessed by Ettakalavan tarwad between the two tarwads Patinhattakoottil and Thekkinakoottil, at any rate regarding the properties which form the subject-matter of the suit, the learned Subordinate Judge based his conclusion that there was no such division mainly on the documentary evidence in the case. On a consideration thereof, it seems to us that the learned Subordinate Judge's finding in regard thereto is correct. He has very fully discussed the matter and it is unnecessary for us to deal with it at length. Exs. 3, 4, 7 and 8 seem to point to the fact that on the dates of those documents the properties dealt with under these deeds were held in joint right. The inference therefrom seems to be reasonable that what was mortgaged to defendant 1 must have been the undivided half possessed by the respective tarwads. On that finding the question is, is the plaintiff's suit liable to be dismissed? The relief which the plaintiff sought is in substance a relief of the redemption of the three mortgages mentioned in the plaint. No doubt he stated that the properties mortgaged thereunder were specific halves of the malas, miloms and forests referred to in the plaint. But the plaintiff does not appear to be responsible for this misdescription because he claimed under the assignment deed which purported to describe the properties in the manner he chose to describe them in the plaint. What was sought in the plaint was a redemption of the three specific mortgages and by reason of a mere misdescription, the Court should not have visited the plaintiff with the extreme penalty of dismissal and we think the learned Subordinate Judge would not have done so if he had not misdirected himself as to the law. His view seems to be that where there is a mortgage of an undivided half of a property, a suit for redemption of that half cannot be sustained without partition. This view is certainly wrong. A tenant-in-common can mortgage his undivided interest in a property.

In this case defendant 1 has chosen to take mortgages of undivided halves of the property separately from each of the respective tarwads. Under S. 60, T. P. Act, as soon as the mortgage amount has become due, the mortgagor has a right of redemption subject to the condition specified in the section. Where an undivided half is mortgaged by a person who owns that undivided half, it is not open to the mortgagee to resist redemption and he is bound to deliver, on tender of the mort-

1. Ramarayanimgar v. Maharaja of Venkatagiri, (1927) 14 A I R P C 32=100 I C 86=54 I A 68=50 Mad 180 (P C).

gage amount, the title deeds relating to the mortgaged property and such possession as he took from the mortgagor in respect of the undivided half. No doubt, defendant 1 being the mortgagee of the other undivided half and defendant 2 being also the owner of that undivided half it would be convenient if both partition and redemption could be directed, but the partition cannot be had unless with the consent of the owner of the other half who is not interested in the mortgages sought to be redeemed by the plaintiff. Defendant 2 is resisting the partition. The only course therefore is to direct redemption of the undivided half mortgaged under the othi and the kanoms in favour of defendant 1.

In this case, when defendant 1 took separate mortgages from the respective tarwads of the undivided halves possessed by each, it must be taken that he got into possession of the undivided halves possessed by each. On tender of the mortgage amount therefore defendant 1 is bound to deliver the plaintiff possession, if any, of the undivided half owned by him in the properties mortgaged. A tenant-in-common is entitled to joint possession. Here the said joint possession was and must be deemed to have been enjoyed by the mortgagor at the dates of the mortgages. There can be no objection to the plaintiff being awarded this relief, he having succeeded to the rights of the original mortgagor. Of course, as mortgagee under the law defendant 1 is entitled to the value of improvements effected by him in the property. We understand that a Commissioner has been appointed to take the value of improvements effected by defendant 1 in the properties mortgaged to him. So far as the plaintiff is concerned, he is bound to pay half the value of the improvements in the properties sought to be redeemed and joint possession whereof is directed to be given by this decree.

We therefore allow this appeal, reverse the decree of the learned Subordinate Judge save in regard to Items 1 and 16 of the plaint schedule and direct the lower Court to ascertain the amount of the improvements pertaining to the half share of the properties mortgaged under Exs. 3, 4, 7 and 8 and pass a decree for redemption in favour of the plaintiff in respect of the half share of the properties specified in the said deeds by decreeing that on payment of the amount due and payable under the said deeds together with the value of improvements ascertained as aforesaid that defendant 1 do deliver and the plaintiff do have joint possession of the half share of the properties mortgaged under the said deeds, that is, the plaintiff be permitted to take possession of the entirety of the said properties as tenant-in-common with defendant 1 : *vide* 38 Mad 310[2] at p. 320. As the plaintiff persisted in contesting the case on the footing of a division between the two tarwads in spite of the objection of defendant 1 and failed to claim an alternative relief on the basis of an undivided half in the said properties having been mortgaged and failed in his contentions, we direct that each party do bear his own costs in the appeal.

C.R.K./V.B.B. *Appeal allowed.*

2. Rathna Mudali v. Perumal Reddi, (1916) 3 A I R Mad 863=17 I C 837=38 Mad 310=23 M L J 576.

A. I. R. 1938 Madras 565

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Sree Batchu Venkataratnam and another — Appellants.

v.

Secretary of State and others — Respondents.

Letters Patent Appeal No. 104 of 1936, Decided on 25th January 1938, against Judgment of Cornish J., D/. 25th August 1936.

(a) Grant—Property belonging to villagers in common cannot be presumed to have been included in grant.

The Government cannot be presumed to have included in the grant property which belonged to the villagers in common : *A I R 1938 Mad 193, Rel. on.* [P 566 C 1]

(b) Grant — Fact that certain tank is not taken into account in fixing assessment payable by zamindar does not indicate that tank is excluded from grant.

To assert that all which is not brought into account in fixing the peishkush is excluded from the grant, is to state the proposition too broadly. [P 566 C 2]

Therefore the fact that certain tank has not been taken into account in fixing assessment payable by zamindar does not indicate that the tank is excluded from the grant : *A I R 1917 P C 42, Rel. on.* [P 566 C 2 ; P 567 C 1]

(c) Words and Phrases—Word "poramboke" —Meaning.

The word "poramboke" is used in several senses. Granting that poramboke includes communal property it cannot be seriously maintained that it connotes no other kind of property. [P 567 C 1]

(d) Grant—Communal property—Description of tank as village tank—Inference.

It would be far fetched to hold that because a tank is called a village tank, the villagers necessarily own it. [P 567 C 2]

B. Somayya and A. Satyanarayana — *for Appellants.*

Government Pleader —*for Respondents.*

Venkatasubba Rao J. — The question raised in this Letters Patent Appeal is whether the suit tank belongs to the zamindar or to the Government. The immediate cause of this litigation, as pointed out by Cornish J , was the action of the Local Taluk Board in auctioning in the year 1926 the right to fish in the tank. Both the Taluk Board and the Government were made defendants and their contentions were rejected by the District Munsif as well as the Subordinate Judge. A second appeal was filed in this Court, only by the Government whose plea was that the tank was communal property. Cornish J., reversing the concurrent decision of the lower Courts, has held that the title of the Government has been proved. Should the tank be held to be communal property as pleaded, it stands to reason that the Government cannot be presumed to have included in the grant property which belonged to the villagers in common: (*see* the judgment of this Bench in Appeals Nos. 327 and 421 of 1931,[1] unreported). But, both the lower Courts have concurrently given first, a negative finding that the tank is not communal property, secondly a positive finding that it is an irrigation tank. If the tank is an irrigation tank as has been found, "it would be meaningless", in the words of the Subordinate Judge,

to hold that the Government had given the lands forming the ayacut of this tank to the zamindar but reserved to themselves the tank itself.

The lower Courts advert to two further circumstances to show that the tank is the property of the zamindar; (i) that it is within the territorial boundaries of the zamindar and (ii) that the Government during a period of over a century never exercised any acts of ownership over the tank. For the first time in 1926, the Taluk Board, as already mentioned, purported to sell the fishing in the tank; but that the zamindar considered himself entitled to the right to fish, is evident from two prior transactions of the years 1904 and 1909 (Exs. C and D). Cornish J. in dissenting from the lower Courts, has relied upon three circumstances. The first is that in what is known as " Bhubandhu Account" (Ex. 2), the tanks in the village including the suit tank were shown under the heading 'Minaha' which means deductions. Of the many statements and accounts prepared at the Permanent Settlement, the Government have chosen to file this paper alone, and as the District Munsif pertinently points out, it would not be proper to draw any inference in favour of the Government, who have refrained from producing the other records which should undoubtedly be in their possession. Apart from that, does the 'Bhubandhu Account' lend the slightest support to Cornish J.'s inference ? The utmost that can be inferred from the exclusion of the tanks is, that they were not taken into account in fixing the assessment payable by the zamindar. As their Lordships observe in the *Urlam case*[2]:

It does not follow that all which is not brought into account in fixing the jamma or peishkush is excluded from the grant. On this footing many things of great importance to the enjoyment of a zamindar would not pass by a zamindari grant, for example, waste land, farm buildings, tanks, or, in the present case, irrigation channels : 44 I A 166[2] at page 185.

To assert that all which is not brought into account in fixing the peishkush is excluded from the grant, is to state the proposition too broadly. That certain land had been exempted from revenue wholly or partially and was on that ground not brought into account is one thing ; but, it is quite a different thing that some portion was not yielding revenue and its income was not therefore brought into account. To the former category belong what are known as lakhraj lands and the following passage from the judgment of one of us in 30 M L W 129,[3] affirmed by the Privy Council in 62 I A 166,[4] may be usefully quoted here :

It has been broadly contended by the Advocate General for the plaintiff that the term lakhraj lands in Regulation 25 of 1802 does not comprise village service inams. As they were not lakhraj, he argues, the revenue from them would be prima facie included in the assets of the

1. Appa Rao v. Secretary of State, *since reported in* (1938) 25 A I R Mad 193.

2. Bala Surya Prasada Rao v. Secretary of State. (1917) 4 A I R P C 42=41 I C 98=44 I A 166 =40 Mad 886 (P C).

3. Secretary of State v. Chandra Mouleswara Prasada, (1929) 16 A I R Mad 676=119 I C 305=30 M L W 129.

4. Chandra Mouleswara Prasada v. Secy. of State, (1935) 22 A I R P C 115=156 I C 1=62 I A 166=58 Mad 711 (P C).

zamindari when its peishkush was fixed at the Permanent Settlement. S. 4 of that Regulation provides that the permanent settlement of the land tax shall be made exclusive inter alia (1) of lakhraj lands (or lands exempt from payment of public revenue) and (2) all other lands paying only favourable quit rents. Without doubt absolute grants in inam are included in the expression 'lakhraj lands.' Then, on what footing do (1) private service inams and (2) village service inams stand ? So far as the former are concerned, it has been consistently held that they are not lakhraj. But the reasons adduced in support of that view furnish a clue to the right understanding of the nature of village service inams. In the case of personal service inams, was there any reason at the time of the Permanent Settlement for treating them 'as lands exempt from the payment of public revenue'? The Zamindar was receiving income from such lands, though not of course in the shape of cash rent but in the shape of services; for, the rendering of services was one mode of paying the rent. It was reasonable therefore to treat them at the settlement as revenue paying lands . . . .

Private service inams not being held to be lakhraj on the ground that they were a source of profit to the Zamindar, if the same principle be applied in the case of village service inams, what would be the result ? It follows as a corollary, that if the services are of a public nature, that is, if it is not the Zamindar that is benefited but the estate of the community at large, the lands would in that case be regarded as lakhraj or exempt from public revenue and the income from them excluded from the assets . . . . The result of the cases then is, that while in regard to private service inams the zamindar has the right of resumption in regard to the village service inams, they are resumable by the Government. My brother Ramesam J., sitting with Oldfield J., in a case dealing with Sarvadumbala grant (an absolute grant in inam), classified the lands excluded from the assessment under S. 4 of the Regulation thus : (1) lands granted on condition of rendering service (that is, public service inams), (2) Sarvadumbala inams, (3) inams granted on favourable quit-rent, the first two groups together forming the lakhraj lands mentioned in the section. This seems to embody the correct principle and I am prepared with all respect to accept the classification as correct (pages 141 to 143).

The principle referred to above does obviously not apply to things (including tanks) such as those mentioned by the Judicial Committee in the *Urlam case.*[2] It follows accordingly that the first ground mentioned by Cornish J. is untenable. Secondly, the learned Judge says that in the Survey and Settlement Register (Ex. 3), the tank is referred to as 'poramboke'; and from that he infers that it belongs to the Government. That the word 'poramboke' is used in several senses, is well settled by authority. Granting that poramboke includes communal property, it cannot be seriously maintained that it connotes no other kind of property. Lastly, Cornish J. thinks that from the description of the tank as 'village tank', it should be inferred that it belongs to the villagers. This view, it need hardly be said, is clearly untenable. This is the largest tank in the village (being over 9 acres in extent) and it is known variously as (a) Pedda Cheruvu, (b) Vooru Cheruvu or tank of the place, (c) Grama Cheruvu or village tank. It would be far-fetched to hold that because a tank is called a village tank, the villagers necessarily own it. It may not be without interest to point out that one of the three tanks is called the "Dogs' tank". In the result, we are satisfied that the conclusion of the lower Court is correct. The judgment of Cornish J. is set aside and that of the lower Appellate Court is restored. The Government will pay the appellants' costs both of the second appeal and of the Letters Patent Appeal. Time for payment of costs two months.

C.R.K./D.S. *Judgment set aside.*

A. I. R. 1938 Madras 567

PANDRANG ROW J.

In re Allah Baksh — Accused.

Criminal Revn. Case No. 710 : Case Referred No. 37 of 1937, Decided on 21st January 1938, referred by Dist. Magistrate, Coimbatore, D/- 14th September 1937.

Criminal Trial — Sentence — Sentences of detention in Borstal School should not be ordered to run consecutively.

The sentences of detention in the Borstal School cannot be regarded as equivalent for all purposes to sentences of imprisonment, though, for purposes of appeal and revision, they are to be deemed as sentences of imprisonment according to S. 20, Borstal Schools Act. The object of detention in a Borstal School being to reform the offender and as the Magistrate has got sufficient discretion to detain an offender for such period as the law permits, there is no reason why one sentence of detention imposed upon an offender should be ordered to run after the expiry of another sentence imposed upon the same offender. [P 567 C 2 ; P 568 C 1]

Public Prosecutor — *for the Crown.*

Order.—From the circumstances reported by the District Magistrate, it is obvious that the sentences in the two cases of detention in the Borstal School in C. C. Nos. 21 and 22 of 1937 on the file of the Sub-divisional Magistrate, Gobichettipalayam, should not have been ordered to run consecutively. These sentences of detention cannot be regarded as equivalent for all purposes to sentences of imprisonment, though for purposes of appeal and revision they are to be deemed as sentences of

imprisonment according to S. 20, Borstal Schools Act. The fact that it was considered necessary by the Legislature to say in so many words that for purposes of appeal and revision a sentence under S. 8, that is to say, a sentence of detention, shall be deemed to be a sentence of imprisonment shows that otherwise they could not be regarded as equivalent. The object of detention in a Borstal School being to reform the offender and as the Magistrate has got sufficient discretion to detain an offender for such period as the law permits, there is no reason why one sentence of detention imposed upon an offender should be ordered to run after the expiry of another sentence imposed upon the same offender. The direction given by the Sub-divisional Magistrate that the sentence of detention in one case should take effect after the expiry of the sentence of detention in the other case is not in consonance with law and is therefore set aside. The sentences shall operate concurrently.

C.R.K./D.S. *Order set aside.*

---

* A. I. R. 1938 Madras 568

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Gogineni Bapayya — Appellant.

v.

Gogineni Ramakrishnayya and others — Respondents.

Letters Patent Appeal No. 109 of 1936, Decided on 7th December 1937, against Judgment of Burn J., D/- 24th November 1936.

*** (a) Registration—Partition lists recording result of already completed partition transaction, do not require registration.**

The test to determine whether a document relating to partition requires registration is whether the document formed an essential part of the process of dividing the property or whether there is ground to suppose that the partition had already taken place and became complete when the document was executed. The question really is whether there is sufficient disassociation of the transaction from the document. The matter does not turn upon the interval of time, although where the interval is long, the disassociation may be more readily inferred. [P 569 C 2]

In a case there was evidence that certain partition lists were prepared with a view to fix the parties to the division so far made and prevent them from going back on it. There was also evidence showing that the parties had already divided the property in shares :

Held that there was already a completed partition before the partition lists came into existence. This being so the lists did not require registration. [P 569 C 1, 2]

(b) Civil P. C. (1908), S. 100 — Appellate Court, while reversing considered judgment of trial Judge, failing to refer to material piece of evidence militating against its own view —Finding of such Court cannot be accepted as final finding of fact.

If an Appellate Court, while reversing a well-considered judgment of the trial Judge, fails to advert to, or in any way indicate that it has considered a most material piece of evidence which militates against its own view, the finding of such Court is not to be accepted as an unassailable final finding of fact. [P 569 C 2 ; P 570 C 1]

P. Satyanarayana Rao — *for Appellant.*

V. Govindarajachari and A. Lakshmayya —*for Respondents.*

Venkatasubba Rao J. — The question to be decided in this appeal is, whether or not there was a completed partition between the plaintiff and his brothers, the defendants. If the plaintiff's allegation that there was a partition is found to be true, he will be entitled to the injunction claimed; otherwise not. The only defendant who denied the partition, is defendant 1, who was the manager of the family. At the trial, two documents were filed, described as partition lists (Exs. E and E-1). Ex. E relates to the lands owned by the family and sets out the items that fell to the share of each member; Ex. E-1 is a sketch of the houses and similarly describes which items were allotted to which member. There are some subsidiary conditions appended as to the mode of enjoyment. The partition set up in the plaint was an oral partition and defendant 1 boldly denied that there was in fact any partition ever effected. The plaintiff was then obliged to produce the lists (Exs. E and E-1) as evidence of the fact that there was, independent of these lists, a completed partition. Both the Courts below as well as Burn J. who heard the second appeal, were of the opinion that notwithstanding Exs. E and E-1 were unregistered, they were admissible in evidence. Once they were admitted, the utter falsity of defendant 1's case became exposed. The Subordinate Judge with whom Burn J. agreed, reversing the Munsif's judgment, has held that Exs. E and E-1 constitute a bare agreement to partition and cannot as such convey a title to the plaintiff to any specific items. This view was based upon the unchallenged evidence of P. W. 1, who deposed that it was in the contemplation of the parties to have the terms appearing in Exs. E and E-1, embodied in a subse-

quent formal document. But there is another principle of law, which on the evidence ought to have been given effect to.

Mr. S. Srinivasa Aiyangar for the appellant contended before Burn J. that Exs. E and E.1 contain merely notes or memoranda of the result of an already completed partition. But upon the ground that this case had not been put forward in the plaint or before either of the lower Courts, Burn J. dismissed the contention as being an after-thought. In so doing, it appears to us that the learned Judge acted wrongly. As already stated, the plaintiff made in his plaint no reference to the lists, and that could be accounted for, upon the only hypothesis that what he was relying upon, was an oral partition. The contention therefore far from being an after-thought, must be taken to have been conceived even as early as at the time of the filing of the plaint. The question then to decide is in effect, do these documents constitute the bargain between the parties or are they merely the record of an already completed transaction?: 50 Cal 338,[1] 53 M L J 179[2] and 54 M L J 109.[3] As held in the two last mentioned cases, the question really turns upon whether the documents constitute the bargain between the parties. If they do, the documents furnish written evidence of the contract and under the Evidence Act, all oral evidence is excluded. Then, by force of the Registration Act, the writing itself, affecting as it does immovable property, becomes inadmissible in evidence—the result being that the transaction cannot be proved. The only evidence that has a bearing on this point is that adduced for the plaintiff, for the obvious reason that defendant 1, having denied the transaction in toto, precluded himself from putting forward any version of his own. P. W. 1 says :

> These lists were prepared with a view to fix the party to the division so far made and prevent them from going back on it.

This certainly suggests that the oral partition became an accomplished fact by the time the lists came to be prepared. Ex. A was executed on the same date and at the same time as Exs. E and E.1. That was a submission empowering P. W. 1 as arbitrator to effect a division of the family moveables. It recites :

> As regards immovable property, all of us have divided it in shares, cast lots in respect of the said shares, determined the share of each in your presence, signed the share list and delivered them to you.

From this again, we are prepared to infer in the circumstances that the partition had become a *fait accompli* and the lists were subsequently prepared. In the words of Curgenven J., the test to apply is, whether the document formed an essential part of the process of dividing the property, or, whether there is ground to suppose that the partition had already taken place and became complete when the document was executed: 54 Mad 27.[4] The question really is, to use the expression of Mr. Govindarajachari himself, is there sufficient disassociation of the transaction from the documents? We cannot accede to his contention that the matter turns upon the interval of time, although where the interval is long, the disassociation may be more readily inferred. In this case we are satisfied, notwithstanding the shortness of the interval, that there was a completed partition before the documents came into existence.

Apart from this finding, we must hold that the Subordinate Judge was not justified in reversing the Munsif's finding that the plaintiff was put in possession of his share of the property. Burn J. observes that the learned Munsif gave "excellent reasons" for holding that the plaintiff got possession of his own share. The Subordinate Judge has failed to refer to defendant 1's admission which clinches this matter, that "the plaintiff is cultivating all the lands as per list V in Ex. E" (that is to say, all the items allotted to him at the division). Burn J. seems to think that this serious mistake does not vitiate the lower Appellate Court's judgment. According to the learned Judge, the finding being one of fact, there is no reason to suppose that the Subordinate Judge did not take into account the admission, although he did not refer to it. If an Appellate Court, while reversing a well considered judgment of the trial Judge, fails to advert to, or in any way indicate that it has considered a most material piece of evidence which

1. Subramaniam v. Lutchman, (1923) 10 A I R P C 50=71 I C 650=50 I A 77=50 Cal 338=1 Rang 66 (P C).
2. Ramakrishna Das v. Kesavalu Chetty, (1927) 14 A I R Mad 1145=102 I C 84=53 M L J 179.
3. Alwan Chetty v. Jagannatha Iyer, (1928) 108 I C 291=54 M L J 109.
4. Subba Rao v. Mahalakshmi Amma, (1930) 17 A I R Mad 883=128 I C 561=54 Mad 27=59 M L J 558.

militates against its own view, is the finding of such Court to be accepted as an unassailable final finding of fact? It must be borne in mind, as already stated, that Burn J. himself thinks that "the learned District Munsif gave excellent reasons for holding that the plaintiff got possession of his own share"—with which observation we entirely agree. Even on the short ground therefore that the finding of the Munsif in regard to possession is correct, the plaintiff is bound to succeed. In the result, the appeal is allowed and the Munsif's judgment is restored with costs throughout.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 570

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Thazhe Nelloli Pazhe Peringati Athiramankutti and another — Appellants.

v.

Thazhe Nelloli Pazhe Peringati Uppari and others — Respondents.

Letters Patent Appeal No. 69 of 1936, Decided on 16th December 1937, against Judgment and decree of Venkataramana Rao J., D/- 24th February 1936, *reported in A I R 1937 Mad 126.*

Landlord and Tenant — Permanent tenant right — Acquisition of — Persons claiming permanent tenant right unequivocally putting forward their right in suit for rent filed in 1906 to which landlord was party and continuing to be in possession of holding openly till 1928 — Suit for ejectment by landlord held barred by limitation.

A permanent tenant right, a species of limited right, can be acquired by prescription. [P 570 C 2]

Where certain persons, claiming a permanent irredeemable tenant right in certain land, unequivocally put forward their right in a suit for rent filed against them in 1906, to which the landlord was a party, and continued to be in possession of the holding from 1906 openly asserting their irredeemable right till 1928, the landlord having throughout notice of the claim put forward during the entire period:

Held that they acquired the right by prescription and a suit by landlord instituted in 1928 for ejecting them was barred by limitation: *A I R 1923 P C 118, Disting.* [P 570 C 2]

M. C. Sridharan — *for Appellants.*

P. Govinda Menon — *for Respondents.*

Venkatasubba Rao J.—Mr. Sridharan strenuously contends that the judgment under appeal is wrong. The question need not be considered whether under a customary law of Malabar a permanent irredeemable kanom can be granted. According to the respondents (the tenants) such a kanom demise under the Malabar law is valid and their contention has been accepted by both the Courts below and by Venkataramana Rao J. It is unnecessary, as we have said, to examine the soundness of this position. Then the question remains whether the respondents have acquired by adverse possession a permanent tenant right. This has been answered in the affirmative by the lower Courts and by the learned Judge who heard the second appeal. Ex. I of 1869 purports to create an irredeemable permanent right. Ex. A of 1895 does not supersede, as Mr. Sridharan contends, the deed of 1869, but on the contrary gives effect to a provision for renewal which that deed contains. In 1903 the then jenmi of the suit property granted a melcharath to one Mammad. He filed a suit for rent in 1906 against the predecessor in interest of the present contesting defendants. To that suit the jenmi, i. e. the ancestor of the present plaintiffs was impleaded as a defendant. There the tenant put forward most unequivocally his saswatham right. The present suit was filed in 1928. From 1906 when the hostile assertion was publicly made in the suit, if not from 1869, the tenants have been in possession of the holding, asserting openly their irredeemable right. The landlord had throughout notice of the claim put forward during the entire period. That a permanent tenant right, a species of limited right, can be acquired by prescription has not been denied. 50 I A 202[1] relied on by Mr. Sridharan is clearly distinguishable. Lord Salveson, delivering the judgment of the Board, observed:

We are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor of the lands: Page 209.

The case here is entirely different. What is relied upon, is not a mere assertion, but possession sufficiently open and hostile, its adverse character and the nature of the right claimed, being brought home to the owner's knowledge. The appeal therefore fails and is dismissed with cost.

C.R.K./R.M. *Appeal dismissed.*

1. Mahomed Mumtaz Ali Khan v. Mohan Singh, (1923) 10 A I R P C 118=74 I C 476=50 I A 202=26 O C 231=45 All 419 (P C).

A. I. R. 1938 Madras 571

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

G. Subbarayaloo — Appellant.

v.

Ranganatha Mudaliar and others
— Respondents.

Letters Patent Appeal No. 60 of 1936, Decided on 17th December 1937, against Judgment and decree of Pandrang Row J., D/- 29th April 1936.

Deed - Construction—Scheme for election of dharmakarthas of temple setting out qualifications of persons entitled to vote—One qualification being that they should be 'Vaishnavas of Tengalai sect' — These words held included even untouchables.

It is a primary rule of construction that whatever the instrument, it must receive a meaning according to the plain sense of the words and the sentences therein contained. When an enactment is unambiguous in itself, the question is not what the Legislature meant, but what its language means, that is, what the Act has stated that it meant. This fundamental principle of construction applies not only to statutes but to wills and in fact to all written instruments. [P 572 C 1]

One of the clauses in a scheme of administration of a temple set out the qualifications of persons entitled to have their names registered in the list of voters entitled to vote at the election of dharmakarthas. One of the qualifications was that the voters must be "Vaishnavas of the Tengalai sect":

Held that these words included persons belonging to that sect even if they were untouchables. [P 571 C 2]

Held further that the fact that no member of this untouchable community had ever claimed to be included in the voters' list signified nothing and did not destroy their legal rights. Nor the existence of a strong sentiment against the participation of untouchables in the management of temples was in any way relevant in the matter : *A I R 1930 P C 120, Rel. on.* [P 573 C 2]

K. Venguswamy Iyer — *for Appellant.*

P. S. Ramaswamy Iyengar —
for Respondents.

Venkatasubba Rao J.—The question raised is an important one, namely, whether the plaintiffs are not eligible to vote in the election of the dharmakarthas of the Sri Parthasarathyswami Temple, Triplicane, Madras, by reason of their being members (to use an expression in vogue) of an "untouchable caste". Mr. Ramappa, the City Civil Judge, has declared in their favour, but on appeal his judgment has been reversed by Pandrang Row J. The two judgments reveal, in sharp contrast, two widely differing modes of approach to the problem and its treatment. A scheme of administration was framed for this temple by a Special Bench of the High Court in 1925. Cl. 2 provides that the management shall be carried on by the dharmakarthas under the supervision and control of a Board of supervision. Cl. 6 says that the dharmakarthas and the members of the Board shall be elected in the manner hereafter appearing. Cl. 7 prescribes that every person shall be entitled to vote at any such election, whose name stands registered in the list of voters. Then follows Cl. 8, the one which directly concerns us, which sets out the qualifications of persons entitled to have their names registered in that list. They are : (a) they must be Vaishnavas of the Tengalai sect., (b) of the male sex, (c) of the age of 21 years or upwards, (d) resident in Triplicane (that part of the city where the temple is situate) for a period which has been specified, (e) able to sign their names, (f) who have made a payment of a certain specified fee.

The dispute now turns on the question, as the learned City Civil Judge points out, are the plaintiffs (1) Hindus, (2) Vaishnavas and (3) of the Tengalai sect ? That they possess the other qualifications mentioned in the scheme is not disputed. There is no reference in Cl. 8 to a voter being required to be a Hindu; but in the expression "Vaishnavas of the Tengalai sect" is implied the idea that being a Hindu is a prerequisite. That the plaintiffs are Hindus is incontrovertible and no suggestion has been made to the contrary. In the lower Court some attempt was made to show that the plaintiffs were not Vaishnavas, which hopelessly failed. To make good the contention, the defendants were driven to put forward a fantastic theory, which excluded from the appellation "Vaishnavas", many Vaishnava caste Hindus, even including a certain sect of Vaishnava Brahmin priests. Realizing the untenability of this position, their counsel very probably abandoned this ground. The plaintiffs being thus admittedly Vaishnavas, nothing turns upon the further words "of the Thengalai sect" as the question of their sect is not in dispute. The words in the scheme then clearly include all Vaishnavas of the Thengalai sect and as Lord Sankey has put it in a similar case, to those who ask why the word should include the "untouchables", the obvious answer is, why should it not ? The burden is upon those, as the learned Lord points out, who deny that the words are intended

to mean something different from what they mean : 1930 A C 124[1] at page 138.

It is a primary rule of construction that whatever the instrument, it must receive a meaning according to the plain sense of the words and the sentences therein contained. When an enactment is unambiguous in itself, the question is not what the Legislature meant, but what its language means, that is what the Act has stated that it meant. This fundamental principle of construction applies not only to statutes but to wills and in fact to all written instruments : Maxwell on the Interpretation of Statutes, Edn. 7. In 4 M I A 179,[2] Lord Brougham after declaring that it is not for the Judges to invent something which they did not meet with in the words of the text, goes on to add an important qualification :

> The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply unless where the construction of these words is, either by the preamble or by context of the words in question, controlled or altered : 4 M I A 179[2] at page 187.

In other words, the instrument must be construed according to its literal import unless there is something in the subject or context which shows that this cannot be the meaning of the words (10 Halsbury, Hailsham Edn., p. 254). The question then is, would the adhering to the plain meaning of the words in the scheme, lead to some repugnance or inconsistency with the rest of the instrument ? The respondent's counsel has not been able to show, either by referring to the preamble or the context, that by giving to the words their ordinary and natural meaning, some inconsistency with the other provisions of the scheme will result. But, says the respondent's counsel, that the previous schemes which the present one replaced, contained indications, that the members of the "untouchable" castes were intended to be excluded. There was a scheme framed in 1884 for this temple and the voters under that scheme were to possess the same qualifications as under the present one. For the purpose of settling the list of voters, it was provided that a preliminary meeting should be held, and in describing the place where such meeting was to be convened, the following words were used :

> The place shall be the usual place where the business of the said temple is carried on, or if there be no such place, some convenient public place inside the temple to which all the said persons hereby entitled to vote may have free access.

It is contended that this clause suggests that only such persons are eligible to vote as possess a right of entry into the temple. This seems to be arguing in a circle. Under this provision, the place to be selected inside the temple shall be such that "all the said persons hereby entitled to vote may have free access." This refers back to the earlier provision which lays down the voters' qualifications and cannot be read as militating against it. Indeed the evidence in the case shows that there are parts within the composite structure of the temple to which the "untouchables" have right of free access. In the plaint the assertion is made, the plaintiffs offer worship "in the outer mantapam within the precincts of the temple." The evidence given at the trial confirms this statement. Plaintiff 1 deposes :

> I go to the temple to worship. We halt near the mantapam and offer worship. We enter the mantapam as a rule.

That this represents the truth there can be no doubt, as the evidence remains not only uncontradicted but unchallenged. The mantapam referred to, though outside the portals of the temple, is deemed a part of the precincts of the temple. Thus, every part of the scheme can be given effect to, by the meeting being convened in the outer mantapam, which the "untouchables" can freely enter, although it happens to be within the precincts of the temple. We are here assuming that the present scheme should be construed in the light of the previous one, although it purports to supersede the latter. Even so, there is nothing, as shown above, in the wording of the previous scheme to lend the slightest support to the respondents' contention. However, the fact is not without significance, that in the present scheme, there is no clause prescribing that the meeting shall be held within the precincts of the temple. The judgment of the Judicial Committee, delivered by Lord Sankey in (1930) A C 124,[1] contains a a valuable exposition of the law on the point. Some cases have been relied on for the respondent where the word "persons" was restricted to members of the male sex. That is explained by Lord Sankey as due to the fact that in construing the English statutes, reference was necessary to the Common law disabilities of

1. Henrietta Muir Edward v. Attorney-General for Canada, (1930) 17 A I R P C 120=126 I C 88=(1930) A C 124=99 L J P C 27=142 L T 98=73 S J 711=46 T L R 4.
2. Crawford v. Spooner, (1846-51) 4 M I A 179=6 Moo P C 1 (P C).

women. The learned Lord mentions (1909) A C 147[3] as an example. S. 27, Representation of the People (Scotland) Act, 1868, provided that every person not subject to any legal incapacity shall be entitled to vote in the election of a member to serve in any future Parliament for such University. It was held that the word "person" did not include woman. But Lord Loreburn referred to the position of women at Common law, and pointed out that they were subject to a legal incapacity. As Lord Sankey points out, the various judgments on the point emphasize the fact that the Legislature in dealing with the matter cannot be taken by employing loose and ambiguous words, to have departed from the usage of centuries. It is important to note the actual decision in the case. The word "persons" in S. 24, British North America Act, 1867, includes members of either sex; accordingly, women having the qualifications enacted by S. 23 can be summoned by the Governor-General to the Senate of Canada. The effect of this pronouncement is that unless the antecedent history of the matter renders a different meaning necessary, the words used must receive their plain and natural meaning. Pandrang Row J. observes :

> It is difficult for me to accept the contention that these learned Judges intended to include any member of the Madiga community in the list of voters.

It is arguing in a vicious circle, as has been said in (1888) 13 A C 294[4] at p. 301 to begin by assuming an intention apart from the language of the instrument itself, and, having made that fallacious assumption, to bend the language in favour of the assumption so made. Is there anything in the previous history of this matter to indicate that the members of the plaintiffs' caste were excluded ? The system of voting did not obtain till for the first time it was introduced by the schemes that were framed. Can it be said that when the earliest scheme was settled, there was something like an established usage which subjected 'untouchables' to this disability ? *Ex hypothesi*, at the time that scheme was settled, there was no system of voting in vogue. Pandrang Row J. next observes that for 90 years past no member of this community ever claimed to be included in the voters' list. This, in our opinion, signifies nothing. From the fact that no claim has been made, it does not follow that had the claim been made and contested, it would have been disallowed. After all, that the members of this community have abstained for 90 years from making a claim, does not destroy their legal rights. It is somewhat difficult to follow the argument that the words in the earliest scheme should be construed in the light of the acts done subsequent to that scheme.

Pandrang Row J. refers to the existence of a strong sentiment against the participation of 'untouchables' in the management of temples. On the contrary, the trial Judge says : "I do not see what sentiment is violated by allowing a Madiga to vote." This shows the danger of referring to uncertain extraneous circumstances such as the so-called sentiments of a people. If this is a relevant consideration, are we to be guided by the sentiment that prevailed when the first scheme or the last one was framed ? Lord Sankey in the case already cited observes:

> The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on men customs which in later years were not necessary: (1930) A C 124[1] at page 128.

This passage, in our opinion, aptly describes the position with reference to the present question. We are constrained to hold that the judgment under appeal does not rest upon any legal basis. The appeal is therefore allowed with costs throughout.

C.R.K./D.S. *Appeal allowed.*

---

3. Nairn v. University of S. Andrews, (1909) A C 147=78 L J P C 54=100 L T 96=53 S J 161=25 T L R 160.
4. Leader v. Dufrey, (1888) 13 A C 294=58 L J P C 13=59 L T 9.

A. I. R. 1938 Madras 573

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Pakkiri Muhammad Rowther— Appellant.

v.

L. Swaminatha Mudaliar— Respondent.

Letters Patent Appeal No. 81 of 1936, Decided on 6th January 1938, against Judgment of Pandrang Row J., *reported in A I R 1936 Mad 464.*

Civil P. C. (1908), O. 47, Rr. 4, 7, 8 and S. 152—Mere correcting of error arising from accidental slip does not bring into existence fresh decree, particularly when Court correcting error purports to act under S. 152—Three stages of review petition pointed out—Rejection

of review petition in second stage does not bring into existence fresh decree superseding old decree.

There are three stages in a review application. The first is the ex parte stage when the Court may either reject the application at once or may grant a rule calling the other side to show cause why review should not be granted. In the second stage the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there. If on the other hand, the rule is made absolute, the third stage is reached. The case is then heard on merits and may result in the repetition of the former order or in some variation of it. In either case the whole matter having been re-opened, there is a fresh decree. Where the Court refuses to grant review, the Court's order must be deemed to have been passed in the second stage and not in the third stage and no fresh decree can be said to have been passed in such a case. The rule being discharged in the second stage, the parties are relegated to and still rest on the old decree. So also the mere correcting of an error arising from an accidental slip does not bring into existence a fresh decree, more so when the Court rectifying the error purports to act under S. 152, and corrects the error without issuing notice to the party who is likely to be affected prejudicially by its order.

[P 574 C 2 ; P 575 C 1, 2]

An application for review was made by the plaintiff on two grounds ; first, that subsequent to the trial Court's judgment but prior to that of the appellate judgment, there was a decision given in a certain suit which negatived the defence put forward by the defendants and secondly that there was an error apparent on the face of the record. The Appellate Court rectified the error which was apparent on the face of the record probably purporting to act under S. 152 of Civil P. C. (no notice having been served on the party affected by the order as required by law), but refused to grant review on the first ground, holding that the new evidence was available to the plaintiff prior to the passing of the appellate judgment and that it should have been produced by him :

Held that the mere rectification of the error by the appellant did not bring into existence a fresh decree superseding the old one. The order rejecting the application had been passed in the second stage and not in the third stage and that being so, no fresh decree could be said to have been passed superseding the old one and that second appeal by the plaintiff from the decree could not be rejected on preliminary ground that it had been superseded by a fresh decree : *30 Bom 56* ; *A I R 1923 Cal 113 and 3 C L J 188, Foll.*

[P 575 C 2]

R. Kuppuswamy Iyer and R. Krishnaswamy Iyenger—*for Appellant.*

K. Venkataramani—*for Respondent.*

Venkatasubba Rao J. — Pandrang Row J. dismissed the second appeal, giving effect to an objection in limine that the decree from which it was filed, was superseded by a fresh decree that was passed subsequent to the filing of the appeal. The question to decide is whether there was in law a new decree passed, which had the effect of discharging the original decree. We regret to say we are constrained to differ from the learned Judge's view. If the course of the proceedings be carefully followed, it will be seen that nothing was done, which could be said to have had legal effect of vacating the decree, from which the second appeal was filed. The facts relevant to the question at issue may be briefly stated. The plaintiff, alleging that he became the purchaser of the suit property, sued the defendants for possession. Their defence was that some amount was due to them, and the trial Court after overruling the plea gave judgment for the plaintiff. It must be mentioned that the property, as was admitted, was held in two distinct shares; one by defendant 1 and the other by his brother the 2nd and the latter's son the 3rd. Defendant 1 alone appealed, without impleading defendants 2 and 3 the owners of the other part. The District Judge, giving effect to the defendant's contention, reversed the Munsif's judgment and dismissed the suit. It is from his order of dismissal that the second appeal referred to above was filed. The Appellate Judge, it will be seen, committed an obvious mistake; he could have dismissed the suit, even on his own finding, against defendant 1 alone, whereas he dismissed it in toto. Thereupon the plaintiff applied for a review of the District Judge's decree and put forward two grounds in support of his application; first that subsequent to the date of the Munsif's judgment but prior to that of the appellate judgment, there was a decision given in a certain suit, which negatived the defendant's right to the unpaid purchase money, by whatever name it might be called and secondly that the dismissal of the suit as against the second set of defendants was an error apparent on the face of the record.

Before proceeding further, we may mention the relevant dates : (1) The lower Appellate Court's decree was passed on 7th August 1930; (2) the review application was made on 12th September 1930; (3) the second appeal was filed on 9th January 1931, and (4) the order on the review petition was passed on 14th November 1931. We may at the outset refer to the valuable observations of Jenkins C. J. as to the three stages of a review application. The first is the ex parte stage when the Court may either reject the application at once or may grant a rule calling the other side to show cause why review should not be

granted. In the second stage the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there; if on the other hand the rule is made absolute, then the third stage is reached. The case is then heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case, the whole matter having been re-opened, there is a fresh decree: 30 Bom 56.[1] This analysis of Jenkins C. J. of the three successive stages is of fundamental importance, as observed by Mookerjee J. in 36 C L J 484.[2]

The question that arises is whether the order to be presently referred to, on the review petition, was one passed in the second or in the third stage. As already said, the review was based on two grounds. So far as the petition prayed that the order dismissing the suit should be confined to defendant 1 alone, the relief asked for was granted. To this extent, though the Judge purported to act under the review provisions of the Code, he must in truth be deemed to have used his powers under S. 152, Civil P. C. Notice was served on defendant 1 only but the order he made affected defendants 2 and 3 prejudicially and it is inconceivable that he would have made it without notice to them under the review chapter. No adverse order can be made under the review sections without notice to the party affected. On the other hand, the error which was rectified was, as the Judge later realised, due to an accidental slip and under S. 152 that could be rectified as a matter of course without notice. So much then for the second ground on which the review petition was founded. Then turning to the first ground, the Judge held that the judgment relied on, by way of fresh evidence, was previously available and ought to have been produced at the hearing. Holding that there was no sufficient cause for its non-production in time, he rejected that part of the petition. To use the Judge's words, he refused to grant review which (as will be evident from Rr. 4, 7 and 8 of O. 47) meant that he dismissed the application in the second stage. As pointed out by Jenkins C. J. in the case already cited, the hearing of the rule in the second stage may involve to some extent an investigation into the merits. That does not affect the character of the order made, for, in each case the Court has to decide, at what stage has the order been made and what is its effect. In the present case, as in 30 Bom 56,[1] the order made must be deemed as one passed in the second and not in third stage. This being so, there is no reason for holding that a fresh decree was passed superseding the original one. If the rule is discharged in the second stage, "the parties are relegated to, and still rest on the old decree": 30 Bom 56[1] at page 60 and 36 C L J 484[2] at page 486.

It may not be out of place to mention here that it becomes sometimes difficult, when the review is refused, to ascertain whether the order is one made in the second and/or in the third stage. Under O. 47, R. 8 when an application for review is granted (which means when the rule is made absolute), the Court has the option either to re-hear the case at once or adjourn it to a future date for hearing. But the Court is required, on making the order absolute, to make a note thereof in the register. Where this rule is not complied with and the ultimate order is that the petition refused, some ambiguity is introduced and the matter becomes difficult to decide. It is incumbent on the Courts to appreciate the difference between the second and third stages and not leave the question in obscurity. Turning to the present case, the Judge made no note that the review was granted, and why should we hold, in spite of it, that he in fact granted the review? In other words, why should it be held, especially when the indications are the other way, that he infringed a mandatory provision? Going back to the second ground for a moment, the correcting of an error arising from an accidental slip does not bring into existence a fresh decree. This has been laid down in 14 Mad 150.[3]

Where the learned Judges pointed out that in the contemplation of law, an amended decree must be taken as in force from the date of the orignial decree, as there is a well founded distinction between a case of amendment and a case of novation or substitution: 3 C L J 188[4] at p. 191.

In the result, we must hold that the second appeal was perfectly competent and that the preliminary objection ought not to have been allowed. The Letters Patent Appeal is allowed and each party will

1. Vadilal v. Fulchand, (1906) 30 Bom 56=7 Bom L R 664.
2. Gour Krishna v. Nilmadhab, (1923) 10 A I R Cal 113=73 I C 34=36 C L J 484.
3. Pydel v. Chathappan, (1891) 14 Mad 150.
4. Sri Brojolal Rai Chowdhury v. Tara Prasanna Bhattacharji, (1906) 3 C L J 188.

bear his costs incurred in the High Court. The second appeal will now have to be heard and we direct that its hearing shall be expedited. The court-fee paid on the memorandum of Letters Patent Appeal will be refunded.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 576

VENKATARAMANA RAO J.

A. Lakshmana Reddiar — Appellant.

v.

Ellinganaickenputty Kumara Koil Sri Subramania Swami and others — Respondents.

Second Appeal No. 1889 of 1931, Decided on 27th January 1938, against decree of Sub-Judge, Ramnad at Madura, in A. S. No. 105 of 1929.

Grant—Inam—Suit for ejectment by inamdar alleging himself to be owner of both warams—Onus is on him to prove that defendant was let in under terminable tenancy.

When an inamdar comes to Court alleging that he is the owner of both the warams, no presumption can be made that the grant was of both the warams and it is incumbent upon him to prove the affirmative of the issue. Even assuming that he establishes that he is the owner of both the warams, in order to sustain an action in ejectment, he must prove that the defendant was let in under a terminable tenancy which entitled him to eject him from the land : *Case law discussed.*

[P 577 C 1]

R. Desikan — *for Appellant.*

V. Ramaswami Aiyar—*for Respondents.*

Judgment.—This second appeal arises out of a suit in ejectment instituted by the trustee of Kumara Koil Sri Subramaniaswami Temple in Ellinganaickenpatti village, Sattur taluk. The case for the plaintiff is that the suit land forms part of an inam wherein the temple owns both the warams, that defendant 2 was in occupation thereof as a tenant-at-will, that in execution of a decree obtained by defendant 1 against defendant 2 defendant 1 purchased the said property and was in possession of the same. During the pendency of the execution proceedings, a claim was preferred on behalf of the temple alleging that defendant 2 had no saleable interest therein and the property belonged to the temple but the claim was dismissed. Hence the present suit was filed for a declaration of the temple's right to the land and for delivery of possession thereof. The defence is that the temple owned only the melwaram right and the kudiwaram right had always been in the tenant of the inam lands and therefore was in defendant 2 and that in any event the plaintiff was not entitled to eject defendant 2 and therefore the suit would not lie. The main questions in dispute between the parties therefore are whether the plaint temple is the owner of both the warams and even assuming it is, is defendant 2 liable to be ejected therefrom? The learned District Munsif dismissed the plaintiff's suit holding against the temple on both the questions but the learned Subordinate Judge reversed his decision. In my opinion, the learned Subordinate Judge misdirected himself on questions of law bearing on the said issues in arriving at his conclusions and threw wrongly the onus on defendants 1 and 2. The learned Subordinate Judge in para. 6 of his judgment states thus :

> When once it is conceded that a tenant is a kudiwaramdar paying rent or melwaram to the melwaramdar, the relationship of landlord and tenant is established between them and the burden of proving full occupancy rights will be upon the defendant.

Again in para. 7 of the judgment he remarks :

> When once it is conceded that they are occupancy tenants, according to their view, the relationship of landlord and tenant is established and the burden of proof is heavily upon defendant 2, and after him, upon defendant 1, to prove such rights. Defendant 2 and his father therefore would have come into possession of the land only under a right derived from these trustees or their predecessors-in-title. They are only tenants-at-will liable to be ejected at any moment by the trustees.

The learned Subordinate Judge purported to follow the decision in 30 M L W 583[1] which in a way supports him. It seems to me the view of law enunciated above is fundamentally opposed to the conception underlying the system of tenure which recognizes kudiwaram and melwaram as distinct interests, in land and is based on a misapprehension of some of the decisions of the Privy Council referred to by both the learned Subordinate Judge and the learned Judges in 30 M L W 583.[1] In 20 Mad 299[2] Subramania Aiyar J. points out that there is no substantial analogy between an English tenant and an Indian raiyat and that the English rule embodied in S. 106, T. P. Act should not be applied, and after citing the

1. Aiyanars and Kaniyala Swamigal Koti Devasthanam v. Periyakaruppan Thevan, (1929) 16 A I R Mad 617=118 I C 279=30 M L W 583.
2. Venkatanarasimha Naidu v. Dandamudi, (1897) 20 Mad 299=7 M L J 251.

following passage from the proceedings of the Board of Revenue dated 5th January 1818 regarding the nature of the rights of the raiyats in the various parts of the Presidency, viz. "whether rendered in service, in money or in kind and whether paid to Rajas, Jagirdars, Zamindars, Poligars, Mutadars, Shrotriemdars, Inamdars or to Government Officers, such as Tahsildars, Amildars, Amins or Thanadars, the payments which have always been made are universally deemed the dues of Government" observed thus :

> To treat such a payment by cultivators to zamindars as 'rent' in the strict sense of the terms and to imply therefrom the relation of landlord and tenant so as to let in the presumption of law that a tenancy in general is one from year to year, would be to introduce a mischievous fiction destructive of the rights of great numbers of the cultivating classes in this province who have held possession of their lands from generations to generations.

45 Mad 586[3] approved this view and cited the above passage from the Board of Revenue proceedings at p. 602 as laying down correctly the place of the cultivating ryots in the agricultural economy of Southern India. "Therefore the observation of Wallace J. in 30 M L W 583[1] "that a kudiwaram holder is a co-owner with his landlord and is not a tenant is not one that has been advanced or approved by any decision of the Privy Council" is not strictly accurate in view of the observations of the Judicial Committee in 45 Mad 586.[3] When an inamdar comes to Court alleging that he is the owner of both the warams, no presumption can be made that the grant was of both the warams and it is incumbent upon him to prove the affirmative of the issue. Even assuming that he establishes that he is the owner of both the warams in order to sustain an action in ejectment, he must prove that the defendant was let in under a terminable tenancy which entitled him to eject him from the land. There is nothing in the decisions of the Prlvy Council laying down a different view. In 30 M L W 583[1] at 589, Wallace J., referring to 47 Mad 337[4] and 45 Mad 586,[3] observed thus :

> It must be admitted that there is a difficulty in reconciling the two decisions which appear, if we may say so with respect, to speak also with diverse voice on the question whether occupancy right can be obtained by adverse possession and prescription. But 47 Mad 337[4] is the latest decision and is binding on us and we cannot refuse to follow where it leads.

With great respect to the learned Judge, 47 Mad 337[4] does not enunciate any rule which is opposed to the conception which underlies the relationship between the melwaramdar and a kudiwaramdar. In that case it will be seen that the tenants were let into possession under muchilikas which entitled the landlord to eject the tenants (p. 354). That the case proceeded upon this view is clear from the following passage in the judgment of Sir John Edge :

> In 1870, Sir C. H. Scotland C. J. held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him (page 354).

It was in relation to this conception of landlord and tenant that the learned Judge made the following observation a little lower down :

> No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands.

The observations to a similar effect on page 344 must be understood likewise and in the earlier part of the judgment, it was pointed out that it was not disputed that the defendants were tenants of the temple, the landlord in that case. In 51 M L J 510[5] Phillips and Madhavan Nair JJ. examined the scope of the Privy Council decision in 47 Mad 337[4] and understood the said decision as not laying down any rule which is inconsistent with that laid down in 45 Mad 586.[3] At page 514 Phillips J. observed thus :

> I had to consider this point, sitting as a single Judge, in 49 M L J 602[6] and there I came to the conclusion that decision in 47 Mad 337[4] by which the burden of proving occupancy right is thrown on the tenant is only applicable in cases where the inamdar is proved or admitted to be the owner of the land itself. A closer scrutiny of the judgment in 47 Mad 337[4] confirms me in this view. . . . . The words 'tenant of lands' must mean tenant of lands belonging to his landlord; that is to say that the landlord has a right not merely to the melwaram but to the land itself.

Madhavan Nair J. at pages 523 and 524 observes thus :

3. Sivaprakasa Pandarasannadhigal v. Veeramma Reddi, (1922) 9 A I R P C 292=68 I C 538 = 49 I A 286=45 Mad 586 (P C).
4. Naina Pillai Marakayar v. Ramanathan Chettiar, (1924) 11 A I R P C 65=82 I C 226= 47 Mad 337=51 I A 83 (P C).
5. Zamindar of Parlakimedi v. Ramayya, (1927) 14 A I R Mad 10=98 I C 313=51 M L J 510.
6. Periakaruppa Thevan v. Aiyannars and Kaniyalaswamigal Koil Devasthanam, (1926) 13 A I R Mad 136=91 I C 1027=49 M L J 602.

The dictum of the Privy Council as regards the burden of proof is based upon two decisions referred to by their Lordships. The facts of these cases and observations show that in both of them, as pointed out by my learned brother, it was either admitted or found as a fact that the tenants had been let into possession by the landlord who was the absolute owner and that consequently when the tenant claimed to possess occupancy right it was incumbent on him to prove it. When similar circumstances arose in 47 Mad 337[4] their Lordships affirmed the same principle . . . . . When the landlord owns both the melwaram and the kudiwaram interests in the land and the tenant set up occupancy rights in such land, the burden of proving that he has such rights is on him. If the dictum referred to in 47 Mad 337[4] is thus understood it is not inconsistent with the decision in 45 Mad 586.[3]

The learned Judges in 30 M L W 583[1] do not notice this decision at all. In 32 C W N 160,[7] Mukerji and Malik JJ. observed thus:

In an action in ejectment one of the things that the plaintiff must prove is his title to immediate possession. This is a proposition as old as the hills. In a case where the defendants' tenancy is admitted – an admission that involves the admission of the defendants' right to be in possession—the plaintiff must necessarily establish as to how he is entitled to possession; in other words, how the tenancy has come to an end.

After referring to the Privy Council decisions in 43 Mad 567[8] and in 47 Mad 337,[4] they remarked thus :

In my opinion, the decisions of the Judicial Committee do not indicate that their Lordships ever intended to depart from these elementary rules. In both the cases the plaintiff's title to the lands was conceded, and notices by which the defendants' tenancies were terminated were not disputed. In neither case had any grant been alleged, asserted, or admitted on behalf of the plaintiff, but inasmuch as the defendants had been in occupation on payment of rent, a tenancy from year to year terminable on notice was all that was conceded.

In 47 M L J 558[9] their Lordships Spencer and Kumaraswami Sastri JJ., after referring to the Privy Council decision in 47 Mad 337[4] laid down the law thus:

When a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the defendant is his tenant as alleged, if that is denied, but also his right to eject. In order to prove a right to eject, he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent rights of occupancy that the defendant may set up but fails to prove.

The same view was enunciated by Spencer J. in 39 M L J 629[10] at p. 639 when he stated that the principle of the decision in 15 Mad 95[11] is unaffected by any decision of the Privy Council. The learned Judges in 30 M L W 583[1] do not advert to either of the above cases. I respectfully agree with the views expressed in these decisions in regard to the inamdar's right to eject and that of Phillips and Madhavan Nair JJ. in regard to the scope of the Privy Council decision in 51 M L J 510[5] and prefer to follow them. The judgment of the learned Subordinate Judge is therefore considerably vitiated by his wrong approach of the questions which he had to decide. I have to set aside his findings and call for revised findings in the light of the remarks made in my judgment. The learned Subordinate Judge is therefore directed to submit his revised findings on the evidence on record on the following questions : (1) Whether the plaintiff is the owner of both the warams. (2) Whether defendant 2 has occupancy rights in the suit property. (3) Whether the plaintiff is entitled to eject defendant 2 from the land. Time for the return of the findings is six weeks from the date of receipt of this order and objections ten days.

C.R.K./D.S. *Case remanded.*

7. Basiruddin Sarkar v. Sahebulla Pramanik (1927) 14 A I R Cal 966=105 I C 857=32 C W N 160.
8. Sethuratnam Iyer v. Venkatachala Goundan, (1920) 7 A I R P C 67=56 I C 117=43 Mad 567=47 I A 76 (P C).
9. Subbarayadu v. Narasimha Rao, (1924) 11 A I R Mad 907=82 I C 623=47 M L J 558.
10. Subramania Aiyar v. Onnappa Goundan, (1920) 7 A I R Mad 991=61 I C 597=39 M L J 629.
11. Venkatacharyulu v. Kandappa, (1892) 15 Mad 95.

A. I. R. 1938 Madras 578

STODART J.

Sinnammal — Petitioner.

v.

Sattiya Goundan — Respondent.

Civil Revn. Petn. No. 543 of 1936, Decided on 17th February 1938, from order of Sub-Judge, Salem, D/- 24th October 1935.

Hindu Law—Joint family—Debts — Suit on promissory note executed by father and son instituted after partition between them and decree obtained against father alone—Decree-holder is not entitled to proceed against property in hands of son unless he obtains decree against him.

Where a person brings a suit on the basis of a promissory note executed by a father and son, who are members of a joint Hindu family, after there has been a partition between them and obtains a decree against the father only, he is not entitled to proceed against the property in the hands of the son, unless he obtains a decree

against the son. The partition does not put an end to the son's liability for the father's debt but it does put an end to the joint family as an entity which can possess joint property and be jointly sued. After partition, if the liability of the son is to be enforced, it must be by a decree obtained against him. [P 579 C 1]

D. Ramaswamy Iyengar — *for Petitioner.*

K. V. Sesha Ayyangar and R. Subramania Ayyar — *for Respondent.*

Order. — The petitioner is the decree-holder. On a promissory note purporting to be executed by a father and a son and a third party, she obtained a decree against the father only, exonerating the other two. She now tries to execute the decree on property in the hands of the son and has been repulsed in both the Courts below. It is the fact that at the time when the debt was contracted the father and son were undivided (15th July 1931) but by the time of the suit (28th October 1933) they had become divided. Petitioner's case is that on a decree obtained after partition against the father alone she ought to be able to proceed against property in the hands of the son. That is against all the current of decisions in this Court. When the petitioner filed her suit she should have prayed for a decree against the son to the extent of the latter's interest in the family property and in the alternative in case the son had become divided to the extent of the family property which the son had got at partition and which he still retained. But petitioner got no decree against the son. Partition does not put an end to the son's liability for a father's debt; but it does put an end to the joint family as an entity which can possess joint property and be jointly sued. After partition therefore if the liability of the son is to be enforced it must be by a decree obtained against him. The petition is dismissed with costs of the respondent.

C.R.K./R.M. *Petition dismissed.*

A. I. R. 1938 Madras 579

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

M. Parthasarathi Ayyangar — Appellant.

v.

K. Ekambara Mudaliar and others — Respondents.

Appeal No. 248 of 1933, Decided on 31st January 1938, against decree of Sub-Judge, Chingleput, in O. S. No. 59 of 1932.

Limitation Act (1908), S. 20—Payment of interest—It is not necessary that money should actually pass between parties—Any facts which would prove plea of payment of interest would be payment sufficient to bar statute.

To constitute a payment of interest for purposes of saving limitation under S. 20 it is not essential that money should actually pass between the parties. Any facts which would prove a plea of payment of interest in an action brought to recover it would be a payment sufficient to bar the statute. [P 580 C 1, 2]

One of the properties comprised in a mortgage deed was agreed to be sold by the mortgagor to one *P* for a certain sum and it was stipulated that out of the amount, *P* should pay Rs. 1500 to the mortgagee who in his turn was to release the mortgaged property from his mortgage security. The mortgagee gave his consent to the arrangement and attested the sale deed in token of it. Simultaneously with the sale deed, a release in respect of the property sold, was executed by the mortgagee and the release deed recited that the amount of Rs. 1500 was received as interest. The amount was however paid subsequently by *P* and the payment was endorsed on the back of the mortgage deed. The mortgagee instituted a suit on his mortgage and relied on payment by *P* to save his claim from bar of limitation:

Held that the transaction amounted in law to payment of interest within S. 20. *P* as a purchaser was a person "liable to pay the debt" and payment by him took the case out of the statute. At any rate *P* could be regarded as the mortgagor's agent 'duly authorized' to make the payment and payment by him saved the claim from bar of limitation : *(1867) 2 Ex 153; (1902) 2 Ch 430; A I R 1921 Mad 102 and A I R 1926 Cal 1218, Rel. on.* [P 580 C 2; P 581 C 1]

R. Gopalaswami Ayyangar — *for Appellant.*

A. Viswanatha Iyer and A. Seshachariar — *for Respondents.*

Venkatasubba Rao J. — This suit, brought upon a mortgage evidenced by two deeds of 1915 and 1916, was commenced on 30th July 1932. The plaintiff, to save his claim from the bar of limitation, relies upon what he alleges amounted to a payment of interest on 30th July 1920. The alleged payment was not made by the mortgagors but by a third party, and the two questions that have been raised are (i) whether the transaction relied upon amounts to a payment of interest and (ii) whether the person who made the payment was one "liable to pay the debt" within the meaning of S. 20, Lim. Act. The facts may be shortly stated. One of the properties comprised in the mortgage was agreed to be sold by the mortgagors to one Paramasiva for Rs. 7600, and it was stipulated that out of this sum he should pay Rs. 1500 to the plaintiff (the mortgagee), who in his turn should release

the item purchased, from his mortgage security. There is sufficient evidence to show that the plaintiff gave his consent to this arrangement entered into between the mortgagors and Paramasiva. The plaintiff was made to attest the sale deed in token of his consent, and some difficulty in the case has arisen from the fact, that it was intended to be executed on 7th May 1920, the date it bears, but the actual execution was on 30th July, when it was presented for registration. The recitals in the sale deed do not represent the arrangement that was eventually given effect to, but as to what happened there can be little doubt. Simultaneous with the execution of the sale deed, a release deed (Ex. C) was executed by the plaintiff in favour of Paramasiva. It bears the date 30th July and recites that out of the amount due to the mortgagee, Rs. 1500 was received for interest, and that in consideration of the payment, the plaintiff relinquishes his mortgage right over the item sold. But it is clear from Ex. I, another document which came into existence on the same day, that no money was paid, and that by agreement between Paramasiva and the mortgagee, the actual payment was deferred to 2nd August 1920. It has also been shown that the money was in fact paid on 7th August 1920, on which date the payment was endorsed on the back of the mortgage deed.

The suit has been contested by defendant 4, a subsequent purchaser. That the transaction to which we have referred amounts in law to a payment can hardly admit of doubt. The plaintiff acknowledged receipt of the amount and executed a release deed relinquishing his right to the item in question. That no money passed makes, in the circumstances, little difference; the plaintiff waived payment and was content to treat the promise to pay as actual payment. Would it have been open to the plaintiff after the release deed, to assert as against the mortgagors, that he did not receive the amount? The effect of the transaction is undoubtedly that the sum due upon the mortgage became reduced by Rs. 1500. This seems to be clear on principle and if authority is needed, (1867) 2 Ex 153[1] may be cited. There, it was held that to constitute a payment of interest sufficient to take a debt out of the operation of the Statute of Limitations it is not essential that money should actually pass between the debtor and the creditor. As observed by Martin B. any facts which would prove a plea of payment of interest in an action brought to recover it, would be a payment sufficient to bar the statute. As already said, in a suit by the plaintiff against the mortgagors, the release deed mentioned above would be conclusive evidence of payment. The plaintiff would have a right of action against Paramasiva on an independent basis, namely his agreement to pay, but that would not render the transaction any the less a payment for the present purpose. To quote another passage from the judgment of Martin B.:

> In my judgment, when a man comes prepared to pay a debt and has the money, in point of fact, in his hand to pay, but the creditor thinks fit to say, 'Do not pay me, I gave you that money, and I consider it as having been paid', at the same time handing the debtor a receipt for the money, and making an indorsement of payment upon the security—that is a payment. There is no necessity for the debtor to go through the form of taking the money out of his pocket and giving it to the creditor, and the creditor returning it to him. If the jury have found the real transaction to be as I have stated it, all that prevented actual payment being, that it was thought unnecessary to go through the idle ceremony of one party taking the money out, and the other handing it back again, that was equivalent to payment : (p. 156).

We must therefore disagreeing with the lower Court, hold that the transaction amounted in law to a payment of interest within S. 20, Lim. Act. That Paramasiva as the purchaser was a "person liable to pay the debt" is equally clear. This is established by 44 Mad 544.[2] Buckley J. in (1902) 2 Ch 430[3] expounds the principle on which this rule rests. The learned Judge, after observing that the whole idea is that the payment is an admission of the right of the person to whom it is paid, goes on to say :

> If the mortgagor has himself paid, or whether he has called upon somebody else and bound somebody else towards him to pay and that person has paid, equally, as it appears to me, the mortgagor has made an admission. That is how I regard it upon principle.

Then the learned Judge quotes (1865) 11 H L C 115,[4] where it was held by Lord

1. Maber v. Maber, (1867) 2 Ex 153 = 36 L J Ex 70.

2. Askaram Sowcar v. Venkatasami Naidu, (1921) 8 A I R Mad 102=62 I C 393=44 Mad 544=40 M L J 218.
3. Bradshaw v. Widdrington, (1902) 2 Ch 430 = 71 L J Ch 627=86 L T 726=50 W R 561.
4. Chinnery v. Evenas, (1865) 11 H L C 115=4 N R 520 = 10 Jur (N S) 855 = 11 L T 68 = 13 W R 20.

Westbury L. C. that under the statute, the receiver in the receipt of the rents is in point of fact as well as of law, the receiver of the mortgagor and that any payment made by the receiver is payment in law by the legal agent of the person liable to pay. In 44 Mad 544[2] already referred to, it was held that a purchaser of the equity of redemption is a person liable to pay the mortgage debt within S. 20, Lim. Act : *see* also 54 Cal 179.[5] The payment by Paramasiva therefore takes the case out of the statute, he being the purchaser of an item comprised in the mortgage. Apart from that, the facts, already adverted to, show that he was the mortgagors' "agent duly authorized" to pay Rs. 1500. On this ground also, the payment made by him on 30th July 1920 saves the claim from the bar of limitation. For the plaintiff it is urged in the alternative, that even should the payment be deemed as made on 7th August, the date when actual cash was paid, he is in no worse position; indeed, his position is, if possible, better, that date being nearer the date of the suit. But the argument assumes that Paramasiva's authority extended to making the payment a week after the sale deed. This is a question we need not go into in the view taken by us on the other point. The extent of an agent's authority under S. 20 is a question to be decided on the facts of each case. As Mr. A. Viswanatha Iyer for the respondent rightly points out, a payment by an agent later than warranted by his authorization would be an act detrimental to his principal, for, the result of such a payment is to extend the period of limitation. In this case, as already observed, it is unnecessary to decide whether or not Paramasiva had authority to make the payment on 7th August.

In the result, the appeal is allowed and the lower Court's decree is set aside. The plaintiff will have a mortgage decree for the amount claimed in the plaint, with interest at 6 per cent. per annum on Rupees 4000 from the date of plaint to the date fixed for payment. There will be no personal decree. Time for payment is three months. Though the plaintiff has succeeded, we deprive him of costs, as he deliberately filed the plaint on the last day of limitation, with a court-fee of Rs. 2 odd, while more than Rs. 500 was payable, and made good the deficit only after several extensions. Our order therefore is that each party will bear his costs both here and in the Court below.

C.R.K./R.M. *Appeal allowed.*

5. Bhuban Mohan Singh v. Ram Gobinda Goswami, (1926) 13 A I R Cal 1218 = 94 I C 204=54 Cal 179=44 C L J 188.

A. I. R. 1938 Madras 581

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Kunnumprath Payyantan Govindan Karnavan and another — Appellants.

v.

J. S. De'Silva — Respondent.

Letters Patent Appeal No. 65 of 1936, Decided on 16th December 1937, against Judgment of King J., *reported in A I R 1937 Mad 213.*

(a) Malabar Compensation for Tenants Improvements Act (1 of 1900), S. 5—S. 5 abrogates Art. 139, Lim. Act.

The general provisions of Art. 139, Lim. Act are abrogated by the provisions of S. 5, Malabar Compensation for Tenants Improvements Act : *Case law referred.* [P 582 C 1]

(b) Res judicata—Lease by jenmi to tenant—During tenant's occupation, jenmi granting melcharath—After previously terminating lease jenmi and melcharathdar bringing suit in ejectment against tenant—Jenmi claiming no relief in his favour but stating in plaint that melcharathdar to be entitled to property and liable to pay value of improvements—Decree passed but not executed—Subsequent suit by successor of jenmi for ejectment is not barred by res judicata.

A jenmi and the melcharathdar as plaintiffs 1 and 2 brought a suit in ejectment, having previously terminated the lease, against the defendant who was a tenant and to whom lease was given before the melcharath was granted. The jenmi prayed for no relief in his own favour. In the plaint the allegation was made that it was the melcharathdar that was both entitled to the property and liable to pay the value of the improvements and a decree in terms was passed. But it was not executed and tenant continued in possession. Subsequently the successor of the jenmi brought a suit to eject the tenant and it was contended that the second suit was barred by res judicata :

Held that there being no issue to be tried in the first suit between the jenmi and the tenant, and there being no decree in the first suit in favour of the jenmi, there was no actual or constructive res judicata which barred the second suit. [P 582 C 2 ; P 583 C 1]

O. T. G. Nambiar and A. Atchuthan Nambiar — *for Appellants.*

B. Sitarama Rao — *for Respondent.*

Venkatasubba Rao J.—In this Letters Patent appeal from the judgment of King J. two questions of law have been argued. In 1889, the suit property was

leased by the then jenmi to the defendant's ancestor for a period of three years. While the tenant was in occupation, the jenmi granted a melcharath in 1913. Having previously terminated the lease, the jenmi as plaintiff 1 and the melcharathdar, as plaintiff 2, brought in 1915 a suit in ejectment against the tenant. In the plaint was made the allegation, that it was the melcharathdar that was both entitled to the property and liable to pay the value of the improvements. On that basis, it was prayed that a decree should be passed, directing possession to be delivered to the melcharathdar on his depositing the amount due. Thus it will be seen that the jenmi, although he joined in the suit as plaintiff 1, prayed for no relief in his own favour and made it clear that he was not to be made liable for the amount payable to the lessee. A decree in the suit was passed in 1916, which directed possession to be delivered to the melcharathdar, on his depositing a certain amount, for payment to the tenant. This decree, however, was not executed and the tenant continued to remain in possession. The present suit was brought to eject him in 1929 by the successor of the jenmi who granted the lease. King J. confirmed the decree passed by the lower Appellate Court in favour of the plaintiff.

Two questions have been raised : first of limitation and secondly of res judicata. As regards the first point, Mr. Nambiar contends that the suit is barred under Art. 139, Lim. Act, which applies to actions by landlords against tenants. The starting point is the determination of the tenancy and the suit must be brought within 12 years. If this provision applies, there can be no doubt that the suit is barred. But, it is contended for the respondent that under the special law of Malabar, this general provision must be deemed to have been abrogated by S. 5, Madras Act 1 of 1900 (The Malabar Compensation for Tenants Improvements Act). It enacts (to quote the material portion) that every tenant to whom compensation is due shall, notwithstanding the determination of the tenancy, be entitled to remain in possession until ejectment in execution of a decree or order of Court. Then sub.cl. 2 of the same section goes on to say, that a tenant so continuing in possession shall during such continuance, hold as a tenant subject to the terms of his lease. This section enacts a contradiction; it says that although the tenancy is determined, the tenant continues in possession as such subject to the terms of his lease. There is some force in Mr. Nambiar's contention that this provision was not intended to override the general law, as it had been enacted merely to protect the tenant's right where compensation has not yet been paid. He seeks support for his contention in the definition of the word 'tenant' in S. 3 and the detailed provisions of S. 6. Whatever the merit of this contention be, a contrary view has been taken in every reported case, and we do not think it right to unsettle the law on a point such as this : *see* 1913 M W N 339,[1] (1916) 2 M W N 324[2] and 29 I C 559.[3] Mr. Nambiar relies upon 41 Mad 118[4] but the judgment will show, if carefully read, that the tenant's contention was negatived there, namely that he acquired title by adverse possession by continuing in possession for 12 years from the termination of his tenancy. This case therefore so far as the decision goes, does not support Mr. Nambiar.

Then as to res judicata : true as Mr. Nambiar contends, the theory of a nominal or pro forma plaintiff is untenable. A plaintiff unlike a defendant comes voluntarily on the record and although the law knows of a pro forma defendant, the idea of a pro forma plaintiff is repugnant to it. But still it seems to us that the learned counsel's argument as to res judicata cannot prevail. First, were there a previous decree in favour of the jenmi, that might constitute res judicata and prevent a second decree being passed; but there is no such previous decree. There was an outstanding melcharath, and under its terms, no decree could have been passed in favour of the jenmi. There was no duty cast on the jenmi to recover possession for the melcharathdar and for that purpose to file a suit. Moreover no question was raised as between the jenmi and the tenant and there was no issue to be tried between them. The question of res judicata is one of substance and it is difficult

1. Kummatha Vittil Kunhi Kuthlai Haji v. Antoni Goveas, (1913) M W N 339 = 19 I C 563=24 M L J 472.
2. Eroma Menon v. Sankunni Menon, (1918) 5 A I R Mad 887=38 I C 651=(1916) 2 M W N 324.
3. Chowakkaran Keloth v. Karuvalote Parkaum, (1916) 3 A I R Mad 975=29 I C 559.
4. Theman v. Kunhi Pathumma, (1918) 5 A I R Mad 84=43 I C 757=41 Mad 118=34 M L J 128.

in the circumstances to hold that there is an actual or constructive res judicata which bars the present action. In the result the Letters Patent appeal fails. We make no order in regard to costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 583

PANDRANG ROW AND KING JJ.

Secretary of State — Appellant.

v.

Pullela Rangaswami Naidu and others — Respondents.

Appeals Nos. 464 of 1931 and 221 of 1934 and Civil Misc. Petn. No. 4161 of 1937, Decided on 14th December 1937, against preliminary decree of Sub-Judge, Vellore, in O. S. No. 58 of 1929.

(a) Land Improvement Loans Act (1883), S. 7 (1) (c) — Mortgage under — Priority.

The mortgage under the Lands Improvement Loans Act cannot be given priority in respect of lands other than those for whose benefit the loan was granted : *A I R 1919 Mad 590, Foll.*

[P 583 C 2]

(b) Civil P. C. (1908), O. 41, R. 27 (1) (b) — Lacuna in case due to negligence of legal adviser conducting trial — Additional evidence cannot be admitted to fill it.

Additional evidence under Cl. (1) (b) of R. 27 of O. 41 cannot be admitted to permit the appellant to fill a lacuna in his case, a lacuna which is undoubtedly due to the negligence of his legal adviser who conducted the trial in the Court below.

[P 584 C 1]

(c) Civil P. C. (1908), S. 80 — S. 80 is mandatory — Notice of claim not given — Trial Court through negligence omitting to frame issue on point of want of notice — Government pleader also through negligence omitting to make application regarding it but all along resisting suit — Point regarding notice cannot be deemed to have been waived by Secretary of State.

Section 80, Civil P. C. applies to all forms of suit against the Government whatever be the relief sought. It is express, explicit and mandatory and it admits of no implications or exceptions. A suit in which the provisions of S. 80 Civil P. C. are not complied with is unsustainable in limine.

[P 584 C 2]

Where in a suit against the Government no notice under S. 80 Civil P. C. was issued and the plaint was silent as to that fact and due to the negligence of the Government Pleader and the Subordinate Judge, who tried the case, the suit was tried and disposed of in the lower Court without raising an issue on this point and deciding it but the Government all along defended the suit :

Held that there was no waiver of this point on behalf of the Secretary of State. It was the duty of the Subordinate Judge to see that a plaint which did not satisfy the provisions of law was not allowed to proceed further. The waiver being out of the question and the non-maintainability of the suit being patent, the suit ought to have been dismissed in limine on the ground that it was prohibited by the provisions of S. 80 Civil P. C : *A I R 1927 P C 176, Ref.* [P 584 C 2; P 585 C 1]

Govt. Pleader — *for Appellant.*

T. R. Arunachalam and K. Krishnaswami Iyengar — *for Respondents.*

Pandrang Row J. — These are appeals from the preliminary and the final decree in O. S. No. 58 of 1929 on the file of the subordinate Judge of Vellore. The suit was for sale of the plaint properties in satisfaction of two mortgages that had been executed by defendants 1 and 2 and the undivided deceased father of defendant 3. Defendants 4 to 6 were impleaded as persons claiming to be puisne mortgagees of one or other of the mortgaged properties. The only contesting defendant was defendant 7 the Secretary of State for India in Council, who had some of the properties mortgaged in his favour under the provisions of the Land Improvement Loans Act. Defendant 7 not only claimed priority in respect of his mortgage, but also contended that the suit should be dismissed summarily, as no notice of the suit was given to him prior to suit as required by law. For some reason or other, this objection to the maintainability of the suit was not made the subject-matter of a separate issue and the judgment of the learned Subordinate Judge is silent on this point. The same point has been repeated in the grounds of appeal by the Secretary of State. Before dealing with this point it is necessary to consider and decide the other point argued in this appeal. The learned Subordinate Judge held, following the decision reported in 41 Mad 691,[1] that the mortgage under the Land Improvement Loans Act could not be given priority in respect of lands other than those for whose benefit the loan was granted and he found that in this particular case there was no evidence to show that the loan had been granted for the benefit of the mortgaged properties concerned.

It has been argued before us by the Government pleader that the decision in 41 Mad 691[1] should be re-considered, but he has not been able to give any reason why that decision should be re-considered. No other authority has been quoted which is to the contrary, and on principle there is no justification for giving priority in respect of a mortgage of properties which are not intended to be benefited by the

1. Sankaran Nambudripad v. Ramaswami Aiyer, (1919) 6 A I R Mad 590=47 I C 801=41 Mad 691=34 M L J 446.

loan granted under the Land Improvement Loans Act. We are not therefore prepared to dissent from the principle laid down in 41 Mad 691.[1] Then on the question of fact whether the properties concerned in this suit in which the Secretary of State is interested are lands for the benefit of which the loan was granted, there is no evidence in support of the case put forward by the Secretary of State. It is in fact conceded that, as the evidence stands, no other finding than that arrived at by the learned Subordinate Judge is possible. An attempt was therefore made to get additional evidence admitted in appeal on this point. An application for the purpose of admitting such evidence in appeal was made in 1937 though the appeal was one filed in 1931. The long delay in making this application has not been explained. So far as Cl. (1) (b), R. 27, O. 41, Civil P. C. is concerned, there is no justification for admitting additional evidence. To admit additional evidence under this clause in this case would only be to permit the Secretary of State to fill a lacuna in his case, a lacuna which is undoubtedly due to the negligence of his legal adviser who conducted the trial in the Court below. So far as Cl. (1) (a), R. 27 is concerned it has not been made out that the additional evidence was really tendered on behalf of the Secretary of State when evidence was let in on his behalf in the Court below. We are therefore unable to find any sufficient reason to allow additional evidence to be adduced in appeal in this case. The application for reception of additional evidence in appeal must therefore be dismissed with costs.

The only point that remains is whether the suit is maintainable in the absence of a notice under S. 80, Civil P. C. That section clearly provides that notice should be given and that the plaint should state that notice has been given. In this case the plaint does not contain any such statement, and it is not contended before us that any notice was actually given, and that the omission to make mention of the notice in the plaint was due to oversight. This is therefore a case in which no notice whatever was given to the Secretary of State as required by S. 80, Civil P. C. As observed by their Lordships of the Judicial Committee in 51 Bom 725,[2] S. 80, Civil P. C. applies to all forms of suit, whatever the relief sought. They further observe (at p. 747) that "S. 80 is express, explicit and mandatory and it admits of no implications or exceptions." They further observe that the suit which was before them was one which on account of non-compliance with S. 80, Civil P. C. was unsustainable in limine. The case before us also is exactly a case of the same kind; for, the plaint does not even mention that notice was given to the Secretary of State of the suit claim.

It is however argued before us on behalf of the plaintiffs-respondents that the point as regards notice must be deemed to have been waived in the Court below on behalf of the Secretary of State. This inference is sought to be drawn from the mere omission to frame an issue and to put in an application asking for an issue on the point. We do not think that in the circumstances of the case such an inference can be fairly drawn. The omission seems to have been on a par with the omission to adduce evidence which was obviously necessary and which was ready to hand, such as the order of the Director of Industries which was necessary to support the case put forward on behalf of the Secretary of State, which was nevertheless not tendered in evidence till perhaps it was too late. In any case, negligence is more likely to have been the cause of the omission to frame an issue on the point of want of notice and the omission to make any application regarding it. This negligence does not seem to have been confined to the Government Pleader appearing in the trial Court but seems to have extended to the learned Subordinate Judge himself who neglected his plain duty in the matter. It was his duty to see that a plaint which did not satisfy the provisions of law was not allowed to proceed further so far as the Secretary of State was concerned. The suit should have been dismissed by him on this ground alone in limine against defendant 7. We are unable to accept the contention that there was any waiver in this case. The suit was throughout resisted by the Secretary of State and it is impossible to believe that there would have been any deliberate waiver on his behalf of a defence which was sufficient to non-suit the plaintiff. Waiver being out of the question, the non-maintainability of the suit as against defendant 7 is patent. The suit should have been dismissed in limine so far as defendant 7, that is the appellant in this

2. Bhagchand Dagadusa v. Secy. of State, (1927) 14 A I R P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).

appeal, was concerned, on the ground that the suit is prohibited by the provisions of S. 80, Civil P. C. The appeals are therefore allowed and the suit is dismissed as against defendant 7 with costs in Appeal No. 464 of 1931 (which is the main appeal from the preliminary decree in the case) in this Court and in the Court below.

C.R.K./D.S. *Appeals allowed.*

A. I. R. 1938 Madras 585

LEACH C. J. AND
VENKATARAMANA RAO J.

Messrs. Nuserwanji Cursedji Bhesania and Co. — Appellant.

v.

Mahamayi Ammal and others — Respondents.

Appeal No. 90 of 1932, Decided on 18th November 1937, against decree of Sub. Judge, Dindigul, in O. S. No. 10 of 1930.

Surety—Discharge—By agreement between *A* and *B*, *A* to hand over partnership assets to *B* immediately in consideration of *B*'s paying certain sum to *A* — *C* standing surety for *B* — Subsequent agreement between *A* and *B* excusing immediate delivery of assets and granting more time — *C* is discharged.

It is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted. Any variation in the original contract cannot bind the surety unless he has assented to the variation : *A I R 1935 P C 21 Rel. on.* [P 588 C 2]

It was agreed between *A* and *B* that *A* should hand over the assets of a partnership business to *B* in consideration of *B*'s paying to *A* certain sum. It was agreed that the assets should be handed over immediately or within reasonable time and that *A* should execute a power of attorney in favour of *B* to enable him to collect all the outstandings due to the business. *B* executed a promissory note as agreed and *C* stood surety for *B*. The assets and the power of attorney were not handed over to *B* within the time agreed. Subsequently by agreement between *A* and *B* the immediate handing over of the assets was excused:

Held this subsequent agreement amounted to variation of the original contract and hence the surety *C* was discharged from his liability.

[P 589 C 1]

Advocate-General, L. S. Veeraraghava Ayyar, K. Umamaheswaran and K. Subramania Ayyar — *for Appellant.*

K. S. Krishnaswami Ayyangar, N. R. Govindachariar and S. Desikachariar — *for Respondents.*

Leach C. J. — The appeal arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Dindigul to recover a sum of Rs. 77,770 with interest from K. S. N. Periathambi Nadar, who was sued as the principal debtor, and from U. P. A. Pachayappa Nadar, who was sued as his surety. They were defendants 1 and 6 respectively, and as it will be necessary in the course of this judgment to mention them frequently, it will be convenient to refer to them here as defendants 1 and 6. Defendant 6 died during the pendency of the suit and the respondents are his legal representatives. The appellants are a firm of produce merchants with their head office at Bombay. In 1915, they opened a branch at Bodinaickanoor in the Madura District, where they carried on business in coffee and cardamoms under the style of M. N. Bodiwala and Company. In the course of their business at Bodinaickanoor, they became associated with defendant 1, who, they say, pressed them to open a branch at Pattiveeranpatti and to allow him to become a working partner so far as the business at Pattiveeranpatti was concerned. Whether the suggestion came from defendant 1 matters not, but the suggestion was made and carried into effect on 15th July 1926. The arrangement was that the appellants were to provide the capital and were to share the profits or losses with defendant 1 in the proportion of ten annas and six annas respectively. It is the appellants' case that defendant 6 undertook to guarantee the payment of defendant 1's share of any loss that might result from the business and that the partnership was formed on this basis. They say that on 15th July 1926, three documents were executed, namely a vartamanam letter by defendant 1, embodying the terms of the partnership (Ex. A) ; a counterpart vartamanam letter executed by Manchand Hathi Chand, the appellant's agent in Bodinaickanoor (Ex. A-1) ; and a vartamanam letter by defendant 6 in which he undertook to make good to the appellants "the loss pertaining to defendant 1's share" and also any amount which might be found to have been misused by him out of the moneys provided by the appellants. This last letter is Ex. B. Defendant 1 by his written statement admitted the appellants' case so far as the formation of the partnership was concerned and also admitted the genuineness of the three documents to which I have just referred, but defendant 6 denied that he had ever undertaken to guarantee defendant 1 and averred that Ex. B was a forgery.

It is an undisputed fact that defendant 1 carried on business in partnership with the appellants at Pattiveeranpatti on the basis of the vartamanam letters, Exs. A and A-1, and that the appellants advanced considerable sums of money for the purpose. The business was conducted on behalf of the appellants by Manchand. The market, however, proved to be a falling one and by the end of August 1927 heavy losses had been sustained. The appellants allege that on 2nd September 1927 it was agreed between them and defendant 1 that the latter should take over all the assets and liabilities of the Pattiveeranpatti business and pay to them a sum of Rs. 70,000. They further allege that defendant 6 agreed to guarantee the payment of this sum and that the arrangement was embodied in three other documents, Exs. D, E and XXVI, all dated 2nd September 1927. Ex. D is a promissory note payable on demand for Rs. 70,000, bearing interest at $\frac{3}{4}$ per cent. per mensem executed by defendant 1 in favour of the appellants. According to its terms Ex. E is a vartamanam letter addressed by defendant 6 to the appellants in which he undertook to pay the amount due on the promissory note within one year in the event of defendant 1 failing to do so. Ex. XXVI is a vartamanam letter executed by Manchand on behalf of the appellants and addressed to defendant 1. It reads as follows :

> Today I checked all the accounts relating to the coffee and cardamom business which you in partnership with our Company were carrying on under the name and style of Moolji Bhai Nuserwanji Bodiwala and Company, at Pattiveeranpatti from 15th July 1926 to 2nd September 1927 ; the outstandings and the profit and loss in the business pertaining to the aforesaid vilasam have been given up to you and I have obtained from you a promissory note for Rs. 70,000 (Rupees seventy thousand) in favour of Messrs. Nuserwanji Karpudji Basania and Co. at Bombay and as security for the amount of that note I have also obtained a security varthamanam from M. R. Ry. U. P. A. Pachayappa Nadar Avergal. The ledger, day book, etc., and the promissory notes of the persons from whom amounts are due are also received. Yourself and myself shall within four days from this date start and go to Bombay, inform the principals of the N. C. Basania and Company, of these matters and I shall obtain from them a power of attorney in your favour enabling you to collect the outstandings and pay the amount to us.

It will be observed that this document states that the outstandings and the profit and loss of the business had been given up to defendant 1, who had signed a promissory note for the agreed amount, but that the books and the promissory notes given by debtors of the partnership had been handed over to Manchand and that he and defendant 1 were to proceed to Bombay to interview the principals, who were to furnish a power of attorney in favour of defendant 1 in order that he might realize the assets of the business. It is however untrue that the assets had been handed over to defendant 1. Defendant 1 admitted the genuineness of these documents, but defendant 6 denied that he had undertaken to act as the surety of defendant 1 and alleged that Ex. E was also a forgery. Exs. D and XXVI are undoubtedly genuine and it is true that after these documents had been executed Manchand and defendant 1 left Pattiveeranpatti for Bombay where they interviewed the appellants. The evidence also discloses that the appellants were reluctant to carry out the arrangement entered into by Manchand, and defendant 1 left Bombay without the power of attorney. When defendant 1 returned to Pattiveeranpatti he wrote several letters to the appellants pressing them to hand over to him (a) the promissory notes and other securities which the debtors of the partnership had executed or provided and (b) the power of attorney, but the appellants did not comply with his demands. They had not been complied with by 29th June 1928, when Jagan Mohandas (P.W. 9), a partner in the appellants' firm, arrived at Pattiveeranpatti. Discussions then took place between him and defendant 1 which resulted in two further vartamanam letters, being executed (Exs. FFF and GGG). The first of these letters was executed on 16th July 1928 by defendant 1 and is in the following terms :

> Whereas I made an agreement on 2nd September 1927 after looking into the accounts, to the effect that I would undertake all the responsibilities of the business of coffee seeds and cardamoms carried on under the name and style of Moolji Bhai Nuzervanji Bodivala and Company, in this place started on 26th July 1926 under the agency of Manchand Hatichand Sait, the agent of your firm at Bodinaickanoor, and pay you Rs. 70,000, whereas I accordingly undertook the same and executed a promissory note in your favour and whereas there is still time up to 2nd September 1928 for the vartamanam letter (letter of agreement) executed by M. R. Ry. U. P. A. Pachaiappa Nadar Avergal, in your favour as security, for the said sum, I declare that I or my surety shall pay the (said) money within the said due date, that in default you may make arrangements for the recovery of the said sum and that I will not alienate my moveable and immovable properties of nanja and punja lands, hills, gardens, houses, etc. all properties belonging to me by way of hypothecation, otti (mortgage with possession)

etc. I declare that I have not prior to this encumbered any of the said properties to any one by way of mortgage, otti etc. You have this day agreed to prepare a general power of attorney similar to the copy of the power of attorney sent by me by registered post on 16th October 1927 and send the same as soon as possible, after reaching Bombay for the purpose of recovering the outstandings due under promissory notes, accounts, usufructuary mortgage, hypothecation, lease, etc, all the documents and true accounts relating to the said firm of M. N. Bodivala and Company, and you have executed a vartamanam letter also to that effect. I shall from time to time pay the money collected by me out of the outstandings of the aforesaid M. N. Bodiwala and Company, into your firm at Bodinaickanoor and obtain receipt.

Ex. GGG bears the same date and is the counterpart signed by Jagan Mohan Das on behalf of the appellants. In spite of this arrangement, the documents which the appellants were to hand over to defendant 1 were not then handed over to him, and they also withheld the power of attorney. After waiting till 3rd August 1928 and the appellants being still in default, defendant 1 wrote to Jagan Mohan Das, who was then at Bodinaickanoor, saying :

Mr. Manchand Hathichand has not delivered the documents and the pronotes to me as it was decided in our agreement. It is a pity that the agreement was not honoured. If I do not get any reply for this within three days, please kindly take notice that my pronote of 2nd September 1927 and the agreement of 16th August 1928 are null and void and will not bind me.

This is Ex. WWW. On 8th August 1928 Manchand wrote to defendant 1 a letter (Ex. 31) and with it enclosed a number of promissory notes and other documents, but he did not send the power of attorney which defendant 1 had throughout insisted on being supplied to him and which the appellants had agreed to furnish. On 18th August 1928, defendant 1 wrote to the appellants at Bombay a long letter (Ex. 34-A) setting out the arrangement entered into with them and concluding as follows :

On account of your many defaults, and your non-compliance with the agreement given by Mr. Jagan Mohan Das on 16th July 1928, I have hereby cancelled the pronote for Rs. 70,000 (seventy thousand rupees only) executed by me on 2nd September 1927. I am enclosing a typed translation of this notice.

This letter was written in Tamil. Defendant 1 having cancelled the agreement, as he had the right to do, as the appellants had for a year failed to carry out their part of the agreement the appellants wished to carry it through and sent him a power of attorney. This, however, did not arrive until 7th September 1928 and it was then too late. The appellants filed the suit on 27th November 1928. Written statements were in due course filed by defendants 1 and 6. The defendant 1 denied liability on the ground that there had been a total failure of consideration for the promissory note which he had signed. Defendant 6 denied that he had ever been consulted and described the claims as being false and fraudulent. Defendant 1 eventually withdrew his defence and allowed the case to proceed against him ex parte. By this time defendant 6 had died and his widow was made a party as defendant 7. She filed an additional written statement in which she adopted the defence of defendant 1 in addition to the defence set up by her husband. The trial was a lengthy one as it involved the question whether Exs. B and E were forgeries. It was alleged that other documents on which the appellants relied had also been fabricated, but it is not necessary for the purpose of this appeal to refer to these other documents. The learned trial Judge held that Exs. B and E are forgeries and dismissed the suit so far as it concerned defendant 6. It is also not necessary for the purposes of deciding the appeal to enter upon a discussion of the finding of the learned trial Judge that Exs. B and E are forgeries, because the appeal fails on other grounds.

In answer to questions put by the Court, the learned Advocate-General very properly admitted that Manchand had full authority to bind the appellants and that the arrangement entered into by him with defendant 1 on 15th June 1926 was binding and needed no confirmation by the appellants. The same admission was also very properly made with regard to the further arrangement entered into by Manchand with defendant 1 on 2nd September 1927. The learned trial Judge held that the appellants and Manchand had the entire control of the business at Pattiveeranpatti until May 1928 in spite of the execution of the promissory note, Ex. D, the consideration for the transfer of the assets of the partnership to defendant 1. The mention of the month of May is a mistake for July, as it was on 16th July 1928 that Exs. FFF and GGG were executed. With this correction we concur without hesitation in the finding of the learned trial Judge in this respect. This means that in spite of the binding contract which defendant 1 entered into with the

appellants in July 1927 the appellants failed to fulfil their part of the bargain, and after the ratification of July 1928 they still remained in default and were in default when defendant 1 gave notice of cancellation of the arrangement by reason of the default. The consideration for the promissory note therefore failed, and defendant 1 was relieved of all liability under the promissory note. That he subsequently withdrew his defence and allowed judgment to be given against him cannot in our opinion affect the position of defendant 6. If defendant 1 was not liable on the promissory note, defendant 6 as surety was also discharged. This is specifically provided for in S. 134, Contract Act, which says that the surety is discharged by an act or omission of the creditor the legal consequences of which is the discharge of the principal debtor. The reason why defendant 1 gave up his defence and allowed judgment to go against him has not been disclosed and no purpose will be served by entering into speculation with regard to the motive.

Section 133 of the Contract Act says that any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance. The contract which the appellants entered into with defendant 1 contemplated the immediate handing over of the assets of the business of Pattiveeranpatti to defendant 1, or at any rate within a reasonable time. It also contemplated the giving of the power of attorney by the appellants to defendant 1 to facilitate his enforcement of rights against the debtors of the partnership. No assets were handed over to defendant 1 until after twelve months from the date of the contract had elapsed and those which were sent to him were only sent after defendant 1 had given notice that he would not be bound by the contract. The same remark applies to the delivery of the power of attorney. The arrangement embodied in Exs. FFF and GGG amounted to a variation of the terms of the contract, because it excused the immediate delivery of the assets to defendant 1 and allowed delivery to be made after more than a year had elapsed. The learned Advocate-General has suggested that inasmuch as S. 133, Contract Act contains the words "as to transactions subsequent to the variance" the case does not fall within the section. Assuming that it does not, it is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted. There are many authorities bearing on the point, but it will suffice if I quote in this connexion the remarks of their Lordships of the Privy Council in 68 M L J 339.[1] At page 346 of the report appears the following passage :

> It appears to their Lordships that the law on the discharge of sureties has been somewhat obscured by the emphasis laid in the cases on an agreement between the parties to vary the terms of the original agreement. The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final 'obligation of the principal debtor will be something different from the obligation which the surety guaranteed.

At page 348 their Lordships observe :

> Having arrived at this conclusion, it becomes unnecessary to consider the effect of S. 133, Contract Act. Whether that much-discussed section relates only to continuing guarantees or is intended to affect a guarantee of one obligation, and if so what it means, it is unnecessary to determine. In any view of the section, it cannot, in their Lordships' opinion, operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor to his promise.

The passage just quoted shows that the provisions of the Contract Act cannot be deemed to be exhaustive. It is clear in this case that the appellants have not shown performance, and, therefore they cannot hold defendant 6 to his promise. A half-hearted attempt has been made to show that defendant 6 did agree to the arrangement entered into between Jagan Mohan Das and defendant 1 at Pattiveeranpatti in July 1928. The attempt was based on a statement in the evidence of Jagan Mohan Das to be found on p. 746 of the printed record where he says :

> I saw defendant 1 and defendant 6. They said they could not make any collections as the season was dull and the crops were not good and wanted more time for payment of the pronote debt. I said that if they paid Rs. 25,000 or Rs. 30,000, I would give them time. They said they would consult and let me know the next day. Next day they said they would give an undertaking that they would not mortgage or sell defendant 1's property and that I need not file a suit or apply for an attachment before judgment. I agreed.

---

1. Seth Pratap Singh Moholalbhai v. Keshavlal Harilal, (1935) 22 A I R P C 21=153 I C 700 =59 Bom 180=62 I A 23=68 M L J 339 (P C).

At a later stage in his evidence the witness stated that he met defendant 6 between 12th and 16th July 1928, but only once. His statement that he saw both defendants 1 and 6 the next day after they asked for time is therefore on his own showing untrue. The learned trial Judge has disbelieved the statement of Jagan Mohan Das that defendant 6 did agree to the arrangement embodied in Exs. FFF and GGG, and we consider that he was fully justified in so doing. If defendant 6 had agreed with Jagan Mohan Das to accept the variation in the contract we have no doubt that he would have induced him to sign Ex. FFF or execute a fresh vartamanam letter. The contention that defendant 6 fell in with the arrangement made by Jagan Mohan Das and defendant 1 at Pattiveeranpatti in July 1928 must therefore be rejected, and we hold that defendant 6 was not a consenting party to the variation of the contract. As the contract was varied without his consent he is discharged from liability, apart from any question of cancellation. Moreover defendant 6 was in fact greatly prejudiced by the fact that immediate delivery of the assets of the partnership to defendant 1 was dispensed with. The arrangement of July 1928 meant that the principal debtor had lost much valuable time and was not likely to be able to realize the assets before the expiration of the twelve months allowed to the surety for payment. For these reasons, we hold that the appeal fails and must be dismissed with costs in favour of respondent 2. We fix the advocate's costs at Rs. 1200. The memorandum of objections is dismissed. No order as to costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 589

KING AND VENKATARAMANA RAO JJ.

Tetali Sooramma — Appellant.

v.

Kovvuri Venkayya and others — Respondents.

Appeal No. 54 of 1934, Decided on 10th March 1938, against decree of Sub.Judge, Rajahmundry, D/- 30th August 1933.

Limitation Act (1908), Art. 96—Suit for sale of property on basis of mortgage—Property alleged to be wrongly described—Plaintiff also praying for rectification of mistake—Art. 96 does not apply — Plaintiff's title may be established by oral evidence even though his right to secure rectification of mortgage deed is barred by limitation.

Where the plaintiff suing for sale of certain property on the basis of a mortgage executed in his favour, alleges that the property is wrongly described and incidentally prays for rectification of the mistake, he is entitled on proof of his title to the relief for sale of the property which was agreed to be mortgaged, even though his right to sue for rectification of the mortgage deed is barred by limitation. Art. 96, of the Limitation Act has no application to such a case. No question of limitation arises as the substantial relief prayed for by the plaintiff is not rectification of the deed, but some other relief which the plaintiff is entitled to claim under the law on the basis of the transaction which he seeks to enforce : *A I R 1918 Cal 809, Foll.* [P 590 C 1, 2]

D. Suryaprakasa Rao — *for Appellant.*

P. Somasundaram — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the judgment of the learned Subordinate Judge of Rajahmundry granting a decree in favour of the plaintiff. The suit is upon a mortgage executed by defendant 1. The substantial defence to the suit was that the plaintiff was not entitled to ask for the sale of one of the items of the property, viz. Survey No. 172/2, on the ground that the property actually described in the deed of mortgage as having been mortgaged was only 172/4. The plaintiff in his plaint stated that the description 172/4 was a mistake for 172/2 and that if necessary the mortgage deed might be rectified by inserting 172/2 in the place of 172/4. But the substantial relief he prayed for in the plaint was the sale of 172/2 on the basis of the mortgage. One of the defences raised was that the prayer for rectification was barred by limitation because it was asked for after more than three years had elapsed from the date when the mistake came to the plaintiffs' knowledge. This contention seems to have prevailed in the lower Court but the learned Subordinate Judge gave a decree on the ground that the prayer for rectification was an unnecessary prayer, that, if the plaintiff was able to establish before Court that by mutual mistake the property was described wrongly, it was open to the Court to take oral evidence in regard to it, treat the document as rectified and give relief to the plaintiff on the basis of the said property, having been mortgaged thus giving effect to the intentions of the parties.

The learned Subordinate Judge purported to follow a ruling of this High Court which clearly lays down that it is open to the

plaintiff or the defendant to adduce oral evidence in regard to the correct description of the property in the conveyance executed between them and that relief in regard thereto can be granted even though a suit for rectification has not been filed: *vide* 34 Mad 51[1] and 3 M L W 551.[2] It has been held that, so far as the defendant is concerned, even though he has not sued to have the document rectified and even though a suit for rectification is barred by limitation, nevertheless the Court is entitled to give him relief: *vide* 2 C W N 260.[3] But it is contended that a different rule ought to apply in the case of a plaintiff, i. e. if he wants to get a relief on the basis of mutual mistake, it is his duty to institute a suit for rectification within three years from the date when the mistake came to his knowledge under Art. 96 of Sch. 2, Lim. Act and no relief could be given if he allows his claim for rectification to be barred. It seems to us that this contention is not tenable. Art. 96 will be applicable only if the plaintiff wants to file a suit for rectification of a deed and prays only for that relief. But, if the plaintiff sues for possession of property or for a declaration of title in regard to property or, as in this case, for sale of property, on the basis of the mortgage executed in his favour and if the relief regarding rectification is only formal or incidental or not necessary for awarding the main relief prayed for, then Art. 96 will have no application. In a case decided in 28 C L J 197[4] it was held by Mukherjee and Walmsley JJ., that:

> Title may be established without rectification of an instrument even though the time to secure a rectification of the instrument has elapsed, and that it is open to a party to give evidence to prove that his name has been omitted from the document by fraud or mistake.

It seems to us that this is the correct principle and especially where the rights of third parties have not been intervened. So long as it is open to the parties to adduce oral evidence on the ground of mutual mistake in regard to misdescription of property, and a Court can give effect to the real intentions of the parties, we do not see why any question of limitation should arise at all when the substantial relief prayed for by the plaintiff is not rectification of the deed but some other relief which he is entitled to claim under the law on the basis of the transaction which he seeks to enforce. Rectification in such a case is not necessary. Following the decision in 28 C L J 197,[4] we think that even though the right of the plaintiff to sue for rectification of the mortgage deed is barred by limitation, still he is entitled to the relief for sale of the property which was agreed to be mortgaged and that the decision of the lower Court is therefore correct. The result is that the appeal is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

1. Mahadeva Aiyar v. Gopala Aiyar, (1911) 34 Mad 51=8 I C 390=8 M L T 289=(1911) 1 M W N 36.
2. Chinna Mallayya v. Veerayya, (1916) 3 A I R Mad 795=31 I C 671=3 M L W 551.
3. Mahendra Nath Mukherjee v. Jogendra Nath Roy, (1899) 2 C W N 260.
4. Asitulla v. Sadatullah, (1918) 5 A I R Cal 809 =41 I C 747=28 C L J 197.

A. I. R. 1938 Madras 590

BURN J.

V. M. Ahmed Maraikayar — Petitioner.

v.

V. N. Thangiah Nadar — Respondent.

Civil Revn. Petn. No. 88 of 1936, Decided on 4th March 1938, from order of District Court, Tinnevelly, D/- 8th August 1935.

Provincial Insolvency Act (1920), S. 42 (1) (a) — Burden of proving existence of circumstances laid down in S. 42 (1) (a) is on debtor and not on creditors or on Official Receiver.

An order of discharge cannot be passed unless the circumstances laid down in S. 42 (1) (a) are shown to exist and the burden of proving the existence of those circumstances is on the debtor. It is not necessary for the creditors or the Official Receiver to show that the debtor could justly be held responsible for the deficiency of assets.

[P 591 C 1]

T. E. Ramabhadrachariar and S. Thyagaraja Iyer — *for Petitioner.*

A. Swaminatha Iyer — *for Respondent.*

Judgment. — Both the lower Courts have clearly lost sight of S. 42 (1) (a), Provincial Insolvency Act which peremptorily requires the Court to refuse an absolute order of discharge

> unless the insolvent satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee . . . . . has arisen from circumstances for which he cannot justly be held responsible.

In this case it is admitted that the assets did not realize eight annas in the rupee. Neither the learned Subordinate Judge nor the learned District Judge has expressed himself as satisfied in the manner required by S. 42 (1) (a). On the contrary, the

Official Receiver reported that there was no evidence whether the deficiency was due to circumstances for which the debtor could not justly be held responsible. This means simply that the debtor did not discharge the burden laid on him by S. 42 (1) (a). The learned District Judge appears to have fallen into the error of supposing that there was a burden on the creditors or perhaps on the Official Receiver to show that the debtor could justly be held responsible for the deficiency of assets. This is the precise opposite of the correct statement of the law. The order granting an absolute discharge is set aside and the application for discharge must be restored to file and dealt with according to law. The appellant (petitioner) will be entitled to his costs of this appeal out of the estate if there are any funds in the estate.

C.R.K./R.M. : *Order set aside.*

A. I. R. 1938 Madras 591

BURN AND VENKATARAMANA RAO JJ.

In re Perne Maila Rai — Petitioner.

Criminal Revn. Case No. 466 and Petn. No. 434 of 1937, Decided on 4th February 1938, from order of Sess. Court, South Kanara Division, D/- 30th March 1937.

(a) Criminal P. C. (1898), Ss. 110 and 117—General repute—Evidence of police witnesses as regards general reputation of a person should not be excluded as inadmissible—Similarly evidence of general reputation may be given by a stranger.

Per *Burn J.*—The question what is a person's reputation is a question of fact. It can be spoken to by anyone who knows what his general reputation is. The police officer who goes to the place where a particular person lives and who makes enquiries to find out what his reputation is, is perfectly competent to speak in the witness-box about the result of his enquiries. His evidence that the reputation of such and such a person is so and so is evidence of a fact and it is not to be excluded as mere hearsay evidence. In one sense the evidence of general repute is of course hearsay but it is hearsay of a particular kind which is made admissible in a case like this by S. 117, Criminal P. C. It is not necessary that the witness who speaks to the general reputation of a person must be resident in the same place. A stranger can find out what the general repute of a person is and he is competent to testify to that fact. [P 591 C 2 ; P 592 C 1]

(Per Venkataramana Rao J.)—Reputation of a man's character is the inference or estimate from the sum total of a man's actions and qualities drawn or formed by persons who are acquainted with him or among whom he resides and with whom he is chiefly conversant or the circle in which he moves ; it is the prevailing opinion formed by those with whom he associates and who would have the best opportunity of knowing his habits and general behaviour. It is generally understood that the "place" or "community" with reference to which reputation evidence is tendered should relate to the neighbourhood where he dwells or moves, but having regard to modern conditions, it is impossible to define "neighbourhood" or "community" with any degree of accuracy. [P 593 C 1]

(b) Criminal P. C. (1898), S. 110—Person proceeded against need not be ex-convict *(Obiter).*—*(Per Burn J.)*

A person against whom proceedings under S. 110 are taken need not be an ex-convict : *A I R 1938 Mad 482, Approved.* [P 592 C 2]

(c) Criminal P. C. (1898), S. 110 (e) and (f)—Finding that person proceeded against under S. 110 is habitual criminal cannot be based on criminal cases against such person in which he is discharged.

A Court is not warranted to base the finding that the person proceeded against under S. 110 is habitual criminal on the evidence gathered from criminal cases against such person in which he has been discharged. [P 592 C 2]

K. S. Jayarama Ayyar for B. Lakkappa Rai — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Burn J. — In my opinion there was evidence upon which the learned Joint Magistrate and the learned Sessions Judge could properly rely in order to hold that the petitioner was habitually committing or attempting to commit or abetting the commission of offences involving a breach of the peace and is so desperate and dangerous as to render his being at large without security hazardous to the community. I cannot accept the contention of Mr. Jayarama Ayyar that the evidence of the police witnesses with regard to general repute should be excluded as inadmissible. The question what is a person's reputation is a question of fact. It can be spoken to by any one who knows what his general reputation is. The police officer who goes to the place where a particular person lives and who makes enquiries to find out what his reputation is, is perfectly competent to speak in the witness box about the result of his enquiries. His evidence that the reputation of such and such a person is so and so is evidence of a fact and it is not to be excluded as mere hearsay evidence. In one sense the evidence of general repute is of course hearsay but it is hearsay of a particular kind which is made admissible in a case like this by S. 117, Criminal P. C. It is not in my opinion necessary— I say it with all respect to the learned Judges who have held otherwise — that

the witness who speaks to the general reputation of a person must be resident in the same place. A stranger can find out what the general repute of a person is and he is competent to testify to that fact. For this reason, I would dismiss this petition holding that there is no ground for interference in revision.

The case was brought before this Bench apparently because of a conflict of rulings in Criminal Rivision Cases 228 of 1937[1] and 474 of 1937.[2] In the former case, Newsam J. is reported to have said :

There is another and I think an even stronger ground for quashing the present proceedings. Neither of the petitioners has ever been convicted of any crime. A mere perusal of S. 110 is sufficient to show that it is intended to deal with ex-convicts or habitual criminals and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient deterrents or adequate safeguards for the public.

In the latter case Horwill J. stated as follows :

It is further contended that before a person can be bound over under S. 110 it is necessary that a certain number of previous convictions should have been proved. I can see no necessity for this if the fact that a person is an habitual robber or housebreaker or thief can be proved otherwise. If there are no previous convictions, the quantum of proof necessary would naturally be greater.

The conflict appears to be that Newsam J. is thought to have held that S. 110 can only apply against habitual criminals if there are previous convictions while Horwill J. has held that it is not necessary to prove previous convictions. The point does not arise in the present case because it has not been contended by Mr. Jayarama Ayyar on behalf of the petitioner that the absence of any previous conviction renders the order of the lower Court invalid. I do not myself think that Newsam J. meant to say that the only habitual criminals who can be dealt with under S. 110, Criminal P. C., are ex-convicts. He says "ex-convicts or habitual criminals and dangerous and desperate outlaws . . . . . " and I do not think that the word "or" is equivalent in this context to "namely". The supposed conflict only arises if Newsam J.'s words are read as if he had said, "ex-convicts, viz. habitual criminals and dangerous and desperate outlaws . . . . " If it were necessary, I would agree with Horwill J. and differ (with all respect) from the interpretation put upon the words of Newsam J. In S. 117, Criminal P. C. it is expressly laid down that the fact that a person is a habitual offender may be proved by evidence of general repute. This is by itself inconsistent with the ideas that a person against whom proceedings under S. 110, Criminal P. C. are taken must be an ex-convict.

Venkataramana Rao J. — This is an application to revise the order of the learned Sessions Judge of South Kanara confirming the order of the Joint Magistrate of Kundapur binding over the petitioner under S. 110 (e) and (f), Criminal P. C. There are two concurrent findings of the lower Court, viz. (1) that the appellant is a person given to habitually committing or attempting tc commit or abetting the commission of offences involving a breach of the peace and (2) that the appellant is so desperate and dangerous as to render his being at large without security hazardous to the community. So far as the first finding is concerned, it is mainly based on three criminal cases which were the subject of judicial proceedings, and which ended in the discharge of the petitioner. Apart from the said proceedings, there is no other reliable evidence in the case. It seems to me that the lower Courts were not warranted in basing their finding on the evidence gathered from the proceedings in those cases, when the petitioner was exonerated in respect of the charges laid against him in those proceedings. I am therefore of the opinion that this finding is not sustainable. With regard to the other finding Mr. Jayarama Ayyar contends that it is based upon certain inadmissible evidence and therefore the finding must be set aside. His contention may be outlined thus: both the lower Courts have taken into consideration the evidence of certain police officers who have made investigation regarding certain offences, namely those which formed the subject of the above criminal proceedings, and their evidence is purely hearsay and therefore the finding based on such evidence cannot be sustained. To appreciate this contention, one has to see what is necessary to sustain a finding with reference to a charge under S. 110 (f), Criminal P. C. Proviso (4) to S. 117 says that :

1. Rathinam Pillai v. Emperor, (1938) 25 A I R Mad 35=172 I C 866=39 Cr L J 230=(1937) 2 M L J 749.
2. In re Shanmugham Asari, (1933) 25 A I R Mad 482=(1938) 1 M L J 178.

The fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

Therefore a finding in regard to a charge under S. 110 (f) can be based on evidence of general repute of the person who is sought to be bound over. The section does not say in what manner evidence is to be given. The evidence as to reputation is always recognized as an exception to the rule as to the non-admissibility of hearsay evidence. Phipson in his book on "Evidence," Edn. 7 observes thus at p. 372 :

Stephen states that oral evidence must in all cases whatever be direct; that is, if it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. But though this is generally true, it is not invariably so, witnesses being in some cases allowed to testify to the opinions of third person who were not upon oath, e. g. when the opinion is that of the community (reputation).

Reputation of a man's character is the inference or estimate from the sum total of a man's actions and qualities drawn or formed by persons who are acquainted with him or among whom he resides and with whom he is chiefly conversant or the circle in which he moves; it is the prevailing opinion formed by those with whom he associates and who would have the best opportunity of knowing his habits and general behaviour. It is generally understood that the 'place' or 'community' with reference to which reputation evidence is tendered should relate to the neighbourhood where he dwells or moves, but having regard to modern conditions, it is imposible to define "neighbourhood" or "community" with any degree of accuracy. Though reputation is, in one sense, hearsay evidence, yet what a man learns of a man's reputation is a fact. Taylor in his book on 'Evidence', Edn. 12 states thus in S. 1472 :

It is not however enough that the impeaching witnesses should profess merely to state what he has heard "others" say, for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant, for it is this only which constitutes his general reputation. In ordinary cases, the witness should himself come from the neighbourhood of the individual whose character is in question, for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his enquiries. The impeaching witness may however be asked in cross-examination the names of the persons whom he has heard speak against the character for veracity of the witness impeached.

One of the cases to which he makes reference is 3 Serg & R 337=8 American Dec 655[3] which gives a fairly good exposition of what reputation evidence consists of and how it is to be proved. In that case Gibson J. observes thus at p. 656 :

The witness shall not be permitted to say he was told that the person had either a good or bad character in his own neighbourhood. But that is a very different thing from a knowledge of common report, acquired, as in this case, from common report itself .... A personal acquaintance with the individual to be affected, is unnecessary .... The witness is to give, not his own judgment of the matter, but the aggregate result of at least a majority of the voices he has heard; or in other words, for after all there is perhaps, no more plain or practical exposition of the matter, he must state what the common report is among those who have the best opportunity of judging of the habits and integrity of the person whose character is under consideration .... The reputation of the neighbourhood is the only thing that is competent; and if the witness has acquired a knowledge of it by the report of the neighbourhood, he is exactly qualified to be heard.

In the same case Duncan J. observes thus at pages 657 and 658 :

How often does the inquiry end in the very question put to this witness: "What is the general reputation of the witness examined as to truth in the county in which he lives?" If a witness was not permitted to state the general reputation, there must be an end of all inquiry into character. Particular facts cannot be given in evidence. Opinion will not be evidence, for, if it were, no witness would be safe from the shafts of calumny. No man is to be discredited by the mere opinion of another; few men live whom some do not think ill of. But it is said the witness must speak of his own knowledge. So he must. But what is this knowledge? Not a personal individual knowledge of facts. He knows by reputation what is the character of the man.

Thus it will be seen that reputation evidence is not what *A B C* state about one's character but what the general opinion concerning him is, because reputation is not the same thing as character. The witness who speaks to reputation must have opportunity to acquire knowledge of it. I do not wish to deal with the question as to what the extent of the opportunity should be and what the extent of knowledge should be, because in this case on a reading of the depositions of the witnesses, whom Mr. Jayarama Ayyar objects, I find that they are persons who are qualified to speak about the general repute. Most of them are officers within whose jurisdiction the petitioner resides and some of them are persons who have held offices in or about that locality. I also

3. Kimmel v. Kimmel, 3 Serg & R 337=8 American Dec. 655.

find that they do not merely say that particular person told them about the petitioner's character but they also speak from the knowledge they have acquired of the common report about the petitioner. Even excluding that evidence. I agree with the learned Sessions Judge that there is sufficient and satisfactory evidence in the case to come to the conclusion that the petitioner is a person of desperate and dangerous character within the meaning of S. 110 (f). I therefore agree with my learned brother in dismissing this revision petition.

In this view it is unnecessary to consider how far a mere stranger, who goes out to find out what the general repute of a person is, is competent to testify to that fact; nor do I think it necessary for the purpose of this case to express an opinion on the difference of view held by Horwill J. and Newsam J., about the interpretation of S. 110, Criminal P. C., namely whether it is intended to deal only with ex-convicts or habitual criminals and dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1938 Madras 594

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

K. Sundaram Ayyangar—Appellant.

v.

Official Receiver, Trichinopoly—Respondent.

Letters Patent Appeal No. 97 of 1937, Decided on 30th November 1937, against Judgment of Burn J., D/- 1st October 1937.

Mortgage — Suit on — Mortgagor becoming insolvent and his assignee Official Receiver impleaded as defendant—Mortgagee appointed receiver, in presence of and after objection by Official Receiver — Mortgagee applying for particulars regarding certain leases granted by Official Receiver—Application allowed—Held that Official Receiver was bound by the order and could not take exception to it.

In a mortgage suit, the mortgagee applied for the appointment of a receiver. The mortgagor became an insolvent and his assignee, the Official Receiver, was impleaded as a defendant to the suit. In the presence of the Official Receiver and after objection by him the mortgagee was appointed receiver. The Official Receiver had granted certain leases and on the application of the mortgagee-receiver the Court directed the Official Receiver to furnish him certain particulars regarding the lease. The order allowing the application was attacked in appeal:

Held that the Official Receiver was a party to the suit and as much as any other party to the suit, was bound by the orders of the Court made in his presence; that the person against whom the order was made happened to be the Official Receiver did not make any difference and that the Official Receiver could not take any possible exception to the order. [P 594 C 2]

K. G. Srinivasa Aiyar — *for Appellant.*

M. S. Vaidyanatha Aiyar—

for Respondent.

Venkatasubba Rao J.—This is a mortgage suit in which the plaintiff applied for the appointment of a receiver. The mortgagor who had become an insolvent, was impleaded as defendant 1 and his assignee, the Official Receiver, was joined as the fifth. In the presence of the latter and after objection by him, the plaintiff himself was appointed as receiver. The Official Receiver having granted certain leases of the property, the plaintiff as receiver applied first that the former should be directed to furnish certain particulars regarding the leases and secondly that he should be directed to deposit the moneys collected by him. The lower Court allowed the application and Burn J. set aside that order. In this Letters Patent Appeal, the correctness of the learned Judge's order is attacked. We fail to see how the lower Court's order of appointment of receiver can be attacked. The plaintiff was appointed receiver on 3rd September 1934 and the order appointing him has become final. How the receiver's application to direct defendant 5 to give him certain particulars can be said to be incompetent, we are unable to follow. For the receiver to carry out his duties the information asked for is necessary. It is difficult to support the learned Judge's statement that Official Receiver is not subject to the directions of of the Civil Court. It makes no difference that the person against whom the order is made happens to be the Official Receiver; he is a party to the suit and is bound by the order made in his presence. The Official Receiver, as much as any other party to the suit, is bound by the orders of the Court. This being so, the first part of the order is a perfectly proper one and no possible exception can be taken to it. The plaintiff cannot carry on the administration without the particulars being furnished and

this part of the order therefore is, as already stated, unassailable.

Passing on to the second part of the order relating to the deposit, the application falls to be considered under two main headings : (i) as regards the moneys collected by defendant 5 before the receiver order ; (ii) as regards the amounts collected subsequent to the order, they fall under two sub-groups, (a) those that accrued due before the order and (b) those that accrued due after the order. Mr. Muthukrishna Ayyar, the plaintiff's counsel, says that his application was limited in the lower Court, and that it is so limited here, to the moneys falling under the second heading alone. That the plaintiff is entitled to the moneys that accrued due after the receiver order, i. e. moneys falling under group 2(b), is admitted by the counsel for the Official Receiver. The lower Court, while allowing the plaintiff's application, reserved the question of the ownership of the amounts falling under group 2 (a). That seems to be the true interpretation of the order of the learned Subordinate Judge and Mr. Muthukrishna Ayyar is willing to adopt it. That is to say, the lower Court's order relating to the deposit must be taken to be limited to the moneys falling under the two sub-groups of the second main heading above. We fail to see how in those circumstances the Official Receiver has any ground of complaint at all. We therefore reverse the order of Burn J. and restore that of the Subordinate Judge. We make no order as to costs.

C.R.K./R.M. *Order set aside*

---

* A. I. R. 1938 Madras 595

VENKATARAMANA RAO J.

In re Narapareddi Seshareddi — Appellant.

Criminal Appeal No. 299 of 1937, Decided on 17th December 1937, against order of Sess. Judge, Cuddapah, in C. C. No. 17 of 1937.

(a) Penal Code (1860), S. 218 — What is essential is making of entries with intention to cause loss or injury and not whether accused will be able to accomplish that object.

The question under S. 218 is not whether the accused will be able to accomplish the object he had in view, but whether he made the entries in question with the intention to cause or knowing to be likely that he will thereby cause loss and injury. The fact therefore that the accused conceived foolish plan of injuring is no ground for exculpating him from the offence which he has committed. [P 597 C 2]

*** (b) Penal Code (1860), Ss. 219 and 218— Village Munsif making entries in register of suits that certain suit was filed when in fact it was not so filed and also that judgment was pronounced when in fact it was not so pronounced—He cannot be convicted under S. 219 but under S. 218.**

The essence of the offence under S. 219 is (1) that there must be a judicial proceeding, that is, a proceeding actually commenced and pending, wherein a party claims relief against another and invites the decision of the Court in regard thereto and not a fictitious one where there is no party litigating, and (2) that there must be the making of a real report or a real pronouncement of an order, verdict or decision. [P 598 C 1]

Where a village Court Judge charged with the preparation of the register of suits filed in his Court frames that register in a manner which he knew to be incorrect, namely by making an entry therein that a certain suit had been filed when in fact it was not so filed and also by making an entry of a judgment purported to have been pronounced when it was in fact not pronounced, he cannot be convicted under S. 219 but can be convicted only under S. 218. [P 598 C 1]

K. S. Jayarama Iyer for P. Basi Reddi — *for Appellant.*

A. S. Sivakaminathan — *for the Crown.*

Judgment.—The appellant Narapareddi Seshareddi was charged before the learned Sessions Judge of Cuddapah with having committed offences under Ss. 218 and 219, I. P. C., for framing an incorrect record or writing with intent to cause loss or injury to one Chamarthi Venkatasubbayya, P. W. 3 in the case, and for pronouncing a verdict which he knew to be contrary to law, and for offences under Ss. 466 and 474, I. P. C., for forgery of a record of a Court of Justice and using a document as genuine knowing it to be not genuine. During the course of the trial the learned Public Prosecutor in the Court below did not press the charges under Ss. 466 and 474, I. P. C., and the accused was acquitted in respect of those charges. The learned Sessions Judge, on a discussion of the entire evidence in the case, came to the conclusion that the accused was guilty of the offences under Ss. 218 and 219, I. P. C., and sentenced him to one year's rigorous imprisonment in respect of each of the charges, the sentences to run concurrently. He differed from the opinion of the assessors who thought that the accused was not guilty of any of the said offences.

The accused is the village Munsif of Mannur and as such a Judge of the village Court of that village. The charge against him is that on 12th September 1934 he

caused an entry Ex. B.1 to be made in the Suit Register Ex. B to the effect that a suit (V. C. No. 19 of 1934) was filed by two persons, Nagiah and Narayanaswami, P. Ws. 5 and 4, against the said Chamarthi Venkatasubbayya (P. W. 3) for recovery of a sum of Rs. 26 being the principal and interest due by him to them on account of the articles purchased in the shop of those two persons on 20th October 1932, that the accused caused a false return on the summons purporting to be issued to him to the effect that the summons though tendered to the said Venkatasubbayya (P. W. 3) he declined to receive it and that on the strength of this return he purported to pass a decree, Ex. B-2, against the said Venkatasubbayya (P. W. 3) on 29th September 1934 for the sum of Rs. 26 with future interest at Rs. 0-8-0 per cent. per mensem, Ex. C, dated 14th September 1934, is the said summons and Ex. C-1 is the endorsement on the summons. The person who is supposed to have served the summons is P. W. 7 and he subscribed his name to the endorsement which is in the handwriting of P. W. 8. A year thereafter, the accused purported to issue a notice Ex. D to P. W. 3 to show cause why the decree passed against him should not be executed. The notice Ex. D is dated 7th September 1935 and the return on it, Ex. D-1, dated 20th September 1935 is to the effect that P. W. 3 declined to receive the same and hence a copy of the notice was affixed to the wall of the house; the notice was again said to have been served on 29th September 1935 and the endorsement Ex. D.2 was to the same effect, namely that P. W. 3 declined to receive the same and hence a copy of the notice was affixed. The endorsement Ex. D.1 is signed by P. W. 9 and the endorsement Ex. D.2 is signed by P. W. 8. The accused subsequently sent a notice Ex. E dated 4th December 1935 which was actually served upon P. W. 3 on 7th December 1935 and the endorsement on it Ex. E.1 was made by P. W. 8.

On receiving the notice, P. W. 3 went and enquired of P. Ws. 4 and 5 as to whether they did file a suit against him and they replied in the negative. He got from them affidavits Exs. J and K and instituted a complaint Ex. A before the District Magistrate of Cuddapah on which proceedings against the accused were taken with the sanction of the Local Government. The motive for the offence as alleged by the prosecution is that P. W. 3 obtained a decree against the accused in S. C. No. 256 of 1934 on the file of the District Munsif's Court, Nandalur, and in execution thereof he had him arrested when he paid a portion of the amount due and executed a security for the balance and he desired to retaliate. This was before 12th September 1934 and the accused paid the amount of the decree in instalments and finally on 20th September 1935 he paid Rs. 10 in cash, got a remission of Rs. 2-12-0 and obtained full satisfaction of the decree from P. W. 3. The intention of the accused in making these entries in the Suit Register was to cause loss to P. W. 3 by having his moveable property attached in execution of the decree which the accused purported to pass and thus cause disgrace to P. W. 3. The case as alleged by the prosecution is proved by P. Ws. 3 to 9. P. W. 3 denied any indebtedness to P. Ws. 4 and 5 and P. Ws. 4 and 5 denied that they had any dealings with P. W. 3 or that P. W. 3 was indebted to them in respect of any such dealings or that they filed any suit or obtained a decree against P. W. 3. The evidence of P. W. 8 is that he wrote the endorsements (Exs. C.1, D.1 and D.2) attributed to him at the dictation of the accused and that the recitals in the endorsements are all incorrect. P. W. 7 also similarly stated that he was persuaded to subscribe to Ex. C.1 by the accused. The defence is that P. Ws. 4 and 5 did file a suit, that the records relating thereto were received by them on 9th December 1935 on the representation that P. W. 3 wanted to settle the matter with them and believing in that representation he returned the plaint, order, judgment and the plaintiff's deposition and they were not returned subsequently, that taking advantage of this, this prosecution was launched against him at the instance of P. W. 6, his, enemy, and the said enmity is alleged to have been due to a District Board election contest which took place between them, and that the practice of returning the records obtained in his Court and though it is irregular, there were several instances where the records were taken by the parties for the purpose of settlement.

The learned Sessions Judge has accepted the evidence for the prosecution and found that the alleged District Board election took place somewhere in 1932 and it could hardly furnish a motive for the launching of this prosecution. The learned Sessions Judge went into the probabilities of the case and thought that it was hardly likely

that P. W. 3 a well-to-do person, could have borrowed articles for the small sum of Rs. 26 from persons like P. Ws. 4 and 5 and kept the debt outstanding for such a length of time. There is one other matter which the learned Sessions Judge might have adverted to, namely that if as alleged in the endorsements on the summons and the notices, P. W. 3 was actually served with the notice of summons of the suit and the notice of the intended execution, P. W. 3 would not have kept quiet without satisfying the debt when he must have known that the failure to comply at any rate with the requisition to show cause why the decree should not be executed would entail attachment of his moveable property without any further notice. Nothing has been alleged against P. Ws. 4 and 5 as to why they should perjure themselves. Mr. Jayarama Ayyar very strongly contends that P. Ws. 4 and 5 admitted in the witness box that they were not quite intimate with the accused and if so, is it likely or probable that the accused would have thought of causing an entry to be made in the names of those two persons as plaintiffs for the object he had in view? No doubt, this is an argument which deserves some consideration, but it cannot outweigh the weight of the overwhelming evidence against the accused. It might be that the accused thought that they might be got at and that there would be no difficulty in persuading them to help him in his object; but the fact that it is not possible to understand why the accused hit upon these two persons as intending plaintiffs is no reason to discredit the testimony of the prosecution.

One other argument which has been advanced by Mr. Jayarama Ayyar is that if the accused had really intended to do harm to P. W. 3, would he have served the notice Ex. E and would it not have been more likely that he would have caused a similar return as in Ex. D.1 and got an attachment issued? It may be that the accused never anticipated that P. W. 3 would go and consult P. Ws. 4 and 5 and he naturally thought that on receipt of the requisition P. W. 3 might seek his aid when he intended that he might have his turn of subjecting P. W. 3 to some sort of disgrace, if he failed to comply with the decree. Another argument advanced by Mr. Jayarama Ayyar is that it is not likely that by the entries alleged, any injury could be caused to P. W. 3 without the co-operation of P. Ws. 4 and 5, because before any attachment of moveable property could be effected, they should be pointed out by the decree-holders. I do not think there is any difficulty so far as this is concerned. The application for execution need not be in writing. The accused can send somebody purporting to be on behalf of the decree-holders to point out the properties which were intended to be attached. The question is not whether the accused will be able to accomplish the object, he had in view but whether he made the entries in question with the intention to cause or knowing to be likely that he will thereby cause loss and injury, to P. W. 3. There can be no doubt that the existence of such a decree would certainly cause loss or injury to P. W. 3 in that either he will be obliged to pay the sum of Rs. 26 or his moveable property is liable to be attached in execution of the said decree. No doubt, no detriment has been caused to P. W. 3 in this case and it is very likely that he could not have caused any, if P. Ws. 4 and 5 were not willing to co-operate with him and their co-operation seems to be very unlikely having regard to the evidence given by them during the course of the trial. But the fact that the accused conceived a foolish plan of injuring P. W. 3 in retaliation of the disgrace inflicted upon him by his arrest, is no ground for exculpating him from the offence which he has committed.

The question is what is the offence which the accused must be said to have committed? Is he liable under both the Ss. 218 and 219 I. P. C? On the facts as found there can be no question that the accused is liable under S. 218 I. P. C. But is he also liable under S. 219 I. P. C.? The gravamen of the charge against the accused is that he being a village Court Judge charged with the preparation of the register of suits filed in his Court framed that register in a manner which he knew to be incorrect, namely by making an entry therein that a certain suit had been filed when in fact it was not so filed and also by making an entry of a judgment purported to have been pronounced when it was in fact not pronounced. This will bring him directly within S. 218; but in order to render him liable also under S. 219, it must be established that he made a report or pronounced an order, verdict or decision in a judicial proceeding which he knew to be contrary to law. The essence of

the offence under that section is (1) that there must be a judicial proceeding, that is, a proceeding actually commenced and pending, wherein a party claims relief against another and invites the decision of the Court in regard thereto and not a fictitious one where there is no party litigating and (2) that there must be the making of a real report or a real pronouncement of an order, verdict or decision. In this case there is no judicial proceeding at all; everything was a make-believe; there is no making of a report nor a pronouncement of an order, verdict or decision except the making of an entry of such a pronouncement having been made when in fact it was not so made. The accused therefore in my opinion cannot be convicted under S. 219 I. P. C., and it was very fairly conceded by the learned Public Prosecutor that it is so.

The only question that remains is as regards the sentence. Mr. Jayarama Ayyar submitted that in view of the accused having been acquitted under S. 219, I. P. C. and having regard to the circumstances adverted to by him, he would press for a lenient sentence. I heard the learned Public Prosecutor and he put it to me that the infliction of a heavy fine having regard to all the circumstances of the case might satisfy the ends of justice and that an award of a fine of Rs. 500 would be an adequate one. I may also note that the learned Sessions Judge was also inclined to take a lenient view in regard to the punishment. I therefore acquit the accused under S. 219, I. P. C., confirm the conviction under S. 218, I. P. C., and sentence him to pay a fine of Rs. 500; in default, to undergo six months' simple imprisonment. Time 2 weeks for payment of the fine from the date of this order. I direct the bail bonds to be cancelled.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 598

VARADACHARIAR AND HORWILL JJ.

Mathukumalli Ramayya and others — Petitioners.

v.

Uppalapati Lakshmayya — Respondent.

Civil Misc. Petns. Nos. 89 and 90 of 1938, Decided on 24th January 1938, for leave to appeal to His Majesty in Council against decree of High Court, *reported in A I R 1938 Mad 513.*

Civil P. C. (1908), S. 110 — Suit by reversioner to set aside alienations by last holders—Parties claiming under different alienations joined as defendants—Decree cannot be treated as single and inseparable for purposes of S. 110 when Appellate Court confirms that decree in respect of some parties and reverses it against others.

In cases where the parties claiming under various alienations which are sought to be set aside by a reversioner, are brought before the Court, the mere fact that the rules of procedure permit the claims to be joined in one suit does not justify the decree being treated as single and inseparable for the purpose of giving leave to appeal to Privy Council under S. 110 when the Appellate Court confirms the lower Court's decree in respect of some of the parties and reverses it as against other parties : *A I R 1936 Mad 881, Rel. on.*

[P 599 C 1]

T. M. Krishnaswami Aiyar for K. Kameswara Rao — *for Petitioners.*

B. Somayya and M. S. Ramchandra Rao — *for Respondent.*

C. M. P. No. 89 of 1938.

Varadachariar J.—This is an application for leave to appeal to His Majesty in Council against the decree passed by this Court in Appeals Nos. 571 of 1931 and 260 of 1932. The application is opposed. The appeals arose out of a suit filed by a reversioner for recovery of possession of the suit properties on the footing that as reversioner to the estate of the last male holder he is entitled to possession. There were two sets of alienees in the case, one set of people who traced their title to the mother of the last male owner and another set of alienees who traced their title to the widow of the last male owner. The lower Court dismissed the suit so far as it related to the properties claimed through the mother but it decreed the suit in respect of properties alienated by the widow of the last male owner. Appeal No. 260 of 1932 was filed by the plaintiff against so much of the lower Court's decree as dismissed the suit in respect of certain properties. Appeal No. 571 of 1931 was filed by such of the defendants as had been directed by the decree of the lower Court to surrender possession. In this Court, Appeal No. 260 of 1932 was in the main allowed but Appeal No. 571 of 1931 was dismissed. It is not disputed that even taking the two appeals separately, the properties involved in each of them exceed Rs. 10,000 in value. So far as Appeal No. 260 of 1932 is concerned, the decision of this Court undoubtedly reversed the decision of the lower Court. The petitioners are therefore entitled to an order

granting them leave to appeal in Appeal No. 260 of 1932. But as the decision in A. S. No. 571 of 1931 confirmed the decree of the lower Court in respect of the properties therein involved and as against the parties concerned therein, it seems to us that the petitioners are not entitled to a certificate in that appeal unless they also satisfy the Court that there is a substantial question of law involved.

Mr. T. M. Krishnaswami Aiyar, the learned counsel for the petitioners, contended that as both the appeals arose out of the same suit, the decree of this Court must be regarded as a single decree and as it at least in part modified the decree of the lower Court, the petitioners are entitled to appeal against the whole decree taking the appeals together. This contention is opposed to several decisions of this Court, the latest being 71 M L J 580.[1] It has generally been held in this Court that in cases of this kind where parties claiming under various alienations are brought before the Court, the mere fact that the rules of procedure permit the claims to be joined in one suit does not justify the decree being treated as single and inseparable when the Appellate Court confirms the lower Court's decree in respect of some of the parties and reverses it as against other parties. Mr. Krishnaswami Aiyar next contended that even in Appeal No. 571 of 1931 the appellants proposed to raise the question arising in the appeal against Appeal No. 260 of 1932, namely that Bangaramma had perfected her title by prescription before the new Act came into force. But the alienees interested in Appeal No. 571 of 1931 claimed under Achamma, the widow of the last "maleholder" who admittedly came into possession of these properties even before twleve years from her husband's death had expired and whose possession cannot be held to be adverse to the estate. We therefore see no substance in the proposed contention so far as Appeal No. 571 of 1931 is concerned. We are accordingly unable to grant a certificate in respect of Appeal No. 571 of 1931. A certificate will issue in respect of Appeal No. 260 of 1932 that the case satisfies the requirements of S. 110, Civil P. C. There will be no order as to costs on this petition, as the parties have succeeded in part and failed in part.

1. Venkataswami Chettiar v. Sukkutti Pillai, (1936) 23 A I R Mad 881=166 I C 251=I L R (1937) Mad 121=71 M L J 580.

C. M. P. No. 90 of 1938.

This is an application asking for stay of further proceedings in the Court below pending the disposal of the appeal to the Privy Council dealt with in C. M. P. No. 89 of 1938. Under O. 45, R. 13 Civil P. C. this Court is authorized to grant such a stay only if special cause is shown. We are not satisfied that any such special circumstances exist in the present case. As regards mesne profits, our decree has only directed an ascertainment of mesne profits by the lower Court and if after the lower Court passes a decree for mesne profits the petitioners are able to satisfy the Court that there are reasons justifying the imposition of conditions on the plaintiffs before drawing the amount, nothing in our present order will preclude them from taking the necessary steps to move the Court to obtain orders to that effect. At this stage and on the materials now before us, we dismiss the petition with costs.

C.R.K./R.M. *Orders accordingly.*

A. I. R. 1938 Madras 599

VENKATASUBBA RAO J.

Talla Lingamurthi—Petitioner.

v.

Siddani Peda Mallayya and others — Respondents.

Civil Revn. Petn. No. 1942 of 1934, Decided on 1st March 1938, from decree of Dist. Munsif, Narasapur, in S. C. S. No. 1382 of 1931.

Negotiable Instruments Act (1881), Ss. 9 and 82 — Payee of promissory note executed by *A* and *B* relinquishing his claim against *B* — Assignee of note taking it with knowledge of this arrangement is not entitled to decree against *B* also.

Where a payee of a promissory note executed by *A* and *B* agrees to hold *A* alone liable and relinquishes his claim as against *B*, an assignee of the note taking it with the knowledge of this arrangement, acquires no better title than what the assignor had, and is not entitled to a decree against *B* also : *5 Mad 108, Commented upon.*

[P 600 C 2; P 601 C 1]

V. Suryanarayana — *for Petitioner.*

Order. — Mr. V. Suryanarayana has raised an interesting question as to the import of the expression "holder in due course" occurring in the Negotiable Instruments Act. The respondents are not represented but Mr. Suryanarayana has fairly placed before me all the relevant considerations. The petitioner (the plain-

tiff) is the assignee of the promissory note executed by defendants 1 and 2. The lower Court has found as a fact that the payee of the note, i. e. the plaintiff's assignor agreed to hold defendant 1 alone liable and relinquished his claim as against defendant 2. There is a further finding of fact that when the note was assigned to the plaintiff, he was aware of this arrangement. Mr. Suryanarayana contends that the petitioner is nevertheless a holder in due course and is not affected by the infirmity attaching to the person from whom he took the transfer. The point to decide therefore is, is the petitioner entitled to a decree against defendant 2 also ? There is a very early decision of Innes and Muthuswami Aiyar JJ., which lends apparent support to the learned counsel's argument: 5 Mad 108.[1] The note, there marked Ex. C, was executed by the defendant in favour of one Alfred Arathoon. The finding was that there was an agreement to which the payee was a party, that a certain new firm was to take over and discharge the debts of the defendant including that under Ex. C; in other words, that the payee agreed to discharge the defendant in consideration of the new firm (of which the payee was also a partner) having made itself liable for the debt. In short, there was an arrangement between Alfred Arathoon and the defendant that the latter should be released from his liability under the note. There was a further finding in the case that Ex. C was an overdue note; the transferee would therefore normally take it subject to all the objections it was liable to in the hands of the transferor. But the learned Judges held that the indorsee of an overdue note is liable to such equities only as attach on the bill or note itself and not to claims arising out of collateral matters. So holding, they decided that the plaintiff there (the assignee from Alfred Arathoon) was entitled to a decree against the defendant on the note. What is the effect of this decision? The maker being discharged but the note being alive—this is an infirmity that does not attach to the note; therefore the assignee of the note gets a better title than the assignor had.

On the analogy of this case, the learned counsel here contends that the agreement between the original payee and defendant 2 is not an equity attaching to the note, in other words, not such an infirmity, as to deprive the assignee with notice, of the protection the law extends to a "holder in due course". Whatever my own view may be, sitting as a single Judge, I am undoubtedly bound by the decision cited; but the question is, is that decision to be regarded as one on the point now raised? The Negotiable Instruments Act is an enactment of 1881 and the decision was given prior to that Act. The expression "equity attaching to the bill" is to be found in the decided cases previous to the (English) Bills of Exchange Act, 1882. Neither in the Indian nor in the English Act does that expression occur; in its place are substituted the words "defect of title" and it is difficult to hold that the two expressions, so widely different, mean identically the same thing. What were the equities attaching to the bill and what were not? These were questions that fell to be decided prior to the passing of the two Acts, and why should it be assumed that the Legislature, while adopting a different phraseology, intended to enact the identical law as had prevailed before ? Turning for a moment to S. 29; English Act, Cl. (2) enumerates the 'defects in title'. Release of the maker has not been specially mentioned, but the list, as the very wording of that clause implies, does not purport to be, and is not, exhaustive (Chalmers on Bills of Exchange, Edn. 10, page 111). As to the interpretation of the statute, I may quote with advantage the valuable observations of Chalmers, in his Introduction to Edn. 3 on his work. The learned Author says :

> The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act.

As the learned Author observes, the Act should be left to speak for itself. According to Mr. Suryanarayana, when a discharge puts an end to the life of an instrument, there arises an "equity attaching to the bill"; but when the instrument is kept alive, one party alone being released from liability, such an equity does not arise. This may or may not be so, as in my opinion that is a perfectly irrelevant factor. I see no reason to depart from the plain and natural meaning of the words employed. There was here a clear defect in the assignor's title, that is to say, he was precluded from suing defendant 2. That this defect is a vital one cannot be gainsaid as it affects his very right to sue; indeed, it puts an end to his claim as against

1. Harry Van Ingen v. Dnunna Lall, (1882) 5 Mad 108.

defendant 2. That in my opinion is essentially a matter of title. The plaintiff then having taken the note with knowledge of that defect can acquire no better title than what the assignor had. The contention of the learned counsel therefore fails and the civil revision petition is dismissed.

C.R.K./R.M. *Petition dismissed.*

A. I. R. 1938 Madras 601

PANDRANG ROW AND ABDUR RAHMAN JJ.

K. Kandaswami Mudaliar—Appellant.

v.

Thevammal — Respondent.

Letters Patent Appeal No. 66 of 1936, Decided on 28th January 1938, from Judgment of Venkataramana Rao J., D/- 20th March 1936, *reported in A I R 1936 Mad 848.*

Limitation Act (1908), S. 20, Proviso—Writing—Creditor can show by extrinsic evidence that payment made was payment towards interest as such.

It is not necessary that 'writing' referred to in Proviso to S. 20 should itself recite in so many words that the payment made was of interest as such or of part of the principal. Payment made by a debtor can be proved by the creditor to have been made towards the interest as such by extrinsic evidence, oral or documentary, other than the writing referred to in S. 20 : *A I R 1937 All 640 ; A I R 1937 Pat 583 ; A I R 1935 All 946 and C R P No. 1450 of 1935, Rel. on.*

[P 601 C 1, 2 ; P 602 C 1]

K. Periaswamy Goundar — *for Appellant.*

C. V. Subramania Aiyar — *for Respondent.*

Pandrang Row J.—The only point that arises in this appeal is whether the payment alleged by the plaintiff of a certain amount as interest due on the suit promissory note can be proved to have been made towards interest as such by evidence other than the writing referred to in the Proviso to S. 20, Lim. Act. The payment is acknowledged in writing by the debtor in the promissory note which was executed in respect of that amount. It is not disputed that payment may be made either in cash or by the execution of a promissory note. There can thus be no doubt in this case that the fact of payment is evidenced by writing signed by the debtor. The writing however does not itself say that the payment was made towards interest as due on the suit promissory note. Now the question is whether this fact, viz. that the payment was made towards such interest can be proved by extrinsic evidence. We fail to see any reason why extrinsic evidence should be excluded. There is no rule of law which requires that the fact of a payment having been made towards interest due on a promissory note should be proved only by documentary evidence. The question also depends upon the interpretation of the words in the Proviso to S. 20, Lim. Act which runs as follows :

> Provided that, save in the case of payment of interest made before the first day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

The advocate for the appellant contends that the acknowledgment should not be merely of the payment referred to in the earlier part of S. 20 but that it should be an acknowledgment reciting in so many words that the payment was made towards interest as such or part of the principal, and that where the acknowledgment in writing is silent about this, there is no such acknowledgment as is contemplated by the Proviso. We are of opinion that this contention involves the reading into the Proviso of words which are not to be found therein. Secondly such a construction of the Proviso would be unreasonable. Thirdly the balance of authority is against this view. Apart from the decisions quoted by our learned brother in the judgment under appeal, some other comparatively recent decisions have been brought to our notice, viz., those reported in A I R 1937 All 640,[1] A I R 1937 Pat 583[2] and the Full Bench decision of five Judges in 58 All 261.[3] An unreported decision of Beasley C. J. in C. R. P. No. 1450 of 1935 on the file of this Court has also been brought to our notice. The decisions in A I R 1937 Pat 583[2] and A I R 1937 All 640[1] as well as in the unreported case are opposed to the contention pressed on us by the advocate for the appellant. In the Allahabad Full Bench case[3] there is nothing said which militates against the view adopted by our learned brother in the judgment under appeal. We are unable to accept the view that the object of the recent amendment of the Proviso was to require that the

---

1. Pearey Lal v. Mohammad Yusuf, (1937) 24 A I R All 640 = 171 I C 422 = I L R (1937) All 732=1937 A L J 792.
2. Idan Sadagar v. Premsukhdas Ramachandra, (1937) 24 A I R Pat 583=167 I C 244.
3. Udaypal Singh v. Lakshmi Chand, (1935) 22 A I R All 946=159 I C 387=58 All 261= 1935 A L J 1029 (F B).

acknowledgment in writing should in terms recite the payment of interest as such or of part of the principal. The amendment was made, as stated by Sulaiman C. J. at p. 274 in 58 All 261,[3] as it was considered necessary to put a stop to the controversy between creditors and debtors as to whether any amount had in fact been paid. See also the observations of Bajpai J., in 58 All 261[3] at page 304. The object of the amendment was, in short, to deprive the creditors of the right, which was often abused, to plead oral payments of interest as such and try to establish them by oral evidence in the absence of anything in writing by the debtor himself evidencing payment.

So far as we can see, S. 20 as it now stands, merely provides that the payment must be of interest as such or of part of the principal—and this can be proved by all lawful means—and that such payment will not however start a fresh period of limitation unless there is an acknowledgment of the payment in writing or signed by the person making the payment. It is not correct to read into the Proviso that the writing referred to therein should itself recite in so many words that the payment made was of interest as such or of part of the principal. The word acknowledgment cannot be interpreted as necessarily connoting the idea that the 'acknowledgment' must be in a particular form or should contain a particular recital, namely that payment made is of interest as such or part of the principal. Unless the words in the Proviso clearly require that the acknowledgment itself should recite these facts, it does not appear to be just or reasonable that a payment which was really made towards interest as such should be held to be not sufficient to give a fresh period of limitation. On the whole therefore we see no reason to differ from our learned brother's conclusion on this point. The appeal therefore fails and is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 602

PANDRANG ROW J.

Somasundaram Chettiar — Petitioner.

v.

A. Venkata Subbayya — Respondent.

Civil Revn. Petn. No. 1312 of 1937, Decided on 24th January 1938, from order of Sub-Judge, Anantapur, D/. 7th August 1937.

Civil P. C. (1908), S. 10 — Court in which previous suit is pending must be competent to grant relief claimed in subsequent suit.

The words "relief claimed" should apply to the suit which is to be stayed and not to the earlier suit. The essential condition for stay under S. 10, is that the Court in which the previously instituted suit is pending must be a Court of jurisdiction competent to grant the relief claimed in the subsequent suit: *A I R 1920 L B 24 and A I R 1935 Cal 1, Rel. on; A I R 1919 L B 10, Expl.*

[P 602 C 2]

V. Ramaswamy Iyer — *for Petitioner.*

T. S. Narasinga Rao — *for Respondent.*

Order. — The simple point raised in this petition is whether the Subordinate Judge of Anantapur was bound as a matter of law under S. 10, Civil P. C., to stay the trial of O. S. No. 22 of 1937 pending on his file in view of the earlier institution of another suit (O. S. No. 280 of 1936) on the file of the District Munsif of Tirupur. The only point argued before me is that it is not necessary for the application of S. 10 Civil P. C., that the Court in which the earlier suit was instituted should be competent to decide the subsequent suit which is to be stayed. On this point, I am of opinion that the weight of authority is against the contention of the petitioner. Even a grammatical construction of S. 10, Civil P. C. as it stands, really does not support this view. The words "relief claimed" should, in my opinion, apply to the suit which is to be stayed and not to the earlier suit. This is the construction adopted in several decisions the effect of which is embodied in Mullah's Commentary on S. 10, Civil P. C. as follows: The third essential condition for stay under S. 10, Civil P. C. is that the Court in which the previously instituted suit is pending must be a Court of jurisdiction competent to grant the relief claimed in the subsequent suit. This condition as well as the other conditions appear to have been taken from 55 I C 254,[1] which, as has been pointed out by the learned advocate for the respondent, was decided by the very same judges who decided the subsequent case reported in 57 I C 904,[2] which was relied upon in support of the petitioner. In 57 I C 904,[2] the learned Judges were asked to reconsider that view in the earlier case but they declined to do so. It may be that the argument of inconvenience would apply whether the Court in which the earlier suit is

1. Bogla v. Khemka, (1920) 7 A I R L B 24=55 I C 254.
2. Khemka v. Bogla, (1919) 6 A I R L B 10=57 I C 904.

pending has jurisdiction or not; but it cannot be said that the only ground on which the Legislature enacted S. 10 was to avoid inconvenience to the parties and that that section has nothing to do with the object of the succeeding sections which is undoubtedly to enforce the rule of res judicata. The latest case on the subject is 61 Cal 670.[3] In that case, it is clearly stated at p. 687 by Costello J. that the real criterion to apply with reference to S. 10 is this :

Supposing the first suit was determined, would the position then be that when the second suit was instituted the matters raised in the second suit were res judicata by reason of the decision of the prior suit ? In that way, the provisions of S. 10, logically and naturally precede S. 11.

If the third condition referred to in Mullah's Commentary were not insisted upon, the result would be strange, namely that a very important suit in a superior Court would have to be stayed pending the decision of a trivial suit in a Small Cause Court in which the same issue might arise between the same parties. In any case, apart from general considerations, I am of opinion that the weight of authority is against the view advanced by the petitioner's advocate and that the Court below did not act contrary to law in refusing to stay the trial of the suit. The petition is therefore dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

3. Durga Prasad v. Kantichandra Mukerjee, (1935) 22 A I R Cal 1=154 I C 645=61 Cal 670=38 C W N 818.

*** A. I. R. 1938 Madras 603**

ABDUR RAHMAN J.

Puvvada Satyanarayanamurthy — Petitioner.

v.

Gadepalli Sundara Rao — Respondent.

Civil Revn. Petn. No. 1433 of 1936, Decided on 9th December 1937, from order of Dist. Court, Vizagapatam, D/- 24th September 1936.

*** (a) Practice—Order of Court setting aside ex parte decree and granting decree-holder costs—Decree-holder accepting costs without protest—He cannot subsequently attack Court's order setting aside ex parte decree.**

If a party has adopted an order of the Court and acted under it, he cannot after he has enjoyed a benefit under the order, contend that it was valid for one purpose and invalid for another and in these circumstances he must be considered to have acquiesced in the order passed by the Court. This principle is based, not on equitable estoppel but falls under the well known rule that a party cannot be allowed both to approbate and reprobate : *A I R 1917 Cal 546* ; *A I R 1927 Mad 1009 and A I R 1930 Mad 268, Rel. on.* [P 603 C 2]

A Court passed an order setting aside an ex parte decree and at the same time finding the judgment-debtor guilty of laches it granted costs to the decree-holder to compensate him for the waste of time, money and energy caused to him. These costs were accepted by the decree-holder's pleader without any protest. The decree-holder subsequently applied in revision against the Court's order setting aside the ex parte decree :

Held that as the pleader accepted the payment without protest the decree-holder could not attack the Court's order setting aside ex parte decree.

[P 603 C 2; P 604 C 1]

(b) Revision — Finding of fact essential for jurisdiction found to be erroneous by higher Court.

A Court cannot be held to have acted without jurisdiction if it is subsequently found by a higher Court that the findings of fact which were essential for the exercise of such jurisdiction were incorrect or erroneous. [P 604 C 2]

N. Vasudeva Rao — *for Petitioner.*

Y. Suryanarayana — *for Respondent.*

Order.—This is a petition for revision from the order of the District Judge of Vizagapatam reversing that of the District Munsif and setting aside an ex parte decree passed in favour of the petitioner. It was admitted that the defendant-respondent was not served personally but it was contended that he had knowledge of the suit and there were no sufficient grounds for his absence. The District Judge did not agree with the contention, and holding that there were sufficient grounds for the defendant's nonappearance, he set the decree aside but as he found the respondent to have been guilty of laches he awarded Rs. 25 to the petitioner 'to compensate him for the waste of time, money and energy caused to him.' These costs were paid at once and received by the petitioner's pleader apparently before the District Judge as a reference to this payment is made in his order dated 24th September 1936. The respondent has raised a preliminary objection that inasmuch as the costs awarded by the District Judge were accepted by the petitioner's pleader without any protest, the petitioner is not entitled to attack the order on revision. The principle underlying this objection has been discussed in a number of cases, both English and Indian, and is based not as stated in some of the cases on equitable estoppel, but falls under the well known rule that a party cannot be allowed both to approbate and reprobate. The question having been fully examined in 37 I C 804,[1]

1. Banku Chandra v. Marium Begum, (1917) 4 A I R Cal 546=37 I C 804 = 21 C W N 232 (S B).

26 M L W 527[2] and 58 M L J 137,[3] it is hardly necessary for me to discuss it again. Suffice it to say that the conclusion arrived at by the learned Judges in these cases was that if a party had adopted an order of the Court and acted under it, he could not, after he had enjoyed a benefit under the order, contend that it was valid for one purpose and invalid for another and that he must in the circumstances be considered to have acquiesced in the order passed by the Court.

In order to apply the principle settled by these authorities, it has to be ascertained whether as contended on behalf of the respondent, the costs were received by the plaintiff's pleader under protest or whether he should be deemed to have acquiesced in the order passed by the learned District Judge. It is true that in the counter affidavit by the pleader filed in this Court it is stated that when receiving payment he had made it clear that the money was being received by him under protest but he has guarded himself by stating that he could not "recollect now and quote the exact language used" by him at the time. On the contrary there is a clear statement in the affidavit filed on behalf of the respondent's pleader

that the money was received in Court by Mr. Venkataratnam, vakil for the respondent (in the Court of the District Judge) in C. M. A. No. 10 of 1936 and the money was received in Court without any representation to the Court that it was received under protest.

In view of the fact that the learned District Judge does not refer to the protest alleged to have been made by Mr. Venkataratnam, pleader, in his order under revision, which as stated above adverts to the fact of payment made by the appellant in his Court, and that there is no mention of any protest made on behalf of the plaintiff's pleader in the receipt granted by him to the defendant, which has been produced by the latter in this Court and admitted by the plaintiff's counsel appearing before me, I hold that the payment was received by the plaintiff's pleader without any protest. Had I not arrived at this conclusion, it might have been necessary for me to consider the effect of protest, even if made, particularly when it was open to the plaintiff or his pleader to allow the defendant to deposit the money in Court and not receive it himself. But in the circumstances of this case, it appears to be unnecessary. It has been however contended on behalf of the plaintiff-petitioner that he should not be held to be debarred from filing this revision: (a) as the District Judge acted without jurisdiction in setting aside the ex parte decree; and (b) as his pleader was not authorized to compromise or waive his right to have the order revised.

I am not impressed by either of these contentions. It has been already stated that the District Judge had come to a finding that there were sufficient grounds for the defendant's nonappearance in Court. This was quite sufficient to give him jurisdiction to act under the provisions of O. 9, R. 13, Civil P. C. and set the ex parte decree aside. A Court cannot be held to have acted without jurisdiction if it is subsequently found by a higher Court that the findings of fact which were essential for the exercise of such jurisdiction were incorrect or erroneous. As for the next objection, it was admitted by the counsel for the petitioner that the pleader was entitled to receive the costs awarded to the plaintiff. If he did so, it was not necessary for him to be conscious of the legal consequences which would follow from such an act. There is no question of any compromise having been entered into by the pleader or of any legal right having been waived by him. Both these objections therefore fail. In view of the finding that the payment in this case was received by the pleader without any protest, I must, following the authorities cited by me, uphold the preliminary objection and find that the revision is incompetent. It is therefore dismissed with costs.

C.R.K./D.S. *Revision dismissed.*

2. Ramaswami Chettiar v. Chidambaram Chettiar, (1927) 14 A I R Mad 1009=105 I C 620 =26 M L W 527.
3. Venkatarayadu v. Ramakrishnayya, (1930) 17 A I R Mad 268=123 I C 337=58 M L J 137.

---

* A. I. R. 1938 Madras 604

FULL BENCH

LEACH C. J., MADHAVAN NAIR AND VARADACHARIAR JJ.

V. E. R. M. K. Krishnan Chettiar — Appellant.

v.

Velayee Ammal — Respondent.

Appeal No. 427 of 1935, Decided on 15th March 1938, against order of Sub-Judge, Coimbatore, in E. P. No. 168 of 1935.

*** (a) Married Women's Property Act (1874), S. 6—'Policy'—Policy stating that proposal and declaration were made part of contract—Statements in proposal must be read as being incorporated in policy.**

The word 'policy' in S. 6 means the document or documents evidencing the contract. If the document known as the policy stands alone and does not incorporate in it any other document, only that document can be looked at, but if it does expressly incorporate another document, the document must be deemed to be part of 'the policy'. [P 607 C 1]

Where the policy of insurance states expressly that the proposal and the declaration were made part of the contract, the statement in the proposal must be read as being incorporated in the policy : *Principle of (1933) A C 592, Applied; A I R 1936 Mad 635 and A I R 1938 Mad 234, Expl.* [P 606 C 2]

(b) Married Women's Property Act (1874), S. 6—Policy expressed in proposal, which was part of policy, to be for benefit of 'self or wife'—Words held created trust in favour of wife.

There can be a contingent trust. In the proposal which was a part of the policy, the policy was expressed to be for the benefit of 'self or wife' meaning thereby that the policy was to be for the benefit of the assured or in the event of his death before the policy matured it was to be for the benefit of his wife :

Held that there was a trust created in favour of the wife in the event of the husband dying before the policy matured : *A I R 1917 Mad 936 and A I R 1932 Mad 220, Rel. on ; A I R 1934 Bom 296, Not foll.; English case law referred.* [P 607 C 1]

(c) Married Women's Property Act (1874)—Value of English decisions.

As the Married Women's Property Act of 1874 followed similar legislation in England, English decisions are directly applicable. [P 607 C 2]

V. Rajagopala Iyer and T. V. Ramiah — *for Appellant.*

K. V. Ramachandra Iyer — *for Respondent.*

Leach C. J.—This appeal raises the question of what is meant by the word 'policy' in S. 6, Married Women's Property Act, 1874. The respondent is the widow of one Sengottiah Goundan, who died on 16th August 1928. On 24th August 1927 the deceased submitted to the Bengal Insurance and Real Property Co., Ltd., a proposal for a policy of insurance on his own life. The proposal was for an endowment policy for Rs. 5000 payable in 15 years. Cl. 12 of the proposal is intended to contain the name of the person nominated to receive the sum assured and his or her relation with the proposer. In this case the words entered were, "self or wife Velayammal" (the name of the respondent). The proposal was accepted and a policy was issued on 5th May 1928. The policy contained inter alia the following clause :

This policy of assurance granted by the Bengal Insurance and Real Property Company Ltd., (hereafter called 'the company') witnesseth that proceeding upon the proposal and declaration subscribed by Subbaraya Goundar Sengottaya Goundar in and dated 24th August 1927 which is hereby made a part of this contract and in consideration of the payment already made to the company of the first premium or the first instalment thereof as stated in the subjoined schedule and of the subsequent premiums or instalments of premiums to be paid as therein provided the company doth hereby agree that upon proof satisfactory to the directors of the happening of the event or events on which the sum assured is to become payable and/or other benefits accrue as described or referred to in the said schedule and of the title of the claimant or claimants under this policy, it will pay the sum stated in the schedule as the sum assured and provide the other benefits, if any.

Clause 8 of the schedule also has bearing on the question which falls for decision. It is in these words :

This policy, which together with the schedule and privileges and conditions endorsed thereon, and the proposal and declaration and answers hereto constitute the entire contract between the company and the assured, shall become indisputable after two years from the date of issue of this policy provided the premiums shall have been regularly paid and the age correctly stated, and provided also that no fraud or wilful misrepresentation has been made by the assured.

On her husband's death the respondent demanded payment from the company of the amount of the policy. The company declined to pay on the ground that there had been a material misrepresentation with regard to the health of the assured. This resulted in the respondent filing O. S. No. 134 of 1933 in the Court of the Subordinate Judge of Coimbatore against the insurance company and the deceased's brother, Ramasami Goundan, who had set up a claim that the amount due under the policy constituted a part of the joint family estate. The company raised the issue of material misrepresentation and also contended that the Court had no jurisdiction to try the suit. The respondent succeeded and a decree was passed on 24h September 1934 in her favour for the amount stated in the policy. An appeal followed to this Court, but it was dismissed. The present appellant obtained a decree against the estate of Sengottiah for a sum of Rs. 9707.2.8 with interest and costs on 28th February 1931 and in execution of that decree applied to the Court of the Subordinate Judge of Coimbatore for attachment of the respondent's decree against the insurance company. The Subordinate Judge held that the

application did not lie, and the present appeal is from that decision. The appellant contends in the first place that this case does not fall within the provisions of S. 6, Married Women's Property Act, because there is nothing on the face of the policy itself which creates a trust in favour of the respondent. The Subordinate Judge held that the proposal must be deemed to form part of the policy. In the second place the appellant says that even if the proposal can be deemed to form part of the policy the words therein "self or Velayammal" cannot constitute a trust in her favour. The case has been placed before the Full Bench as there has been a conflict of opinion on the interpretation to be placed on S. 6, Married Women's Property Act. Cl. (1) of that section states :

> A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate.

When the appeal arising out of the respondent's suit against the insurance company was before this Court (Cornish and King JJ.) the question, whether the proposal and declaration could be construed as being part of the policy, arose and it was held that they formed part of the policy : I L R 1937 Mad 990[1] at page 998. On the other hand Venkatasubba Rao J. in 71 M L J 39,[2] and Burn and Lakshmana Rao JJ. in 46 M L W 904[3] have held that the word 'policy' means the document described as the policy and that it cannot be deemed to include any other document. Venkatasubba Rao J. said that the words used must be plain and unambiguous and for the purposes of the section the only document that can be looked into is the policy. I would here point out that that case differed very much from the case we are now concerned with. There was there no clause making the proposal part of the policy. Burn and Lakshmana Rao JJ. quoted with approval this decision of Venkatasubba Rao J. but here again there was no clause incorporating the proposal in the policy. All that the policy stated was that the proposal and the declaration made by the assured should be the basis of the insurance. On the other hand, the policy contained an express provision that the money should be paid to the legal heirs of the assured. In the present case, there are no words in the document issued on 5th May 1928 indicating to whom the money shall be paid, but we have, as I have already indicated, a provision in the body of the policy itself and a similar provision in the schedule making the proposal part of the policy, and we have to look to the proposal to discover to whom the insurance money is payable. It seems to us that in these circumstances the Court must read the statements in the proposal as being incorporated in the policy. The parties to the contract were at liberty to make such a provision. In 47 Bom 578,[4] the Privy Council had to construe what was meant by an error on the face of an award. The question was whether a document referred to in the award could be read as part of the award. Lord Dunedin who delivered the judgment of their Lordships observed (page 586 of the report) :

> An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.

The House of Lords considered the same question in (1933) A C 592.[5] There the award recited the contract between the parties and referred to the provisions of condition 30 thereof. The House of Lords held that condition 30 was incorporated into and formed part of the award just as if the arbitrator had set it out verbatim and had then proceeded to state the construction which he placed upon it. The same principle applies here. The policy of insurance stated expressly that the proposal and the declaration were 'made part of the contract'. That being so, the Court must look at them to find out the full terms of the contract. Moreover S. 2 (6), Life

1. Bengal Insurance and Real Property Co. Ltd., v. Velayammal, (1937) 24 A I R Mad 571=170 I C 279=I L R (1937) Mad 990
2. Krishnamurthy v. Anjayya, (1936) 23 A I R Mad 635=164 I C 465=71 M L J 39.
3. Venkatasubramania Sarma v. United Planters Association of South India, (1938) 25 A I R Mad 234=46 M L W 904.
4. Champsey Bhara and Company v. Jivraj Baloo Spinning and Weaving Co. Ltd., (1923) 10 A I R P C 66=73 I C 436=47 Bom 578=50 I A 324 (P C).
5. F. R. Absalom Ltd. v. Great Western (London) Garden Village Society, Ltd., (1933) A C 592 =102 L J K B 648=149 L T 193=49 T L R 350.

Assurance Companies Act, 1912, defines a "policy of assurance on human life" as meaning,

any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life.

The instruments which evidence the contract between the parties and therefore constitute the policy are the proposal, the declaration and the document which was issued by the insurance company when the proposal was accepted. We wish it to be clearly understood that we are dealing here with a case where the policy does expressly incorporate the proposal. We have no criticism whatever to offer to the decisions in 71 M L J 39[2] and 46 M L W 904,[3] on the facts of thoses cases, but the learned Judges who decided those cases did use words which might be held to apply to a case like this. If that was their intention, we must express our dissent. The word "policy" in S. 6, Married Women's Property Act means the document or documents evidencing the contract. If the document known as the policy stands alone and does not incorporate in it any other document, only that document can be looked at, but if it does expressly incorporate another document, as in this case, the document must be deemed to be part of 'the policy.' For the reasons indicated we consider that the learned Subordinate Judge was right in treating the proposal as part of the policy of insurance in this case. This brings me to the contention of the learned advocate for the appellant that the words used in answer to question No. 12 of the proposal, "self or wife Velayammal" cannot be construed as constituting a trust in favour of the respondent. He would attach no meaning at all to those words. The answer to the question is certainly not as full as it might have been, but it is an answer, and the words can be construed as meaning that the policy was to be for the benefit of the assured or in the event of his death before the policy matured it was to be for the benefit of his wife. It seems to us that this is the only reasonable interpretation to be placed upon the words, and placing this interpretation upon them it means that there was a trust created in favour of the respondent in the event of the husband dying before the policy matured. That there can be a contingent trust is accepted in England, and as the Married Women's Property Act of 1874 followed similar legislation in England, English decisions are directly applicable. In (1926) 1 Ch 48,[6] Tomlin J. had to consider a case where the terms of the policy provided that the money was to be paid to the wife of the insured if she were living at his death or in the event of her prior death, to his executors, administrators and assigns. The learned Judge observed :

A number of cases has been cited to me, and my attention has also been called to S. 11, Married Women's Property Act, 1882. In my view that section applies to this policy. The policy is, in the terms of the section, a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife. It is true, it is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think therefore that the policy creates a trust in favour of the wife, but only in the terms of the trust.

Another case which has a bearing on this question is that of (1892) 1 Q B 147.[7] This case followed the conviction of Florence Elizabeth Maybrick for the murder of her husband. Her husband, James Maybrick, effected an insurance on his life in favour of his wife. The policy was made payable to the wife if she was living at the time of his death; otherwise the money was to go to his legal representatives. The Court of Appeal, consisting of Lord Isher M. R. and Fry L. J. and Lopes L. J. held that there was here a trust created by the policy in favour of the wife under S. 11, Married Women's Property Act, 1882, but it became incapable of being performed by reason of her crime. No doubt was expressed as to the policy creating a trust in her favour under that section. The same view has been taken in this Court in 3 M L W 466[8] and 55 Mad 171.[9] In the latter case which was decided by Madhavan Nair J. the policy was payable to the "assured or his wife if he predeceases her" and my learned brother held that these words operated to create a trust in favour of the wife within the meaning of S. 6.

6. In re Fleetwood's Policy, (1926) 1 Ch 48=95 L J Ch 195=1926 W C & Ins Rep 1=135 L T 374.
7. Cleaver v. Mutual Reserve Fund Life Association, (1892) 1 Q B 147 = 61 L J Q B 128=66 L T 220=40 W R 230=56 J P 180.
8. Srinivasachariar v. Ranganayaki Ammal, (1917) 4 A I R Mad 936 = 32 I C 991 = 3 M L W 466.
9. Abiramavalli Ammal v. Official Trustee of Madras, (1932) 19 A I R Mad 220=141 I C 680 =55 Mad 171=62 M L J 111.

The learned advocate for the appellant has placed great reliance on 58 Bom 513[10] and (1924) 2 Ch 348.[11] In the former case a Bench of the Bombay High Court had before it an endowment policy of insurance which was payable at the death of the assured or at the age of 55 and was made payable to the wife provided she survived him. Failing her it was to be paid to the assured, his executors, administrators or assigns. The Court did not consider the English authorities and came to the decision that there was no trust created in favour of the wife within the meaning of S. 6, Married Women's Property Act, on the wording of the section. As I have already stated the Indian Act follows the English Act and the English cases are directly applicable. When these cases are considered, there seems to be no doubt that in a case like the present a trust is created. (1924) 2 Ch 348[11] was a case in which a father had taken out an endowment policy on the life of his own daughter and for her benefit. It was held that in such circumstances, no legal estate was created in the daughter and that there was no trust for her benefit. The Court treated this case as being outside the Married Women's Property Act, 1882, as it was, because under that Act, as under the Indian Act, the policy must be on the life of the husband or the father. As there can be a contingent trust and as we construe the words in the proposal, which forms part of the policy, as creating a contingent trust in favour of the respondent we must also reject the second contention of the learned advocate for the appellant. For these reasons this appeal fails and must be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

10. Dinbai v. Shet Bamansha Jamasji, (1934) 21 A I R Bom 296=152 I C 163=58 Bom 513=36 Bom L R 608.
11. In re Engelbach's Estate, Tibbets v. Engelbach, (1924) 2 Ch 348=93 L J Ch 616 = 130 L T 401=68 S J 208.

A. I. R. 1938 Madras 608

VARADACHARIAR AND PANDRANG ROW JJ.

Mask & Co. and another — Appellants.

v.

Secretary of State — Respondent.

Appeal No. 179 of 1937, Decided on 2nd February 1938, against decree of Sub-Judge, Cuddalore, D/- 30th March 1937.

(a) Jurisdiction—Civil Court—Suit instituted on ground that goods imported ought not to have been taxed by customs authorities on particular basis and that authorities have acted on wrong interpretation of the Sea Customs Act is triable by Civil Court — Finality enacted by last clause of S. 188, Sea Customs Act, is restricted to the redress available before the executive authorities themselves.

Where executive authorities in the exercise or under colour of statutory powers, interfere with the person or property of the subject improperly or in excess of the limits authorized by the law, the subject has the right to resort to the Civil Court unless its jurisdiction has been taken away by express words or by clear implication.

[P 611 C 2]

Every order of a Customs Officer, under the Sea Customs Act, in whatever connexion passed, cannot be regarded as in the nature of an adjudication by a tribunal; it is only in cases of offences referred to in the Sea Customs Act, in respect of which the Customs Officers are given a kind of magisterial jurisdiction, that the orders of such officers can be spoken of as adjudications or decisions so as to preclude the Civil Courts from questioning them. The jurisdiction of the Civil Court is not barred in cases of orders passed by the Customs Officers in the ordinary discharge of their duties as executive officers performing their duty of assessing and collecting duty leviable on goods under the Act. The finality enacted by last clause of S. 188 of the Act must be restricted to the redress available before the executive authorities themselves. It must not be understood as precluding the jurisdiction of the Civil Courts.

[P 610 C 1, 2; P 611 C 1]

A suit instituted on the ground that goods imported by the plaintiff ought not to have been taxed by the customs authorities on a particular basis and that authorities had acted on wrong interpretation of the Act is therefore triable by a Civil Court : *4 Mad 344; 1 Mad 69 (F B); A I R 1932 P C 168; A I R 1938 P C 15 and A I R 1936 Mad 269, Ref.; C.S. No. 747 of 1920; A I R 1937 Mad 536; (1884) 12 Q B D 142 and (1897) A C 615, Disting.* [P 608 C 2; P 611 C 2]

(b) Sea Customs Act (8 of 1878), S. 188 — Opening words of S. 188 cannot be limited to cases falling under S. 182 and succeeding sections.

The opening words of S. 188 referring to any decision or order passed by an officer of customs under the Act cannot be limited to cases falling under S. 182 and the succeeding sections.

[P 611 C 1]

K. Bhashyam Ayyangar and T. R. Srinivasan — *for Appellants.*

Govt. Pleader — *for Respondent.*

Varadachariar J. — This appeal arises out of a suit for recovery of excess customs duty paid by the plaintiffs under protest and raises a question as to the jurisdiction of the Civil Court to deal with a matter of this kind. This point as to jurisdiction was raised by Issue 3 and was tried as a preliminary issue in the Court below. As the learned Subordinate Judge held against the plaintiffs on this question, he dismissed

the suit. Hence this appeal by the plaintiffs. The following are the relevant facts : The plaintiffs are merchants carrying on business in the South Arcot District under the name of "Mask & Co." and towards the end of 1932 and in the course of 1933, they imported several consignments of betelnuts from Java. The consignments were landed in Pondicherry and had to be brought to British India across the land frontier there. To avoid delay in doing so, they put themselves in communication with the customs authorities but as there was a dispute between them as to the correct duty leviable, the plaintiffs paid under protest the higher duty demanded by the authorities and cleared the goods. The Assistant Collector of Customs passed his order on 28th February 1933; and an appeal against it was dismissed by the Collector of Customs on 20th June 1933. The matter was taken to the Government of India in revision but by their order dated 13th August 1933, the Government of India confirmed the Collector's order.

The point in dispute between the parties was whether the betelnuts imported by the plaintiffs should be treated as falling under the category of "boiled" betelnuts. If they are not, the goods will be liable to duty on an ad valorem basis which works out greatly in the plaintiffs' favour as each cwt. was valued by them only at about Rs. 10. The customs authorities were of opinion that the betelnuts should be treated as "boiled, split or sliced" which under the notification issued under the Tariff Act were liable to duty on a tariff valuation of Rs. 23 per cwt. during the year 1932 and Rs. 16 per cwt. during the year 1933. The plaintiffs produced a certificate from Java that the betelnuts did not undergo any process of boiling; it would also appear that even in India the result of the chemical examination was that they had not been boiled but subjected to some lime process. The Assistant Collector of Customs nevertheless took the view that they were liable to be taxed as "boiled". When the matter went before the Collector, he stated that though the betelnuts had not undergone the process of boiling they were known in the trade as 'boiled'; and as the note in the notification under the Tariff Act prescribed that the various heads in the Tariff should be applied in the light of the ordinary trade description of each article, he held that the order of the Assistant Collector of Customs was right. The plaintiffs challenge the correctness of this view of the Collector. The order of the Government of India in revision was to the effect that the order of the Collector of Customs was correct in law.

The plaintiffs instituted the suit on the ground that the goods imported by them ought not to have been taxed as boiled betelnuts and that the customs authorities had acted on a wrong interpretation of the Sea Customs Act and the Tariff Act. The objection to the jurisdiction of the Civil Court was stated in paras. 8, 9 and 10 of the written statement to the following effect; that the Collector of Customs came to a judicial decision in the matter, that this decision had been confirmed on revision, that these orders are final as a legal adjudication and that their correctness or legality cannot be questioned in a Civil Court. In dealing with the question thus raised it will be convenient to refer at the outset to the cases that have been decided under the Sea Customs Act itself. In the present case, the Act directly applicable is the Land Customs Act of 1924, but S. 9 of that enactment makes various provisions of the Sea Customs Act applicable. As early as in 4 Mad 344[1] it was observed by Sir Charles Inns that the corresponding provisions of the Sea Customs Act, 6 of 1863, did not by implication exclude the jurisdiction of the Civil Courts in cases like the present. Referring to Ss. 218 to 220 of the former Act, the learned Judge held that they only applied to awards of confiscations and forfeitures and duties increased by way of penalty ; and as regards S. 188 of the Act now in force (namely Act 8 of 1878) the learned Judge said :

> I do not understand the words 'decision or order' passed by a Custom House Officer in S. 188 of Act 8 of 1878 to refer to executive orders levying duty. In his capacity of levying duty he is simply the executive officer to carry out the Act. The words refer, I think, to judicial order and adjudications under Ss. 182 and 183. But whether they be so restricted or not, I do not think Ss. 188 to 192 even by implication, exclude the jurisdiction of the Courts for wrongs done by Custom House Officers, and S. 198 recognizes that there may be suits against them.

We may in this connexion refer also to the observation of Morgan C. J. in 1 Mad 89[2] at p. 104 to the following effect :

> It is clear that when a law gives to certain persons or officials the power of adjudicating upon a particular matter, their decision concludes the inquiry.

1. Hari Bhanji v. Secy. of State, (1882) 4 Mad 344.
2. Collector, Sea Customs v. Chitambaram, (1876) 1 Mad 89 (F B).

These passages suggest a distinction between one class of cases contemplated by the Sea Customs Act and another class of cases, namely instances in which in respect of offences referred to in the Act, the Customs Officers are given a kind of magisterial jurisdiction and instances in which in the ordinary discharge of their duty as executive officers, they assess and collect duty leviable on goods under the Act. The opinion of the learned Judges indicated in the passages above referred to clearly was that it is only in the former class of cases that their orders can be spoken of as "decisions" in the true sense, so as to preclude the Civil Court from questioning them. In two recent cases however there were observations by learned Judges of this Court sitting on the Original Side which are relied on as supporting a different view. In C. S. No. 747 of 1920, Coutts-Trotter J. (as he then was) had to deal with a suit for recovery of a sum of Rs. 20,000 which had been deducted from the value of certain gold coins seized by the customs authorities the Rs. 20,000 representing the fine which the authorities adjudged as payable by the importer in view of his attempt to bring these coins clandestinely into British India. Objection was taken by the Government that the trial of the suit was barred by S. 188, Sea Customs Act; and the learned Judge upheld the objection. We think that the decision in that case is, if we may say so, not open to exception and it does not help the Government in this case; because the act of the customs authorities in that case was an "adjudication" of a fine in respect of an offence committed by the importer and within the meaning of the passage that we have cited above from 4 Mad 344,[1] that adjudication was a decision of a tribunal which has been given jurisdiction to deal with such offences by the statute. In 45 M L W 394,[3] Gentle J. had to deal with a claim for recovery of duty alleged to have been levied in excess. As the suit was instituted on the Original Side in respect of what happened in the city of Madras, the learned Judge held that the jurisdiction of the High Court was excluded by S. 106, Government of India Act. He however added that the suit was also barred under S. 18, Sea Customs Act. The observations on the latter point were only obiter.

As against this recent judgment in this Court, we may refer to the fact that in two recent cases which came before the Judicial Committee, 56 Bom 313[4] and A I R 1938 P C 15,[5] the Courts in India as well as their Lordships of the Judicial Committee adjudicated upon a question relating to the correct basis of assessment in respect of certain imported goods. It is true that in those two cases the objection to jurisdiction does not appear to have been raised and discussed. But we are unable to assume that if the objection to jurisdiction was so obvious as has been suggested before us, the learned counsel who appeared for the Government or their Lordships who dealt with the case on the merits would have overlooked such an objection. The decisions in 43 Bom 221[6] and 46 Bom 732,[7] to which the learned Subordinate Judge has referred are clearly distinguishable. They fall within the principle already indicated, that adjudications by customs officers dealing with an offence committed under S. 182 have prima facie to be regarded as adjudications by a special tribunal and as such are not examinable by a Civil Court except where they have acted without jurisdiction or in contravention of fundamental principles of judicial procedure. The learned Subordinate Judge has referred to the judgment of the Judicial Committee in 56 Bom 313[6] but has tried to distinguish it on a ground which we find difficult to follow.

Such being the state of the authorities, we may now deal with the arguments advanced before us with reference to the language of the relevant provisions of the Act. The learned counsel for the appellant contended that the finality enacted by the last clause of S. 188, Sea Customs Act, must be limited to redress available before the executive authorities themselves and must not be understood as precluding the jurisdiction of the Civil Court. He also contended that that finality can attach only to decisions or orders passed by cus-

3. Bhiwandiwalla & Co. v. Secy. of State, (1937) 24 A I R Mad 536=172 I C 70=45 M L W 394.

4. Vacuum Oil Co. v. Secy. of State, (1932) 19 A I R P C 168=137 I C 535=59 I A 258=56 Bom 313 (P C).

5. Ford Motor Co. Ltd. v. Secy. of State, (1938) 25 A I R P C 15=172 I C 771=65 I A 32 (P C).

6. Ganesh Mahadev v. Secy. of State, (1919) 6 A I R Bom 30=49 I C 427=43 Bom 221=21 Bom L R 27.

7. Mahadev Ganesh v. Secy. of State, (1922) 9 A I R Bom 30=66 I C 872=46 Bom 732=24 Bom L R 245.

toms authorities when acting under S. 182 of the Act and the succeeding sections. We are not prepared to accede to the latter contention. The opening words of S. 188 refer to any decision or order passed by an officer of customs under this Act and it has not been shown why those words should be limited to cases falling under S. 182 and the succeeding sections. For one thing, such a construction may unduly curtail the right of appeal given to a party by S. 188 and unless such a construction is obvious, we are not disposed so to interpret the section. The first contention, namely that the finality enacted by the last clause of that section should not be interpreted to take away the jurisdiction of the Civil Court, seems to us well founded. Cases have come before this Court where upon similar provisions in other enactments the same argument against the jurisdiction of the Civil Court has been advanced but has been repelled. Many of these cases have been referred to in 69 M L J 695,[8] and it is unnecessary to deal with them again here.

The learned Government Pleader contended, in the alternative, that even if the exclusion of the Civil Court's jurisdiction is not to be inferred from S. 188, the same result must be reached on general principles, on the ground that where the Legislature has created a special tribunal to give redress to a party in respect of particular wrongs it must be presumed that it was intended to be an exclusive remedy. Adopting the language used by the learned Judges in 12 Mad 105[9] at p. 108, he contended that

> when by an Act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted, and in case of injury the party cannot proceed by action.

The scope and limits of this principle have been discussed at some length in 69 M L J 695[8] already referred to and 12 Mad 105[9] has also been explained there. The question for consideration in such cases is whether the order complained of can be regarded as anything in the nature of an adjudication by a tribunal. It seems to us too much to contend that every order of a customs officer under the Customs Act in whatever connexion passed must be regarded as in the nature of an adjudication by a tribunal. The learned Government Pleader also relied on the observations of the Master of the Rolls in (1884) 12 Q B D 142[10] at p. 145. No question arose in that case as to the limits of the jurisdiction of the Civil Court. A stipendiary Magistrate was empowered to pass orders on the application of the urban authority on a default made by a private owner in carrying out certain works. There was an application for certiorari to move unto the High Court an order made by the stipendiary Magistrate in connexion with such an application. The Master of the Rolls observed that that was a case where

> the statute has imposed on certain persons a liability not known to the Common law, and has given to other persons powers and duties also not known to Common law, and it seems to me to follow that where that is the case, and where there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability, such mode of procedure is the only one to be followed and used for that purpose.

We find it difficult to say that the present case is one of that kind. (1897) A C 615,[11] which was also relied on by the learned Government Pleader, is likewise distinguishable. The proposition there laid down was that :

> Where a statute gives a right to recover expenses in a Court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a Court of summary jurisdiction.

It was on those facts that Lord Watson said that "the right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other". It has also been held that when executive authorities in the exercise or under colour of statutory powers interfere with the person or property of the subject, improperly or in excess of the limits authorized by law, the subject has the right to resort to the Civil Court, unless its jurisdiction has been taken away by express words or by clear implication. Judged by this test, we do not think it can be said in this case that the jurisdiction of the Civil Court has been excluded. The appeal is accordingly allowed and the case remanded to the lower Court for disposal on the merits. The court-fee paid on the memo-

8. Kamaraja Pandiya Naicker v. Secretary of State, (1936) 23 A I R Mad 269=162 I C 419 =69 M L J 695.

9. Ramachandra v. Secretary of State, (1889) 12 Mad 105.

10. Wake v. Sheffield Corporation, (1884) 12 Q B D 142=53 L J M C 1=50 L T 76=32 W R 82 =48 J P 197.

11. Barraclough v. Brown, (1897) A C 615=66 L J Q B 672=76 L T 797=62 J P 275= 8 Asp M C 290.

randum of appeal will be refunded. The appellant will be entitled to the costs of this appeal.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 612

VARADACHARIAR AND
PANDRANG ROW JJ.

Ar. L. N. Rm. Ar. Sevugan Chettiar — Appellant.

v.

Raja Srimathu Muthu Vijaya Raghunatha Doraisingam and others — Respondents.

Appeal No. 391 of 1933, Decided on 8th February 1938, against decree of Sub-Judge, Devakottai, D/. 28th June 1933.

(a) Madras Court of Wards Act (1 of 1902), S. 49—'Property of ward' cannot comprise property of institution of which ward is only trustee.

The expression "property of ward" used in various sections of the Madras Court of Wards Act (including S. 49) cannot comprise the property of an institution of which the ward is only a trustee or manager : *A I R 1923 Mad 497 and A I R 1922 P C 123, Rel. on; 32 Cal 129 (P C), Disting.*
[P 612 C 2 ; P 613 C 2]

(b) Civil P. C. (1908), S. 80—Suit concerning title between plaint charity and temple represented by ward—Ward represented by Collector—Case held did not fall under S. 80.

In a suit instituted under the Madras Survey and Boundaries Act, a minor, whose property was under the management of the Court of Wards, was impleaded as a defendant and was represented by the Estate Collector. The suit related to a claim of title between the plaint charity on the one hand and the temple represented by the minor on the other:

Held that the suit could not be regarded as instituted against the Secretary of State or a public officer. So also the claim did not bring the case under S. 80. [P 613 C 2]

T. L. Venkatarama Iyer and M. Murugappa Chettiar — *for Appellant.*

Advocate-General, K. Subramaniam and V. Ramaswamy Iyer — *for Respondents.*

Varadachariar J. — This appeal arises out of a suit instituted under S. 14, Madras Survey and Boundaries Act. The lower Court has dismissed the suit as barred by limitation. This plea of limitation is the only point for decision in the appeal. In the village of Kallal, in the Sivaganga Estate, there is one portion belonging to a temple of which the zamindar is the dharmakartha and the other portion which belongs to the plaintiffs' family has been set apart by them for certain charities and in that character has been under their management. During the survey operations carried on in the estate, the Survey Officer demarcated the boundary between the two portions in a manner to which the plaintiffs take exception. Hence this suit. Under S. 14, Madras Survey and Boundaries Act, the suit has to be instituted within three years of the final publication of the survey demarcation, which in the present case took place on 21st January 1928. As the suit was instituted only on 19th February 1931, it will be prima facie barred, unless the plaintiffs can claim the benefit of S. 15 (2), Lim. Act, which provides that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded. As the Sivaganga Estate was under the management of the Court of Wards, the plaintiffs apparently thought that in the present case notice under S. 49, Madras Court of Wards Act had to be given and they have given a notice to the Estate Collector and another notice to the District Collector. If the two months' period required by S. 49 could be excluded, the present suit would undoubtedly be in time. The question was accordingly raised before the lower Court whether this is a case in which notice had to be given under S. 49. The learned Subordinate Judge held that notice was not required under that section in the present case and that the plaintiffs were therefore not entitled to claim the benefit of S. 15 (2), Lim. Act in respect of the period of notice.

Before us, it has been contended that the view of the learned Judge is not right, that the decision in 44 M L J 367[1] which he purports to follow was not a decision on this point and that the observations relating to S. 63, Court of Wards Act should not be followed. As a matter of the ordinary meaning of the language employed in S. 49, it seems to us difficult to say that the expression "property of a ward" can include property of an institution of which the ward is a manager or trustee. Whether the office of trusteeship is not in a sense property and to that extent it might not fall under S. 49 is not a question that we need consider in this case; because the suit

1. Varadachariar v. Ramakrishnamba Garu, (1923) 10 A I R Mad 497=76 I C 781=44 M L J 367.

does not relate to the right to the office. Again, whether the word 'property' in S. 49 should be restricted to property in which the ward has a 'beneficial' interest or can also comprise property whereof the legal title is vested in him, though he may hold it subject to certain obligations either wholly or partly in the nature of a trust is again a question which does not arise for decision in this case. So far as we can gather, the property of which the zamindar claims to be in possession is one of the usual endowments of temples in this country which prima facie belong to the deity and of which the dharmakartha is only a manager and not the legal owner, as explained in 44 Mad 831.[2] Mr. Venkatarama Ayyar, the learned counsel for the appellant, relied on the decision of the Judicial Committee in 32 Cal 129,[3] but that case does not help him. All that their Lordships there held was that as the possession and management of the property of the idol were vested in the shebait, any cause of action for the protection of such property must also be held to accrue to the shebait, within the meaning of S. 7, Limitation Act. On the other hand, their Lordships recognize—though they say that it is only in an ideal sense true—that the title vests in the deity; and in view of the fuller discussion of the subject in 44 Mad 831,[2] it is impossible to interpret the decision in 32 Cal 129[3] as supporting the view that the shebait is the owner of the property of the institution.

Whether the grounds of policy which led the Legislature to enact that a notice should be given in certain cases will not equally apply to cases of trust properties dealt with under S. 63, Court of Wards Act, is a matter which we are not justified in taking into account in the interpretation of S. 49. On the other hand, the history of the legislation on the subject seems to suggest that prior to 1902 the consensus of opinion was that neither the Court of Wards nor a Civil Court exercising jurisdiction under the Guardians and Wards Act was entitled to deal with the properties of institutions of which the ward was only a trustee or manager and it was to provide for the performance of the ward's duties as such trustee or manager during his wardship, that special provision was made by S. 63, Madras Court of Wards Act of 1902. It does not seem to us proper to read this special provision as having the effect of bringing the properties of the institution into the managment of the Court of Wards in the sense in which the private properties of the ward come under its control. On the other hand, S. 63 speaks of them as properties belonging to the institution or endowment. Though the actual point for decision in 44 M L J 367[1] was different, we respectfully agree with the view expressed by the learned Judges that the expression "property of the ward" used in various sections of the Madras Court of Wards Act (including S. 49) cannot comprise the property of an institution of which the ward is only a trustee or manager.

It was contended in the alternative by Mr. Venkatarama Ayyar that if the present case is held not to fall under S. 49, Court of Wards Act, it is at least one in which notice under S. 80, Civil P. C., was required and that as the plaintiffs have also given a notice to the District Collector under S. 80, they are entitled to the benefit of S. 15 (2), Limitation Act. We fail to see how the subject-matter of the present suit relates to any act done by the Collector or by any public officer in his official capacity. It is the zamindar that has been impleaded as the defendant in the case and as he happens to be a ward he is sought to be represented by the Estate Collector. It is therefore not possible to regard it as a suit instituted against the Secretary of State or against a public officer. Further, the suit relates to a claim of title between the plaint charity on the one hand and the temple represented by the zamindar on the other. It is therefore not a case falling under S. 80 of the Code. The learned Subordinate Judge was therefore justified in holding that the plaintiffs were not entitled to claim the benefit of S. 15 (2), Limitation Act and that the suit was barred. The appeal fails and is dismissed with costs.

C.R.K./V.B.B. *Appeal dismissed.*

2. Vidyavaruthi v. Balusami Aiyer, (1922) 8 A I R P C 128=65 I C 161=48 I A 302=44 Mad 831 (P C).

3. Jagadindra Nath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129=31 I A 203=8 Sar 698=8 C W N 809 (P C).

A. I. R. 1938 Madras 613

LAKSHMANA RAO J.

In re Public Prosecutor, Madras —

Petitioner.

Criminal Revn. Case No. 918 and Petn. No. 860 of 1937, Decided on 1st December 1937, from Judgment of Sub-Divisional Magistrate, Sankari, D/- 6th August 1937.

Criminal P. C. (1898), S. 397—Direction that sentence of detention in Borstal School should commence after expiration of previous one is illegal.

Section 397 is not applicable to sentences of detention under S. 8, Madras Borstal Schools Act and the direction in a case that the sentence of detention should commence after the expiration of the previous sentence of detention is illegal. [P 614 C 1]

K. Venkataragavachariar — *for Petitioner.*

Order.—S. 397, Criminal P. C., is not applicable to sentences of detention under S. 8, Madras Borstal Schools Act and the direction that the sentence of detention in this case should commence after the expiration of the previous sentence of detention is illegal. The direction that the sentence in this case should commence after the previous sentence of detention is therefore set aside.

C.R.K./D.S. *Direction set aside.*

A. I. R. 1938 Madras 614

VARADACHARLAR AND HORWILL JJ.

Sri Sri Sri Nirvani Mahant Gomati Doss Bhavaji and another — Appellants.

v.

Madras Hindu Religious Endowments Board, Madras and another — Respondents.

Appeal No. 109 of 1933, Decided on 20th January 1938, against decree of Dist. Court, Kistna at Masulipatam, D/. 1st December 1932.

Madras Hindu Religious Endowments Act (2 of 1927), S. 63—Scheme framed by Board—Clause in scheme providing that it would be in force for two years—Subsequent order substituting fresh period in old scheme—Subsequent order held amounted to framing of new scheme and suit under S. 63 brought within six months of that order was in time.

A scheme was framed by the Board on 31st August 1929. A clause in the scheme provided that the scheme would be in force for a period of two years. The clause also provided that at the end of the two years' period, the scheme would be taken up for consideration and for such modification as might be necessary in view of the progress made in the administration of the affairs of the mutt during the said period. The Board subsequently passed an order on 16th March 1932 which purported to modify the scheme of August 1929 by substituting fresh period in the clause of the scheme. A trustee filed a suit under S. 63 within six months from the latter order:

Held that the mere fact that the latter order purported to be by way of modification of the old scheme would not justify the ignoring of the substance of what had happened. The order of 16th March 1932 in substance amounted to the framing of a new scheme and the suit was in form and substance a suit to set aside the scheme framed by the latter order and being within six months from that order was in time. [P 615 C 1]

P. Satyanarayana Rao — *for Appellants.*

P. V. Rajamannar — *for Respondents.*

Varadachariar J.—This is an appeal against a decree dismissing a suit instituted by the appellant under S. 63, Madras Hindu Religious Endowments Act. As the lower Court has dismissed the suit as barred by limitation, without going into the merits, the only point for consideration at this stage is whether the suit is so barred. The last clause of S. 63 of the Act provides that the trustees or any person having interest may, within six months of the date of the publication of the order complained against, institute a suit in the Court to modify or set aside such order. In the present case, the Board framed a scheme on 31st August 1929 and the present suit was instituted only on 4th July 1932. The learned District Judge was of the opinion that it was the plaintiff's duty to have filed a suit within six months of the publication of the scheme framed on 31st August 1929 and has accordingly held that the suit is barred. But he has not taken into account the fact that by cl. (13) of the scheme framed on 31st August 1929, it was provided that that scheme shall be in force for a period of two years. It is true that the later orders passed by the Board on 8th January 1930 and 16th March 1932 purport to be orders modifying the scheme of August 1929 by substituting fresh periods in cl. (13) of the scheme. But it seems to us that, in substance, the order of 16th March 1932 amounts to the framing of a new scheme.

The learned counsel for the respondents lays stress upon the latter part of cl. (13) of the scheme of 1929 which provides that at the end of the two years' period, the scheme will be taken up for consideration and for such modification as may be necessary in view of the progress made in the administration of the affairs of the mutt during the said period. He asks us to read the scheme as one made permanently and to hold that all that was intended by cl. (13) was that at the end of two years, the Board will consider whether any modifications were necessary. We do not think that this is a reasonable reading of cl. (13). It is not for us to say whether or not that is what the Board intended. To test the argument, let us assume by way of illus-

tration that at the end of the two years, the Board passed no further order. It seems to us that in the face of the language of cl. (13) it cannot be contended that the scheme will of its own force continue to remain in operation any longer. When the plaintiff knew that that was the provision in cl. (13), he might well have thought it unnecessary to institute a suit to question the scheme as he expected that after two years, the whole matter will have to be dealt with afresh. The mere fact that the later orders purport to be by way of modification of the old scheme will not justify the ignoring of the substance of what had happened. There is another provision in cl. (4) of the old scheme which refers to a modification of particular provisions of the scheme at the end of two years. If the matter had remained with that clause, there might be considerable force in the respondents' argument. But as the words we have already quoted from cl. (13) specifically limit the duration of the scheme to a period of two years, we do not think that the lower Court was right in holding that the present action must be treated as one to set aside the scheme of 1929. It is in form and in substance a suit to set aside the scheme of March 1932 and in this view, it is in time. The appeal is accordingly allowed and the suit remanded to the lower Court to be disposed of on the merits. Costs to abide. Court-fee paid on the memorandum of appeal will be refunded.

C.R.K./D.S. *Suit remanded.*

A. I. R. 1938 Madras 615

HORWILL J.

In re Ganti Veera Reddi and others — Petitioners.

Criminal Revn. Case No. 763 and Petn. No. 715 of 1937, Decided on 1st March 1938, from Judgment of Sess. Judge, Bellary, in Criminal Appeal No. 10 of 1937.

(a) Criminal P. C. (1898), S. 110 (e)—Attempt to commit rape involves breach of peace.

Section 106 makes it quite clear that an assault is an offence involving a breach of the peace and clearly an attempt to rape does involve an assault upon the person against whom this offence is committed. Such attempt therefore involves a breach of the peace within the meaning of S. 110 (e) : *30 Cal 366 ; 5 C W N 249 and A I R 1915 All 352, Expl.* [P 615 C 2 ; P 616 C 1]

(b) Criminal Trial—Joint trial—Four charges of attempt to commit rape framed against *A*, *B* and *C* for which they were jointly responsible—Two other charges against *A* and another charge against *A* and *B* jointly—Joint trial of all is desirable.

In every case it has to be considered how far the evidence establishes association and how far the various persons tried are prejudiced by a joint trial. [P 616 C 1]

Four charges of attempt to commit rape were framed against three accused *A*, *B* and *C*, for which they were jointly responsible. Two other charges were framed as against *A* and another charge was framed as against *A* and *B* jointly :

Held that the joint trial of all the three accused was not only permissible but also desirable. The accused were not prejudiced by the additional charges being tacked on to the four for which they were jointly responsible : *A I R 1925 Mad 189 and 27 Cal 781, Disting.* [P 616 C 1]

J. R. Gundappa Rao — *for Petitioners.*

N. Somasundaram — *for the Crown.*

Order.—The petitioners have been bound over under S. 110 (e) and (f), Criminal P. C., for habitually committing offences involving a breach of peace, to wit, attempts to rape, and they have also been deemed, by virtue of this habitual practice, to be desperate and dangerous members of a community, whom it is not safe to leave at large without furnishing security. This order was confirmed on appeal by the learned Sessions Judge of Bellary. It has been contended for the petitioners that attempts of rape do not involve a breach of the peace, that they are not desperate and dangerous to the community, and that it was illegal to try the three petitioners together. The principal case quoted before me from which it was sought to deduce that an attempt to commit rape does not involve a breach of the peace is 30 Cal 366.[1] In that case, the counter-petitioners were found to have been attempting to seduce women and of behaving obscenely towards them. It was rightly pointed out that before a person could be bound over under S. 110 (e) he must be found to have committed offences of which a breach of the peace was a necessary constituent. Reference was made to S. 106, Criminal P. C., for ascertaining the meaning of 'breach of the peace' ; and it was held that from the wording of Section 106, it was clear that a 'breach of the peace' was not involved in committing offences such as the accused in that case were found to have been guilty of. S. 106 makes it quite clear that an assault is an offence involving a breach of the peace ; and clearly an attempt to rape does involve an assault upon the person against whom this offence is committed. In 5

1. Arun Samanta v. Emperor, (1903) 30 Cal 366.

C W N 249,[2] the accused was found to have been guilty of certain lewd behaviour and of making improper gestures towards women; but these acts were not of such a nature as to amount to any assault or to any act of violence or force against the person. In 16 Cr L J 582,[3] the counter-petitioners had made certain indecent overtures towards boys. It seems however clear that as in the case before us, the offences committed involved assaults, force, and violence, they did involve a breach of the peace.

Seven charges were framed in the preliminary order under S. 112. Four of them were of attempts to rape P. Ws. 3, 4, 5 and the wife of P. W. 6. Two others related to the first counter-petitioner only, and one to counter petitioners 1 and 2 jointly. The learned Sessions Judge has ignored the charges relating to counter petitioners 1 and 2 only and has considered the case against the three counter-petitioners of being jointly responsible for the attacks on the four women. Clearly, this was a case in which it was not only permissible for the accused to be tried jointly, but was a case in which the accused should have been tried jointly; for, they acted together in committing these offences. It would have been better not to have added the specific charges against counter-petitioners 1 and 2; but as the learned Judge pointed out, these charges were trivial and hardly relevant to the matter under enquiry. I do not think that the counter-petitioners have been in any way prejudiced by these additional charges being tacked on to the four for which they were jointly responsible. In 47 M L J 689,[4] which has been relied on by the learned advocate for the counter-petitioners, only two charges were common to all the persons tried; and it was found that the evidence of association of the various persons tried was weak. In 27 Cal 781,[5] also there were only two counts common to all the counter-petitioners. In every case it has to be considered how far the evidence proves association and how far the various persons tried are prejudiced by a joint trial. In the present case, I am satisfied that the joint trial was desirable as well as permissible.

Emphasis has rightly been laid on the fact that although the evidence is that specific offences under the Penal Code were committed, with respect to which charges of complaints should have been made to the village Magistrate and trial under the Penal Code could have taken place; yet P. Ws. 3, 5 and the wife of P. W. 6 made no complaint to any person in authority. That is explained by the facts that the offences were against their modesty and that a complaint might have brought disgrace upon them, their husbands and their families. P. Ws. 3, 4 and 5 would, even today, not have come forward and spoken to the attacks upon them had it not been for the fact that the unfortunate wife of P. W. 6 was thrown into such despair by the attack made on her that she committed suicide. P. Ws. 3 to 5 were driven to speak to the attacks upon them in order that some action might be taken against the counter-petitioners to prevent a recurrence of such attacks in the future. I therefore agree with the Courts below that the accused were habitually committing offences involving a breach of the peace and that as they are in the habit of waylaying women working in fields and attempting to rape them, they are desperate characters whom it is dangerous to leave at large without calling upon them to furnish security. I therefore think that the order passed was justifiable and accordingly dismiss this petition.

C.R.K./D.S. *Petition dismissed.*

2. Akhoy Kumar Chatterjee v. Queen Empress, (1901) 5 C W N 249.
3. Muhammad Asghar Khan v. Emperor, (1915) 2 A I R All 352=30 I C 134=16 Cr L J 582.
4. In re Kutti Goundan, (1925) 12 A I R Mad 189=86 I C 49=26 Cr L J 673=47 M L J 689.
5. Hari Telang v. Queen-Empress, (1900) 27 Cal 781=4 C W N 531.

A. I. R. 1938 Madras 616

WADSWORTH J.

Mahomed Yoonus — Plaintiff.

v.

Abdur Sattar Ismail and others — Defendants.

Testamentary Original Suit No. 6 of 1935, Decided on 17th December 1937.

(a) Mahomedan Law—Applicability—Cutchi Memons—Wills.

A Cutchi Memon is governed by the Mahomedan law so far as the execution and revocation of his will is concerned. The will need not be in any particular form and it can be revoked by any definite expression of a present intention to revoke it: *A I R 1919 Bom 80, Rel. on.* [P 617 C 2; P 618 C 2]

(b) Evidence Act (1872), Ss. 91 and 92 — Applicability to wills.

Sections 91 and 92 apply only to contracts, grants and dispositions of property and a will is neither a contract nor a grant nor a disposition of property until the death of the testator makes it operative. Hence a registered will can be revoked by an unregistered document and Section 92 (4) is no bar. [P 618 C 2]

(c) Will—Revocation — Mahomedan testator after making registered will communicating with his solicitors and getting properly drafted but incomplete codicil — Testator subsequently sending telegram and letter suggesting certain alterations — Telegram and letter not signed by testator — Telegram and letter held were not codicil nor were revocation of former will.

Though the will of a Mahomedan need not be drawn in form, and it need only be a declaration of the testamentary intentions of the testator, it is imperative that there should be evidence which would justify a conclusion that the testator intended that the declaration which he made of his intentions should be of itself operative and that it should not be merely the basis for making a draft which he would subsequently scrutinize, correct and amplify before signing it. [P 619 C 1]

A testator had made a will drawn up in due form, attested and registered. After making this will, he communicated with a firm of solicitors and got a properly drafted but incomplete codicil. After receiving that draft codicil, he communicated again with the solicitors by a telegram and letter instructing them to make certain alterations in that draft and urging them not to delay in the process. The telegram and letter were not signed by him :

Held that the testator did not intend his letter and telegram to the solicitors to be a codicil or to be in themselves the revocation of a former will, either in whole or in part. The letter and the telegram were intended to serve no other purpose than to provide materials for the preparation of a draft. A mere expression of an intention to revoke a will at some future date could not amount to a revocation of the will under any system of law : *A I R 1919 Bom 80, Expl.* [P 619 C 1, 2]

O. T. G. Nambiar, K. I. Subramaniam instructed by Messrs. King and Partridge — *for Plaintiff.*

C. Srinivasachariar, instructed by T. A. Rangachari; P. K. Janakiram, J. Lakshmayya, V. Subramaniam, V. Satyanarayana, V. V. Srinivasa Iyengar for D. Narasaraju and N. Krishnamachariar — *for Defendants.*

Judgment. — This matter concerns the will of Hajee Sir Ismail Sait, a gentleman of the Cutchi Memon community, who died on 24th April 1934 in the Tuberculosis Sanatorium at Arogyavaram in the Chittoor District. The petitioner, who is one of the sons of the testator, propounds a registered will dated 19th March 1934 about which there is really no dispute; and also desires probate of two communications, which are alleged to amount to a codicil to that will, despatched by the testator to his solicitors, Messrs. Moresby and Thomas, on 13th April 1934. Most of the issues framed in this suit are entirely irrelevant to probate proceedings. Issue 1 in this case as to whether the deceased was governed by the Hindu or the Mahomedan law so far as it relates to the execution of his will is governed by authority, viz. 43 Bom 641,[1] where it has been held that the Mahomedan law governs the wills of Cutchi Memons and that consequently no particular form is necessary for the execution of such a will. Nothing has been urged before me to throw a doubt as to the correctness of that ruling on this point. I am not concerned in this suit with the law governing the extent of the testator's testamentary capacity, but I do hold that he is governed by the Mahomedan law so far as the execution of the will and the alleged codicil are concerned.

The execution of the registered will has been formally proved and there is no doubt that it was validly executed by the testator when in a sound disposing state of mind. The issues relating to the provisions of the will and the extent of the properties which are validly covered by the will and the rights of the widow to maintenance are, to my mind, quite irrelevant to probate proceedings. The only issue remaining is Issue 4 which relates to the telegram and the letter dated 13th April 1934 which together are alleged to constitute a codicil effecting a partial revocation of the will of 19th March. Two witnesses, whose evidence I see no reason to distrust, have spoken to the circumstances in which this telegram and the letter were written and despatched. There was an application for the examination on commission of the petitioner. But, as it appears that his evidence will add nothing to the evidence of these two witnesses who were present and know the circumstances of the despatch of this letter and the telegram and whose evidence I propose to accept entirely, I see no reason to delay the decision of this suit by examining on commission a witness whose evidence will add nothing to the materials available for the disposal of this case.

Before going into the circumstances relating to this alleged codicil, it is desirable to give a very brief summary of the will itself. The will appoints three executors of whom two have renounced and the petitioner Mr. Mahomed Yoonus is the sole

1. Sarabai Amibai v. Mahomed Cassum, (1919) 6 A I R Bom 80 = 49 I C 637 = 43 Bom 641 = 21 Bom L R 549.

remaining executor and trustee. It conveys certain specific properties to the trustees for certain specific charitable purposes. After these provisions, the shares of the testator in his firm are divided amongst his various descendants and the balance is to go to the wakf which is constituted over the residue of the whole estate. Then certain gifts and loans are confirmed and the whole of the residue is to be transferred to the wakf trustees who are directed to provide for the education of the grandsons now living and after-born sons of respondent 1, the marriage of respondent 1's existing daughters and his after-born daughters and the other grand-daughters, for the education of a named grandson, and any balance left after making these provisions is to be held by the wakf trustees of the wakf estate with an ultimate remainder to certain specified religious purposes. Meanwhile the income is to be devoted to the education and marriagee xpenses of the descendants of the testator and there is a provision that any payments out of the wakf income are to be additional to the education and marriage provision made in the body of the will. At the time when this will was made, the testator had been for a considerable time in the Tuberculosis Sanatorium at Arogyavaram. Very shortly after it was registered he was already in communication with his solicitors about a codicil and he wrote on 5th April giving directions for the preparation of a codicil with certain blanks which were to be filled up by him. On 6th April the solicitors sent a draft codicil accordingly. Then on 13th April come these two communications which are alleged to have the effect of partially revoking the registered will. These consist of a telegram, Ex. C, which runs as follows :

> Your letter 6th. Since my grandson Abdul Samad died. Have therefore decided omit all school fees. Don't delay. Ismail.

The evidence shows that this telegram was typed by the stenographer, P. W. 1, to the dictation of the testator and that it was not signed by the testator himself. At the same time, the letter, Ex. B, was despatched. This letter acknowledges the letter of the 6th with the draft codicil, intimates the death of the grandson at school and says :

> I have withdrawn my other grandson and have decided to cancel the allowances provided for school fees. I have therefore wired you as under.

Then the wire is repeated. The letter is signed by the petitioner and by P. W. 2, Mr. Narasappa, who was the chief accountant under the testator, "By Order". The evidence shows that this letter was also written to the dictation of the testator himself, and that, though both the signatories were in the habit of signing for the testator, it was unusual for both of them to sign any one communication. It also shows that at the time of the telegram and the letter the testator himself was clear in his head, carried on his business and physically quite capable of signing for himself. On receipt of this letter and the telegram, the solicitors wired and wrote to the effect that the instructions were not clear enough for a redraft of the codicil and the evidence is that this letter and the telegram were seen by the testator but his condition was so bad that those who were responsible for his care did not place them before him for orders and his directions were not taken regarding them. He died on the 24th.

There is no doubt that S. 70, Succession Act, does not apply to this will, that the ordinary Mahomedan law governs the execution and revocation of the will, that the will need not be in any particular form and that it can be revoked by any definite expression of a present intention to revoke it. An attempt has been made to argue that S. 92, Cl. (4), Evidence Act prevents the revocation of a registered will by an unregistered document. It seems to me that this contention does not require any serious consideration. Ss. 91 and 92 apply only to contracts, grants and dispositions of property and a will is neither a contract nor a grant nor a disposition of property until the death of the testator makes it operative. I have been referred to the case already quoted, 43 Bom 641,[1] as authority for the somewhat drastic position that any letter written by a Mahomedan to his solicitor telling him what his intentions are with reference to the making of a future will is itself a will. It seems to me that this proposition has only to be stated in those terms for its unsoundness to be apparent. It is true that the decision which I have just quoted does appear to treat as a will a document which might be described as a direction to the lawyer to prepare a will. If it is to be regarded as a decision that any letter by a Mahomedan to his lawyer telling him the terms in which a will is to be drafted is itself a will, I can only say that with all respect I dissent from it. Actually, I do not believe that such a rule can be spelt out of this judgment which really only goes to the

extent of holding that the letter is good evidence of the testamentary intentions of the testator and that in the circumstances of that case, the testator being at the time dying from cancer of the tongue and unable to speak, there were grounds for concluding that those testamentary intentions were finally declared.

The circumstances of the present case are very different. Here we have the testator who had made a will drawn up in due form, attested and registered. After making this will, he communicates with a firm of European solicitors and gets a properly drafted but incomplete codicil. After receiving that draft codicil, he communicates again with the solicitors, instructing them to make certain alterations in that draft and urging them not to delay in the process. It seems to me quite clear that the testator did not intend his letter and telegram to Messrs. Moresby and Thomas to be a codicil or to be in themselves the revocation of a former will, either in whole or in part. Clearly what he intended was that the solicitors should draw a proper draft codicil embodying the modifications communicated since the preparation of the previous draft, and he had every intention after approving the draft and filling in the blanks to execute that codicil formally as he had done with the previous will. Granted that the will of a Mahomedan need not be drawn in form, and granted that it need only be a declaration of the testamentary intentions of the testator, it seems to me imperative that there should be evidence which would justify a conclusion that the testator intended that the declaration which he made of his intentions should be of itself operative and that it should not be merely the basis for making a draft which he would subsequently scrutinize, correct and amplify before signing it. Had the testator intended that this letter and telegram should revoke any portion of his registered will, I cannot believe that he would have abstained from signing them himself and directed his servants and attendants to sign for him. Clearly, he regarded these communications as nothing more than instructions to his solicitors on the basis of which they were to prepare the document which itself was at some future date to effect a revocation of a portion of the will. While therefore it is to my mind quite possible that a letter by a Mahomedan to his solicitor might operate to revoke a will, I do not for a moment believe in the circumstances of this case that it was the intention of the testator to revoke any part of his will by this letter or this telegram. I believe that the letter and the telegram were intended to serve no other purpose than to provide materials for the preparation of a draft. A mere expression of an intention to revoke a will at some future date cannot amount to a revocation of the will under any system of law, so far as I am aware.

In this view I hold that the letter and the telegram dated 13th April 1934 cannot be admitted to probate as a codicil to the will dated 19th March 1934. Probate will therefore issue of the will dated 19th March 1934. Taxed costs of all parties will come out of the estate. Costs to be taxed for all parties as between attorney and client.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 619

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Chada Mangiah and others — Appellants.

v.

Secretary of State — Respondent.

Letters Patent Appeals Nos. 75 and 76 of 1936, Decided on 1st December 1937, against Judgment of Menon J., D/. 6th May 1936.

Madras Irrigation Cess Act (7 of 1865), S. 1, Proviso 1 — Water irrigating land belonging to Inamdar admittedly coming from artificial channel belonging to Government — Inamdar claiming to be entitled to use water free from cess must prove engagement with Government within meaning of Proviso to S. 1 — He must also prove that water which he has used comes from mamool source of supply — The fact that channel flows through an Agraharam and Inamdar abstracts water at point situated in Agraharam makes no difference — Question is not whether property has become third person's property but whether channel is one belonging to and constructed by Government.

Where the water irrigating land belonging to an Inamdar admittedly comes from an artificial channel or stream belonging to the Government, the right to exemption from the cess can arise only under Proviso 1 to S. 1, Irrigation Cess Act by reason of an engagement with the Government and no exemption from cess can be claimed by the Inamdar unless such engagement, either express or implied, is proved by him : *Case law referred.*

[P 620 C 2; P 621 C 1]

The engagement within the meaning of the Proviso to S. 1 cannot be inferred merely because the land irrigated by the Inamdar has been described in the Inam Register as wet and there is

no mention of the source of supply : *A I R 1928 Mad 97, Ref.* [P 621 C 1, 2]

The Inamdar claiming to be entitled to use the water free from cess has to prove that the water which he has used is from the mamool source of supply. No presumption that the water used by the Inamdar comes from such a source can be drawn in favour of the Inamdar when it is found that the channel from which the water is drawn was excavated as recently as in 1913. It cannot be argued that once the liability of the Government to supply water is shown the Inamdar of his own sweet will may tap any water at any point whatsoever : *A I R 1917 P C 42 and 26 Mad 66, Ref.* [P 622 C 1]

So also the fact that the channel at first flows through an Agraharam and the Inamdar abstracts water at a point situated in the Agraharam, does not help the Inamdar. The question under the Irrigation Cess Act is not whether the property has become some third person's property but is whether the river, stream, etc., is one belonging to or constructed by the Government : *1933 M W N 1457 and A I R 1933 Mad 646, Rel. on.* [P 622 C 2]

In the case of an artificial water course any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought: *A I R 1925 P C 236, Rel. on.* [P 622 C 2]

V. Govindarajachari — *for Appellants.*

N. Srinivasa Ayyangar for Government Pleader — *for Respondent.*

Venkatasubba Rao J.— In these Letters Patent Appeals the question to be decided is, whether the plaintiffs are entitled, as claimed by them, to a refund of water cess collected by the Government. Although some relief has been granted to them, all the Courts have unanimously upheld the right of the Government to levy the water cess. For the plaintiffs it is contended that this contention is wrong. The land to which the appeals relate, is a part of a minor inam of the total extent of about 20 acres, situate in a ryatwori village known as Manyapu Uratla in Vizagapatam District. The inam in question bore the old Survey Nos. 143-A and 143-B, of which 143-A corresponds to the Re-Survey Nos. 143-1 and 143-3 and 143-B to the Re-Survey No. 143-2. We are concerned here with the plot bearing Re-Survey No. 143-1 alone. The plaintiffs inam adjoins, and is roughly south-west of Gurampet Agraharam, through which passes a channel known as Papanna Cherikalvai, marked A B D F in the sketch, flowing from west to east. Of this channel the part shown as D F is entirely within the limits of the Agraharam ; indeed a small bit of the water-course to the west of D is also comprised within its limits. The main channel A B D F bifurcates at the point B, which is admittedly on Government land. One of the branches flowing from B, as will be seen from what has been said, is B F. We are not concerned with the other branch which flows northward and is shown in the sketch as B C. The plaintiffs have, for irrigating their land 143-1, used the water of the channel marked D E (described as "bodi"), which takes off at, and flows southwards from, D which as already stated, is within the limits of the Agraharam. To complete the description, it remains to add that the channel A B D F itself flows from a presumably larger channel on Government land and belonging to the Government, known as Nimmakattu channel.

The plaintiffs asserted that their entire inam was mamool wet land irrigated from ancient times by the channel D E ; but there is a concurrent finding by both the Courts below that D E was excavated somewhere about the year 1913. It is however contended for them that their inam was confirmed in 1865 or thereabouts and that the entire land of 20 odd acres was shown as wet in the Inam Fair Register, from which Ex. B-1 is an extract. The inam title deed has not been produced, but from the available papers, it appears that at the inam enquiry, the total assessment was computed at Rs. 14, on which basis, the quit rent of Rs. 1-12-0 (being 1/8th of the assessment) was fixed. The argument is that the land being shown as wet land, the assessment, with reference to which the quit rent was imposed, should be assumed to be "wet" assessment; this being so, it is contended, that to allow a fresh levy of water cess would be tantamount to a double levy. The plaintiffs' right to exemption has been put on two grounds. First, it is claimed that the case falls within Proviso 1 to S. 1, Irrigation Cess Act (Madras Act 7 of 1865). For this purpose, it is not disputed that the water which irrigates the land, is from a channel or stream belonging to Government. Section 1 (a) applies when water is used for irrigation from a river, channel, etc., belonging to Government; Cl. (b) applies whenever water by direct or indirect flow from any such river, channel, etc., from or through adjoining land irrigates the land —we are here referring only to the relevant parts of the Section. It is unnecessary to decide whether the facts of the present case bring it within Cl. (e), for there can be no doubt that so far as Cl. (b) is con-

cerned, it applies; nor has this been disputed. We refer to this for an argument may be based upon the absence of the word "used" in the part of S. 1 (b) we have just quoted.

It may be contended that whereas Cl. (a) covers a case of voluntary user (*see* the discussion in 59 Mad 107,[1] affirmed in (1937) 1 M L J 732[2]), what the extracted part of Clause (b) contemplates by the use of the expression "irrigates any land" is involuntary user, thus excluding voluntary enjoyment. To argue so would of course be futile, for, if even involuntary user would cast a liability, voluntary user would *a fortiori* do so, and as already stated, this contention has not been put forward. The substantive part of the section thus applying, the question arises, can the immunity be claimed under the Proviso above mentioned? In other words, can the inamdar point to an engagement with the Government exempting him from the cess? In the inam papers filed, there is no reference whatsoever to any source of water supply, but it is argued for the plaintiffs (appellants) that the mere classification of the land as "wet" imports an engagement to exempt it from cess. Several cases have been cited such as 26 Mad 66,[3] 32 Mad 456,[4] 24 M L J 680,[5] 1913 M W N 858,[6] 26 I C 187[7] and 28 M L J 297,[8] but the question has not arisen in this precise form in any of them. In all the decided cases, the right of the zamindar or the inamdar, as the case may be, to irrigate free of cess the area specified as wet, has been assumed and the further question has been raised, was he entitled to free irrigation of any excess area? Here the right to irrigate free of charge even the extent shown as wet is denied and the question that therefore arises is, from the description simply of the land as wet and in the absence of mention of the source of supply, can an engagement within the meaning of the Proviso be inferred? In 53 M L J 769,[9] there is an observation of Ramesam J. obiter, which reads thus:

> It was the duty of the Inam Commissioner to ascertain the assessment so that the quit rent to the Government may be fixed, and for the purpose of ascertaining the assessment it may be necessary to enquire how much was wet and how much dry, and as to the wet lands irrigated with water from a Government source of irrigation, how much was cultivated with such water, free of charge; but where the entry is very general, i. e. so muchl and wet and so much dry, I doubt if they had anything to do with the question of irrigation free of charge. (page 775.)

This seems to indicate that no claim can be based upon the mere description of the land as wet. Then in 26 Mad 66,[3] one of the cases already referred to, the learned Judges (Bhashyam Ayyangar and Moore JJ.) after referring to the inam papers which showed that the wet area was about 10 acres, went on to observe that according to the principle of law enunciated in S. 13 (c), Easements Act, the inamdar would be entitled to irrigate the said extent of wet land free of separate charge from the same source from which the land was irrigated at the time of the grant. Here, it is implied that the engagement is not an unqualified one but is with reference to a particular source of water supply. In 44 I A 166[10] at p. 173 (*the Urlam case*) their Lordships of the Judicial Committee, while indicating the things to be shown by the person relying on the Proviso, refer as one of them, to his being entitled to water for irrigation "from the source from which he is actually irrigating his lands". The appellants' counsel finds support for his argument in the wording of the Board's Standing Order, which says that to the extent of wet land specified in his title deed, no inamdar can be charged for irrigation to a single crop. He specially relies upon the fact that this rule was promulgated by the Government in 1865, i. e. about the period of the Inam Enquiry (Board's Standing Orders (1931) Vol. 11, R. 64, p. 423). The specific case set up by the plaintiffs that the channel D E was the source of water supply both prior to, and at the date of the settlement, has been negatived by a concurrent finding of the Courts below. There

1. Kanniappa Mudaliar v. Secy. of State, (1936) 23 A I R Mad 42=159 I C 13=59 Mad 107=69 M L J 728.
2. Secretary of State v. Veeranna, (1937) 24 A I R Mad 548=168 I C 864=I L R (1937) Mad 772=(1937) 1 M L J 732 (F B).
3. Chidambara Rao v. Secretary of State, (1903) 26 Mad 66.
4. Lutchmee Doss v. Secretary of State, (1909) 32 Mad 456=3 I C 456=19 M L J 470.
5. Venkata Rangayya Appa Rao v. Secretary of State, (1913) 24 M L J 680=19 I C 227.
6. Bommereddipalli Chinna Venkayya v. Secretary of State, (1913) M W N 858=18 I C 102.
7. Sethumathavachariar v. Secretary of State, (1915) 2 A I R Mad 556=26 I C 187.
8. Ranganayakamma v. Secretary of State, (1914) 1 AIR Mad 109=24 IC 741=28 MLJ 297.
9. Yahya Ali v. Secretary of State, (1928) 15 A I R Mad 97=106 I C 377=53 M L J 769.
10. Bala Surya Prasada Row v. Secy. of State, (1917) 4 A I R P C 42=41 I C 98=44 IA 166=40 Mad 886 (P C).

is no evidence whatsoever whether at the time of the grant there was in fact any source of irrigation at all, the water from which was available to the inamdar. Let it be assumed however that by reason of the description of the land as wet, reinforced by the Standing Order in question, there is a duty cast upon the Government to supply the water free. But does that absolve the plaintiffs from the obligation of proving that the water they have used is the water from the mamool source of supply? On the facts here, they can invoke no sort of presumption in their favour, that the water used is from such source, for, the finding of the Courts below, by which we are bound, is that the channel DE, the water of which has been used, was excavated as recently as in 1913. It has been broadly argued that once the Government's liability to supply water is shown, the inamdar of his own sweet will may tap any water at any point whatsoever. No Court can give countenance to a proposition of this sort, which would lead to startling results.

Turning to the facts, there is not even a semblance of justice in the case of the plaintiffs put forward. From 1890 the land was shown as "dry" in the survey and settlement records. It has not been shown that before 1913 it was ever irrigated as wet land. In the last mentioned year, the canal in question (DE) was dug for the first time and the Government forthwith claimed the right to levy the water cess. They accordingly declared it to be so liable and from 1913 for about 12 years the inamdars acquiesced in the demand and continued to pay the cess. It was not till the plaintiffs, who are recent purchasers, acquired the land that the Government's right was questioned. The second ground on which the immunity is claimed is in the nature of what may be termed a *jus tertii*. Mr. Govindarajachari for the plaintiffs relies upon certain dicta of their Lordships in the *Urlam case*[10] to the effect that once the water is lawfully taken into the channel, the Government would have "nothing further to do with the matter". This passage in its context cannot support the learned counsel's argument, for their Lordships also observe:

> If cess were levied upon her as inamdar, she can rely on the same engagement to the same extent as could a tenant of zamindari land authorized by zamindar to use the water. (Page 186.)

What the learned counsel seems to suggest is that by reason of the principle of the *Urlam case*,[10] the Gurampet Agraharamdar became the proprietor of the water at the point D where the plaintiffs abstracted it through the excavated channel DF. In the first place, that case decides nothing of the sort, for the question involved there is not of ownership of water. Pappanna Cherikalvai, it must be remembered is not a natural but an artificial water-course, as the Government has pleaded and the District Munsif has found (see first of the two paragraphs in his judgment numbered 13). As Lord Atkinson points out in 3 Rang 494[11] in the case of an artificial water-course, any right of the owner to the flow of the water must rest on the prescription or grant from or contract with the owner of the land from which the water is artificially brought. The contention therefore based upon the supposed proprietary rights of the Agraharamdar to the water falls to the ground. But apart from that, the question under the Irrigation Cess Act is not whether the water has become some third party's property, but whether the river, stream, etc., is one belonging to or constructed by the Government: *see* 1933 M W N 1457[12] followed in 56 Mad 696.[13] Had the channel not been an artificial water-course but a natural one, different considerations might probably apply: *see* 42 Mad 239[14] and 55 Mad 268[15] at page 275, but that is not a matter on which we are called on to pronounce an opinion. Papanna Cherikalvai, the artificial channel being undoubtedly the property of the Government, the right to exemption can arise only under Proviso 1, which no doubt affords protection to the Gurampet Agraharamdar by reason of the Government's engagement with him, but confers no such benefit whatever upon the plaintiffs, who can rely upon no such engagement either express or implied. In the result the Letters Patent appeals are dismissed with costs.

C.R.K./R.M. *Appeals dismissed.*

11. Maung Bya v. Maung Kyi Nyo, (1925) 12 A I R P C 236=90 I C 198=52 I A 385=3 Rang 494.
12. Hyder Ali Saheb v. Secy. of State, 1933 M W N 1457.
13. Ayyanna v. Secy. of State, (1933) 20 A I R Mad 646=145 I C 594=56 Mad 696=65 M L J 179.
14. Chinnappa Chetty v. Secy. of State, (1919) 6 A I R Mad 412 =49 I C 673=42 Mad 239=36 M L J 124 (F B).
15. Secy. of State v. Sannidhiraju Subbarayudu, (1932) 19 A I R P C 46=136 I C 413=55 Mad 268=59 I A 56 (P C).

A. I. R. 1938 Madras 623

VENKATARAMANA RAO J.

On difference between

BURN AND ABDUR RAHMAN JJ.

Sundararajulu Naidu and others — Appellants.

v.

B. Papiah Naidu — Respondent.

Appeals Nos. 101 of 1935 and 220 of 1936, Decided on 4th February 1938, against orders of Sub-Judge, Chingleput D/- 5th October 1934.

(a) Estoppel—Decree against inalienable jagir — Compromise between decree-holder and some of judgment-debtors including minors consenting execution to proceed against immovable property—Court when recording compromise not observing provisions of O. 32, R. 7, Civil P. C., regarding minor judgment-debtors — Other judgment-debtors remaining ex parte—Portion of property mortgaged to decree-holder by previous jagirdar — No evidence showing decree-holder's ignorance of terms of jagir—Plea of estoppel held could not prevail against minors and other judgment-debtors remaining ex parte (Per *Abdur Rahman J.*).

In a suit against a jagir which was inalienable a decree was passed. A compromise was effected between the decree-holder and some of the judgment-debtors including minors whereby they consented to the decree being executed against the immovable property. To this compromise the rest of the judgment-debtors were not parties. The Court when recording the compromise did not observe the provisions of O. 32, R. 7, Civil P. C., regarding leave in respect of the minor judgment-debtors. Further a portion of the property had been mortgaged to the decree-holder by the previous jagirdar but there was no evidence showing that the decree-holder did not know the real state of affairs, that is, the terms of the jagir, or that he was induced to act merely on the representations of the judgment-debtors. In execution the decree-holder attached the jagir and pleaded that the judgment-debtors were estopped from pleading that the jagir was inalienable:

Held that the plea of estoppel could not prevail as against the minors and other judgment-debtors who remained ex parte. [P 627 C 1]

(b) Civil P. C. (1908), S. 60—Grant by East India Company of village to make permanent provision for grantee and his heirs as compensation for loss sustained owing to resumption of emoluments attached to police services—Grantee entitled to rents and profits but prohibited from alienating village — Village held could not be attached and sold in execution—Only interest attachable and saleable held was right to enjoy rents and profits (Per *Abdur Rahman and Venkataramana Rao JJ.*)

A village was granted to a person on behalf of the East India Company by a deed of grant the object of which was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office which was carried out in consequence of a policy enunciated by the then Government of abolishing all emoluments granted in support of the police establishments. The grant provided that the grantee and his heirs were to appropriate the rents and profits for their own use. It was further provided that the grantee was prohibited from alienating the village by grant, sale or otherwise but in default of legal heirs the village should revert to the Company.

Held (Per *Abdur Rahman and Venkataramana Rao JJ.*) that the grant was not an absolute grant but conferred on the grantee a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who would succeed him. It was competent to the Crown to make such a heritable grant providing for a succession of limited interests, each grantee taking the estate for life. The prohibition as to alienation was valid. By virtue of the limited nature of the grant the village was not a saleable property within the meaning of S. 60. The only interest which could be made available to the decree-holders was the right to enjoy rents and profits during the life of the grantee and they were attachable and saleable. The proper order in such case was to appoint a receiver to be in possession and management of the property, to collect rents and profits to be paid to the creditors : *A I R 1932 Mad 417 and A I R 1927 Mad 140, Disting; A I R 1931 P C 160, Rel. on.* [P 628 C 1; P 631 C 2]

(Per *Burn J.*)—That the village was attachable and saleable in execution in spite of the prohibition against alienation: *A I R 1932 Mad 417, Rel. on; A I R 1927 Mad 140, Ref ; A I R 1931 P C 160; A I R 1922 Mad 197; A I R 1923 Bom 276 and A I R 1925 P C 175, Disting.* [P 625 C 1]

A. V. Viswanatha Sastri—*for Appellants.*

C. Narasimhachari and M. E. Rajagopalachari—*for Respondent.*

Appeal No. 220 of 1936.

Burn J. — This is an appeal from an order in execution passed by the learned Subordinate Judge of Chingleput. The appellants were sued by the respondent in O. S. No. 63 of 1933 on the file of the Subordinate Judge of Chingleput on foot of a promissory note executed by appellant 1, appellant 4 and the father, since deceased of appellants 5, 6 and 7. Appellants 2 and 3 are minor sons of the first. In execution of the decree granted to him in the suit, the respondent prayed for attachment and sale of the entire shrotriem rights of the defendants in the village of Irungattukottai. The learned Subordinate Judge overruled the objections of the defendants and ordered attachment and sale. This appeal is by the judgment-debtors. Irungattukottai is a jaghir granted by order of Lord Clive to the predecessors of the defendants in 1802. It was granted in order to compensate the "mocassahdar" of that date for the loss to which he would be subjected by reason of the abolition of the previous system of policing the country. The compensation took the form of confirming the villages formerly held on

mocassah tenure to the holders and their heirs on shrotriem tenure. The deed of grant concludes with the following stipulation :

> You are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs the said village shall revert to the Honourable Company.

At the time of the inam settlement it was proposed to enfranchise this inam, imposing one-eighth quit rent, but this was not done, because the inamdar at the time was a minor, and the Collector of the District desired the Inam Commissioner to leave it on the existing tenure till the minor should attain his majority. This is therefore an unenfranchised inam. The contention of the appellants is that the jaghir cannot be sold in execution because of the prohibition against alienation in the original grant; the terms of which, as the learned Subordinate Judge observes, are still in force. The learned advocate for the appellants relies on S. 3, Crown Grants Act (15 of 1895), the terms of which are:

> All provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

The respondent on the other hand relies on the terms of S. 60, Civil P. C., where it is enacted :

> The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, ... and save as hereinafter mentioned all other saleable property moveable or immovable, belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit. .

There can be no doubt about the fact that this jaghir comes within the terms of S. 60, Civil P. C. It is certainly saleable property over the profits of which the judgment-debtors have a disposing power which they may exercise for their own benefit. This is clear from the terms of the grant. Para. 3 of the Purwana runs as follows :

> The Governor-in-Council having commuted the Russooms and Marahs assessable on the village of Erungaud cottah for money rent, you are entitled to collect those Russooms and Marahs at the rate entered in the dowle of fasli 1210 and to appropriate the amount to your own use.

No words could have given the grantee a fuller power of disposing of the profits of the village for his own benefit than is given by these words. Hence it is clear that the village is saleable in execution under the terms of the Civil Procedure Code. The only question is whether the restriction on alienation made valid by S. 3, Crown Grants Act, renders it unsaleable. This jaghir is neither more nor less than a personal inam granted to a particular person as compensation in lieu of payment for services which had become unnecessary. The grantor undoubtedly intended it to descend to the heirs of the grantee, and it was probably with that object in view that the prohibition against alienation was inserted. I do not accept Mr. Narasimhachari's argument that the prohibition was inserted solely in the Government's interest, i. e., in order to enable the Government to resume the inam if the condition should be violated. The penalty for violation of the condition is not stated in the deed of grant. I am even prepared to assume that the prohibition against alienation was made in the interests of the grantee and of his heirs. But the form of the prohibition itself shows that the prohibition, like the grant, was addressed to a particular person : "You are to understand that the said village is not alienable by gift, sale or otherwise . . ." This is in terms a warning to the grantee that he could not alienate the village by gift, sale or otherwise. It needs no argument to show that the Governor-in-Council could not issue a declaration, having the force of law, to the effect that the village could never be transferred by the operation of law. In 59 Cal 1,[1] relied on by the learned advocate for the appellants, the corpus of the property was made inalienable for ever, not by the terms of the indenture between the Secretary of State and the Nawab Bahadur of Murshidabad, but by the Murshidabad Act (15 of 1891). A special Act of the Legislature was necessary to effect that purpose. The Murshidabad case gives no support to the appellants' claim.

Mr. Viswanatha Sastri for the appellants quoted 45 Mad 620,[2] but that case is quite irrelevant to the question now under discussion; the land in that case was burdened with the performance of a service of a public nature. Nor can the appellants get any assistance from the case in 47 Bom 597.[3] That was a case of a dispute between a Hindu widow and a reversioner, in

1. Wasib Ali Mirza v. Karnani Industrial Bank Ltd., (1931) 18 A I R P C 160=132 I C 727=59 Cal 1=58 I A 215=35 M L W 384 (P C).
2. Anjanayalu v. Sri Venugopala Rice Mills Ltd., (1922) 9 A I R Mad 197=70 I C 466=45 Mad 620=42 M L J 477.
3. Basangowda v. Irgowadati, (1923) 10 A I R Bom 276=73 I C 196=47 Bom 597=25 Bom L R 293.

which it was held that the widow's interest in the property could not be attached in execution of a decree. There was a compromise between the widow and the reversioner by which the widow agreed to keep the property for her lifetime, and undertook not to sell or mortgage the same. It was held that the compromise was a family arrangement not amounting to a transfer of property within the meaning of S. 10, T. P. Act, and that the widow only retained an interest in the property restricted in its enjoyment to herself personally. Fawcett J. held that the widow consequently "had no power of disposal of the usufructuary interest of the lands." Mr. Viswanatha Sastri has quoted also the case in 47 All 385,[4] but in that case the Privy Council held expressly that the judgment-debtor had no more than a right of maintenance, which was not attachable and saleable by reason of S. 60 (1) (n) of the Civil Procedure Code.

There is authority in this Court for the view that this jaghir can be attached and sold in execution. This case is precisely similar to 35 M L W 395,[5] and the learned Subordinate Judge was, in my opinion, right in following the decision of Curgenven J. in that case. I would also refer to 50 Mad 441,[6] where it was held that unenfranchised personal inams can be alienated in spite of the prohibition against alienation in the Inam Settlement Rules. Such an alienation, Ramesam J. observes, is not void, though prohibited. It may be ignored by the Government, but so long as the Government do not step in to force their rights, it is not open to question by others. The same principle, I think, is applicable in the present case. Whether the Government can or cannot resume the grant in case the jaghir is sold away from the jaghirdar's family is a question which has not arisen, and the learned Subordinate Judge has very properly not decided it; what is certain is that no party other than the Government can have any right to avoid the transfer which may follow on the Court sale. Mr. Narasimhachari for the respondent contended that the judgment-debtors were estopped from alleging that the jaghir could not be sold. This contention is based partly on the fact that some of the judgment-debtors signed a memo consenting to execution against their immovable properties, and partly on the fact that in 1884 the then jaghirdhar mortgaged with possession some portion of the jaghir. I see no reason to discuss this matter at length, because (a) it is unnecessary to do so, and (b) there are no pleadings in the case on which an issue of estoppel could have been framed. In my opinion, the decision of the learned Subordinate Judge is correct and this appeal should be dismissed with costs.

Abdur Rahman J. — The village of Errongaud Cottah in the zamindari of Sriperumbudur, now known as Irungattukottai, was granted under a Purwana dated 31st August 1802 by Lord Clive, then a Governor of Madras, to one Sreeram Singama Naick and was chargeable with an annual rent of Pagodas 50 (amounting approximately to Rs. 175) including Russoom and Marahs. The following are the important conditions of this purwana :

(2) In consequence of the foregoing resolution the Governor-in-Council confers on you the village of Errongaud Cottah in the zamindari of Sriperumbudur on shrotriem tenure, chargeable with an annual rent of pagodas 50 including Russoom and Marahs.

(3) The Governor-in-Council having commuted the Russooms and Marahs assessable on the village of Errongaud Cottah for money rent, you are entitled to collect these Russooms and Marahs at rate entered in the Dowle of Fasli 1210 and to appropriate the amount to your own use.

(4) The Governor-in-Council confirms to you and your heirs the village of Errongaud Cottah as shrotriem so long as you discharge the rent and are obedient to the laws and regulations established or to be established, under the authority of the Governor-in-Council . . .(torn). . . time being.

(5) In confirming to you and your heirs as shrotriem the village of Errongaud Cottah you are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Honourable Company.

In execution of a decree obtained by the respondent against the present holders of that village (presumably the heirs of the original grantee), the decree-holder applied for attachment of the jaghir and desired the Court to sell it to satisfy his judgment-debt. On behalf of the jaghirdars, it was contended that the village was not saleable in execution. This contention did not find favour with the Subordinate Judge and the judgment-debtors have now come to us in appeal. In his arguments the learned coun-

4. Rajendra Narain Singh v. Mt. Sunder Bibi, (1925) 12 A I R P C 176=87 I C 295=47 All 385=52 I A 262 (P C).

5. Rama Rao v. Srinivasiah, (1932) 19 A I R Mad 417=137 I C 799=35 M L W 395.

6. Vaidhyanatha Aiyer v. Yogambal Ammal, (1927) 14 A I R Mad 140=99 I C 452=50 Mad 441=51 M L J 695.

sel for the appellants has mainly relied on S. 60, Civil P. C., and S. 3, Crown Grants Act (Act 15 of 1895) and contended that inasmuch as the judgment-debtors did not have a disposing power on the village, covered by the grant, which they could exercise for their own benefit and as the conditions in the grant have been declared to be valid under S. 3, Crown Grants Act, the jaghir falls within the exception to S. 60, Civil P. C. and could not be sold at the instance of the decree-holder.

During the course of arguments, it was admitted, and indeed it is clear from the terms of the Purwana itself granted by Lord Clive, that the aforesaid grant and other similar grants were nothing short of gifts granted by way of compensation to the police employees who held lands or villages under mocassah tenures to start with but which were subsequently changed by the Government into shrotriem tenures. It will be clear from the terms of this grant that the gift was not made for any services of a public nature, but was made purely out of consideration to compensate the police employee for the loss which he was expected to suffer on account of a change in the nature of his tenure. It has been contended on behalf of the decree-holder that having regard to the fact that the grantee was only entitled to recover certain rents and land revenue, the land being in possession of persons holding permanent rights, the grant should be held to consist of the right of collecting rents and profits merely and not of the corpus of the village. It was also urged that para. 5 of the grant should be so construed as to have been inserted for the benefit of the Government alone. It was further argued that the judgment-debtors should not be allowed to take advantage of it as against their own creditors, particularly when they have been alienating it by way of hypotheca themselves and consented even in the decree under execution, which was based on a compromise, that the decree-holder would have the liberty to proceed against immovables. A plea of estoppel was thus being raised for the first time in this Court. In any case it was alleged that the property which has now been attached does not fall within the exceptions of S. 60, Civil P. C., and is therefore saleable. It was also argued on behalf of the decree-holder that this provision in the grant was of a purely personal character and did not run with the land.

Having read the terms of the grant as a whole, I am of the opinion that the last contention of the decree-holder is not correct and the provisions contained in cls. 4 and 5 were not meant to be personal in character but were intended to run with the land. Having regard to the various clauses of the Purwana, I would also repel the contention that the jaghir consisted of rents and profits only or that the village did not form the subject matter of the grant. The construction which has been attempted to be placed on them is incorrect. They are quite clear and admit of no doubt both as to their intention and meaning. As to the plea of estoppel even if it is permitted to be raised in this Court for the first time, there is no force in the decree-holder's contention. The compromise was entered into between the decree-holder in O. S. No. 63 of 1933 and appellants 5 to 7 alone who were judgment-debtors in that case, while the decree was ex parte as against the other defendants. This means that appellants 1 to 4 did not agree to the terms of the compromise and out of the defendants who did so, defendants 6 and 7 were minors. The attention of the Court does not appear to have been directed to the question whether a compromise of this nature was advantageous to the minors (defendants 6 and 7) and no leave appears to have been granted by the Subordinate Judge who passed an ex parte decree. This means that the salutary provisions contained in O. 32, R, 7, Civil P. C. were not observed by the Court at the time when the compromise was being recorded. It may be contended that this decree was passed not on account of a compromise which was arrived at between the guardian for the minors and the plaintiff, but on account of the fact that the guardian ad litem had merely abandoned his defence and the sanction of the Court was not therefore requisite for the purpose. In view of the following term in the statement of counsel for the parties, which is being relied upon by the decree-holder now that the "plaintiff will have liberty to proceed against immovables in the meanwhile," the contention would have no force. Moreover, defendants 2 and 3 were also minors, and there is no mention of this fact in the order of the Court which passed the decree. In the circumstances, I do not think any question of estoppel really arises as against defendants 1 to 4 or 6 and 7. In my opinion no useful purpose would be

served by going into this question even as regards defendant 5 as the question whether the village is attachable and saleable would have to be decided on its own merits, even if raised by one of the defendants. The second ground of estoppel which was pleaded on behalf of the decree-holder was based on the jaghirdar's conduct in mortgaging a portion of the grant with some one else in 1884 (Ex. D) and in mortgaging a portion of this very village with possession with the decree-holder himself in 1921 (Ex. B). No evidence has been led to show that the decree-holder did not know the real state of affairs, that is the terms of Lord Clive's grant, and was induced to act merely on the representations of the judgment-debtors. In the absence of any such evidence which it was the decree-holder's duty to adduce, this ground of estoppel must also be decided against the decree-holder.

The next contention is as regards the right of the decree-holder to attach and sell the village. Under S. 60, Civil P. C., the property to be attached must be (1) saleable property belonging to the judgment-debtor or, (2) over which or the profits of which he has a disposing power which he may exercise for his benefit. The question therefore is, is the village saleable? Under the terms of the Sanad or Purwana, the grantee and his heirs are restrained from alienating the village by "gift, sale or otherwise". That this restriction on alienation is valid and binding on the holder of the village for the time being cannot be doubted in view of S. 3, Crown Grants Act. I need only refer to the decision of the Division Bench in 49 Mad 349,[7] where a similar restriction on alienation in a grant by the East India Company was held to be valid. Once the said restriction is held to be valid, the village must be held to be a property which is neither saleable nor one over which the judgment-debtor has any disposing power within the meaning of S. 60, Civil P. C. The counsel for the respondent placed a great deal of reliance on 35 M L W 395.[5] But the ruling has no application to the facts of the present case. First of all, the terms of the grant under which the jaghir was created in that case are not known. Moreover, it was admitted in that case that the jaghir consisted of a grant of land revenue. In this case, as pointed out above, a reference to the Purwana by Lord Clive points clearly to the conclusion that the corpus of the village was granted and that the grant was not that of land revenue merely. Basing his decision on the fact that the jaghir consisted of a grant of land revenue, Curgenven J. had held that the jaghir—not being a pension—did not fall within the exceptions contained in S. 60, Civil P. C. and was held to be saleable. The other authority relied upon by Mr. Narasimhachari, counsel for the respondent, was 50 Mad 441.[6] A reference to the authority would show that the question whether the property involved in that case was saleable or not did not arise in that case. There is no reference to S. 60, Civil P. C. in the whole of the judgment. The only two questions which arose in that case were firstly whether in view of S. 4, Pensions Act, the suit was maintainable in Civil Courts and secondly, whether the devise by will to the widow contravened certain provisions of the Inam Rules of 11th October 1859. In this particular case, the Inam Rules passed in 1859 or their interpretation are not relevant, and I would therefore hold that this authority also has no application to the facts of the present case.

In view of what I have said above, I would hold that the condition imposed by Lord Clive on behalf of the East India Company in cl. 5 was valid and binding, and was not inserted in the interest of the Government alone. I would therefore hold that the corpus of the property could not be sold. But under the terms of the grant, the right to enjoy the rents and profits during the time of their natural lives, has been given to the grantee and his heirs and the judgment-debtors have a disposing power over the rents and profits of the village which they may exercise during their lifetime for their own benefit. Not having the power of disposal over the corpus of the property, they cannot be held to have any power to deal with its income beyond the period of their natural lives. Their Lordships of the Privy Council while construing similar terms contained in Murshidabad Act (15 of 1891) which was enacted only with the object of confirming and giving effect to an indenture between the Secretary of State for India and the then Nawab Bahadur of Murshidabad arrived at the same conclusion: 35 M L W 384.[1] Following the principles laid down in this case, I hold that although the corpus

7. Secretary of State v. Parthasarathy Appa Rao, (1926) 13 A I R Mad 706=96 I C 1011=49 Mad 349=50 M L J 699.

of the village now proposed to be sold is neither attachable nor saleable, yet its profits and income are so during the principal judgment-debtors' lifetime. The next question then is as to what order would be most appropriate in these circumstances. In another case which was brought to our notice by the counsel for the appellant and published in 47 All 385[1] the Judicial Committee of the Privy Council took the view that although the appellant's interest in the villages, being a right to future maintenance, was exempted under S. 60 (1), Civil P. C. from attachment and sale, yet a receiver was ordered to be appointed to realize rents and profits with a direction to pay a sufficient and adequate sum for the maintenance of the appellant and his family and to apply the balance to the liquidation of the decree. It is true that the rents and profits of the village over which the judgment-debtors are held to have a disposing power could be sold for the period during which the judgment-debtors are alive. But the better relief in the circumstances of this case appears to be that a receiver be appointed in this case for the purpose of collecting rents and profits of the village until such time as the debt is paid off or the judgment-debtors are alive.

For the reasons given above, I would accept the appeal and order the appointment of a receiver of the village, now desired to be sold, with the object of collecting its rents and profits and direct that after defraying the cost of collection, the balance be paid to the decree-holder towards the satisfaction of his decree. In the event of the decree having been satisfied or in the event of the death of the principal judgment-debtors 1 and 4, whichever event happens earlier, the receiver will be removed by the Court and the corpus of the property covered by the Purwana will be handed over to the judgment-debtors or their legal heirs as the case may be. The appointment of receiver is being left to the lower Court which is directed to appoint one after listening to the suggestions of the parties and their objections if any. In view of the fact that the appeal has partially succeeded, I would leave the parties to bear their own costs incurred by them in this and the lower Court.

C. M. A. No. 101 of 1935.

Burn J.—In consequence of my judgment in C. M. A. No. 220 of 1936, I must hold that the learned Subordinate Judge's order making the attachment absolute, was correct and that this appeal also should be dismissed with costs.

Abdur Rahman J.—In consequence of my judgment in A. A. O. No. 220, I must hold that the Subordinate Judge's order making the attachment absolute was wrong and the appeal should be accepted. I would however leave the parties to bear their own costs as I have ordered in the main appeal. As my learned brother takes a different view the appeal must be laid before a third Judge.

(Accordingly the appeals were referred to Venkataramana Rao J. who gave the following opinion):

Venkataramana Rao J. — This civil miscellaneous appeal has been referred to me in consequence of a difference of opinion between my learned brothers Burn and Abdur Rahman JJ. The point in controversy in the appeal is whether the plaintiff is entitled to attach and sell the village of Errongaud Cottah in execution of a decree in O. S. No. 63 of 1933 obtained against the defendants. The suit which resulted in the decree was laid on a promissory note executed by defendants 1 and 4 and the father of defendants 5 to 7. Defendants 2 and 3 were impleaded in the suit as the sons of defendant 1. In execution of the said decree an application was made to attach the suit property under O. 21, R. 54 and have the same sold under O. 21, R. 66. The defendants preferred objections both to the attachment and sale on the ground that the property is inalienable and therefore not liable to be attached and sold. The said village was granted to one Sriram Singana Naick, a Poligar of the District of Tripassore, on 1st August 1802 by Lord Clive on behalf of the East India Company by a deed of grant bearing the said date. The object of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office which was carried out in consequence of a policy enunciated by the then Government of abolishing all emoluments granted in support of the police establishments: *vide* Cl. 5, Permanent Settlement Regulation 25 of 1802. After stating in para. 2 that the grant was made to the grantee in pursuance of that policy, it proceeds to indicate the nature of the interest conferred on the grantee and his heirs, and in para. 3 the nature of the interest is described thus:

You are entitled to collect those Russooms and Marahs at the rate entered in the dowle of Fasli 1210 and to appropriate the amount to your own use.

In para. 4 it is distinctly stated that the grant was to the grantee and his heirs. Para. 5 is important and it runs thus:

In confirming to you and your heirs as shrotriem the village of Errongaud Cottah you are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Honourable Company.

The word 'you' in the sentence 'you are to understand' will, having regard to the context, include both Singama Naick and his heirs referred to in the previous passage. The confirmation of the grant to the grantee and his heirs is repeated in para. 5 so as to emphasize that the restriction on alienation is imposed on both the grantee and his heirs. It appears to me that the intention of the East India Company in conferring this grant was not to make an absolute grant to Singama Naick but to confer on him a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who will succeed him. It cannot be doubted that it is competent to the Crown to make such a heritable grant providing for a succession of limited interests, each grantee taking the estate for life. In 3 Bom 186,[8] a similar grant came up for consideration before their Lordships of the Privy Council. In that case the grant was made by the East India Company in 1800 to one Najamoddin, who was the Commander-in-Chief of the forces of the Nawab, and was called the Buckshee.

As the administration of the city of Surat was taken over by the East India Company it was thought incumbent and proper that some suitable provision should be made for the said Buckshee and his descendants. In pursuance of this object they made a grant of a jagir to the said Najamoddin and his children. The grant clearly stated that Najamoddin with his children or descendants after the deduction of the income of the jagir according to the particulars given at the foot of the sanad shall receive from the Government a certain sum and the mahals which were provided as jagir was mentioned in the schedule to the sanad. In that case, one of the descendants Moinooddin executed a mortgage of some of the mahals and a suit was filed on the mortgage and a question arose what was the nature of the interest possessed by the said Moinooddin and whether he could bind his descendants or his co heirs. The Collector who was then in possession of the property denied the liability of the mortgagee to claim any payment of the income of the said property after the death of Moinooddin on the ground that he had only a life-interest in the property. Their Lordships upheld the contention. After stating that it was the intention of the East India Company to make a permanent provision for the family of the said Buckshee, their Lordships observed thus:

Their Lordships, having regard to the peculiar character of this grant from the Government under the circumstances which have been related, and with the objects which it expresses have to come to the conclusion that the Court of Bombay was right in treating it as conferring upon the descendants of Najamooddin, who would be entitled under it, an estate for life and for life only.

In answer to an argument whether it is open to the East India Company to create such an estate, their Lordships made the following observation:

Their Lordships may observe that they are not prepared to affirm that all the considerations applicable to grants from private persons apply to grants from the State.

In 59 Cal 1,[1] a grant of a similar description came up again for consideration before the Privy Council. The grantee in that case was the eldest son of the Nawab Nazim of Bengal, Bihar and Orissa. He agreed to relinquish this title with its appurtenant rights in consideration of his receiving the titles of Nawab Bahadur of Murshidabad and Amir-ul-Omrah and also in consideration of provision being made for the maintenance of the said dignity. There was a contract entered into between the Government and the grantee which was evidenced by an indenture dated 12th March 1891. The Secretary of State on behalf of the Government covenanted for the due maintenance and support of the said titles to pay to the grantee and his lineal male heirs in perpetuity a particular sum and agreed that the immovable properties mentioned in the schedule to the indenture should be held and enjoyed by the grantee and such one among his lineal heirs male as may be successively entitled to hold the said titles in perpetuity with and subject to the incidents, powers, limitations and conditions as to inalienability and otherwise. The conditions as to inalienability ran thus:

8. Gulabdas Jugjivandas v. Collector of Surat' (1878) 3 Bom 186=6 I A 54=3 Sar 889 (P C).

The said Nawab Bahadur shall not, nor shall any of his successors in the said titles, sell, mortgage, devise or alienate the said properties respectively or any of them otherwise than by lease or demise for a term not exceeding 21 years and under a rent without bonus or selami.

This indenture was later confirmed by an Act called the Murshidabad Act 15 of 1891. Their Lordships held that the Act rendered the property inalienable and observed that the Nawab for the time being was only a limited owner with power to draw the rents in question during the period of his life. Though they held the property to be inalienable, they observed that a receiver could be appointed to appropriate the rents and profits for discharging the debts of the creditors as the Nawab was given disposing power over the income. After referring to S. 60, Civil P. C., they remarked thus :

While the Murshidabad Act renders the immovable properties to which it relates, inalienable except to the limited extent permitted, it imposes no restriction on the enjoyment of the rents by the Nawab Bahadur for the time being. So long as he is entitled to draw the rents he may dispose of them as he pleases .... The Nawab therefore has a disposing power over the income. Once this is established, no question of public policy is involved and their Lordships are unable to see that either the terms of the statute or the indenture are contravened by aiding the creditors of the appellant to effect payment out of his income of the debts which he has incurred.

It will be seen that this case is an authority for the view that it is open to the Crown to create successive life-estates or limited interests and the prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant. And by virtue of the limited nature of the grant, if the immovable property is such as it is not saleable, the rents and profits may be appropriated for the use of the creditors. My learned brother Burn J. distinguished 59 Cal 1[1] on the ground that a special Act of the Legislature was passed to effectuate the purpose intended by the Government and remarked thus :

It needs no argument to show that the Governor-in-Council could not issue a declaration having the force of law, to the effect that the village could never be transferred by the operation of law.

With great respect I am unable to agree with him in this view and the difficulty which he felt is sufficiently met by the decision of the Privy Council reported in 27 All 634.[9] That was a case in which the taluka of Mehewa was granted in 1859 to one Gajraj Singh and his heirs. On his death the property was inherited by his elder son Girwar Singh who was recognized by the Government as Talukadar. In 1861 the Government proposed, in the case of any Talukadar whose eldest son by custom succeeded him, to change the ordinary form of sanad for a sanad stating that primogeniture would be the line of inheritance. Girwar Singh was willing to have the sanad of the nature proposed granted to him and accordingly he received a sanad in 1861. A question arose after the death of the adopted son of Girwar Singh as to the succession of the said Taluka. The contention advanced was that the Government having granted the estate in 1859 to Gajraj and his heirs nothing was left to grant to Girwar at a later date but this objection their Lordships met by saying that it would not apply to transaction by which Girwar, the person absolutely entitled to inheritance to everything that passed under the earlier grant, surrendered it in consideration of a re-grant of the same estate on new terms. On this a further contention was advanced that the Government had no power by an executive act to change the line of succession and the contention is thus put :

It was suggested that though in the earlier troublous times many things were effectively done by Government as acts of State, still, in or after 1861, no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law, and the law in the present case would be the Hindu law.

Their Lordships met this contention by observing as follows :

Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, Act No. 15 of 1895 (The Crown Grants Act, 1895).

Therefore this case is a distinct authority for the position that it is open to the Crown to create a heritable grant like the one in question, each grantee taking a life-interest. S. 3 of the Crown Grants Act is clear on the point. In this case the grantee Singama Naick had only a life-interest to enjoy the rents and profits and each of his successive heirs had the same tenure. The only interest which can be made available to the plaintiff for the satisfaction of his debt is the interest of defendants 1 and 4 in the property the father of defendants 5 to 7 having died. I shall now proceed to deal with some of the cases cited at the bar in support of the contention raised by the

9. Sheo Singh v. Raghubans Kunwar, (1905) 27 All 634=32 I A 203=8 O C 317=8 Sar 791 (P C).

respondent. Emphasis was laid on the decision in 35 M L W 395[5] by Curgenven J. and the decision of Ramesam J. in 50 Mad 441,[6] both of which cases were referred to by my learned brother Burn J. in his judgment. In the course of the judgment, Curgenven J. makes the following remarks:

> It can hardly be disputed that the jagir is the personal property of the jagirdar and accordingly there is nothing in the section (S. 60, Civil P. C.) which will render it exempt from being proceeded against under a decree.

The terms of the jagir are not given and if, as observed by him that the jagir is the personal property of the jagirdar, there can be no question that it is attachable and saleable. The learned Judge makes the following further observation on which much reliance is placed.

> Reference has then been made to the Crown Grants Act which provides by S. 2 that the Transfer of Property Act shall not apply to grants from the Crown, including, I suppose, a jagir of this character. But that is not to say that the operation of the Civil P. C. is also rendered inapplicable.

With great respect to the learned Judge, I am not able to follow this observation. If under the terms of the grant the jagirdar takes only a limited interest and is incapable of alienating the property, it is not possible to understand how the operation of the Civil P. C. would be rendered inapplicable. The learned Judge omitted to notice S. 3 which expressly mentions that all limitations contained in a Crown grant shall be valid and take effect according to their tenor notwithstanding any statute or enactment of the Legislature which would take in S. 60, Civil P. C. As regards the decision in 50 Mad 441,[6] in my opinion, it has no bearing on the facts of the present case. The question in that case was, what is the effect of prohibition indicated under R. 5, Cl. 3 of the Inam Rules? Ramesam J. observed that the object was only to protect the interests of the Government and the prohibition indicated therein can only mean that as against the Government all alienations are inoperative; but it was not the intention of Ramesam J. to lay down that where under the terms of a particular grant a limited interest is conferred on a grantee the property could still be alienated. As pointed out in 44 Mad 632[10] at p. 635, it is open to the Government, in spite of the prohibition, to recognize the title of the alienee, and Sadasiva Aiyar J. observed thus in that connexion:

> The so-called prohibition is therefore not based on any grounds of public policy except the protection of the rights of the Government, and so long as such protection is carried out there is no reason to consider the prohibition as an absolute prohibition even if it has the force of law which is very doubtful.

It cannot be said that the prohibition against alienation under the grant in question was intended for the protection of the Government. It was made in pursuance of a policy of preserving intact the property in the family being lost by improvident alienations. I am therefore of the opinion that the interest possessed by defendants 1 and 4 in the property is only the right to enjoy the rents and profits during their lives and they are attachable and saleable but the proper order in such cases is that passed by my learned brother, Abdur Rahman J. I accordingly agree with him and hold that the appropriate order to be passed in this case is to direct the appointment of a receiver to be in possession and management of the property who will collect the rents and profits thereof and pay the share of the net profits of defendants 1 and 4 in satisfaction of the decree and the share of the net profits appertaining to the deceased father of defendants 5 to 7 to the guardian of defendants 5 to 7.

A. A. O. No. 101 of 1935: A. A. O. No. 220 of 1936: These appeals coming on after the expression of opinion of the third Judge to whom the appeals were referred for opinion and for final orders, the Court made the following

Order.

In these appeals we direct that the parties shall pay their own costs throughout.

C.R.K./D.S. *Order accordingly.*

*** A. I. R. 1938 Madras 631**

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Chavali Velayya — Petitioner.

v.

President of Board of Commissioners of Hindu Religious Endowments, Madras — Respondent.

Civil Misc. Petns. Nos. 3307 to 3315 of 1937, Decided on 26th January 1938, for leave to appeal to His Majesty in Council against the Judgment of High Court, D/- 22nd January 1937.

10. Venkatarama Aiyer v. Chandrasekhara Aiyer, (1921) 8 A I R Mad 292=62 I C 625=44 Mad 632=40 M L J 344.

(a) Civil P. C. (1908), S. 110 — Substantial question of law — Question whether property was gift to God or archaka service inam — Question turning upon construction of inam papers — Question is not substantial question of law.

Where the question to be decided is one of fact, it does not involve any issue of law merely because documents, which were not instruments of title or otherwise the direct foundation of rights but were really historical materials, have to be considered for the purpose of deciding the question: *A I R 1930 P C 91, Foll.* [P 632 C 2]

Hence the question whether certain property was gift to God or an archaka service inam and turning upon the construction of inam papers does not involve any substantial question of law. [P 632 C 2]

(b) Civil P. C. (1908), S. 110 – View based on language of section and taken in several cases — No substantial question of law is involved.

The view that the requirement of S. 70, Hindu Religious Endowments Act is fulfilled by the notice being served upon the archaka on the ground that he was the de facto trustee is based on the clear language of the section itself, and taken in several cases and as such no substantial question of law is involved. [P 632 C 2]

* (c) Civil P. C. (1908), S. 110 — Decree of affirmance — 'Decree' and 'decision' — Distinction between — Several decisions in respect of several subject-matters — Decree embodying those decisions should not be regarded as one and entire.

In connexion with the High Court, the words used in Section 110 are, "the decree", whereas in regard to the lower Court, the expression is "the decision". These two expressions should not be held to mean exactly the same thing. It is reasonable to hold that the Legislature employed two different expressions to convey two different ideas. A single decree may comprise several decisions and each decision may relate to a distinct subject matter. The oneness of the decree does not preclude the question being considered, whether it comprises one decision or several decisions. When there are several decisions in respect of several subject-matters, the decree embodying those decisions should not by some fiction, be regarded as one and entire: *A I R 1936 Mad 881, Foll.*; *A I R 1937 Lah 712, Rel. on.* [P 633 C 2]

Where therefore out of five items held by the lower Court to belong to the deity, the High Court excluded two of them, on the ground that the grant did not comprise them, the High Court's decree must be treated as having affirmed the lower Court's decision in regard to three items and reversed it in regard to the remaining two. [P 633 C 2]

V. Rangachari — *for Petitioner.*

K. Subba Rao — *for Respondent.*

Venkatasubba Rao J.—These are petitions for leave to appeal to His Majesty in Council (the judgment to be appealed from is reported in 46 M L W 587[1]). All of them excepting one may be easily disposed of. The question raised in each case is whether the property was a gift to the god or was an archaka service inam. The point turned upon the effect of the inam proceedings and it was held in an affirming judgment, upon a construction of the various inam papers, that the gifts were intended for the deity. That the property in each case is of the requisite value under S. 110, Civil P. C., is not disputed. The High Court's decision being an affirming one, the only point that arises is whether the proposed appeal involves some substantial question of law. The finding here was reached, as already stated, upon a construction of the inam papers and no question of the law was raised.

Where the question to be decided is one of fact, it does not involve any issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials have to be considered for the purpose of deciding the question : 11 Lah 199.[2]

Following this decision, I must hold that the question whether the gift was to the god or not, does not in the circumstances involve any substantial point of law. A subsidiary question was raised in the appeals whether the requirement of S. 70, Hindu Religious Endowments Act, was fulfilled by the notice being served upon the archaka on the ground that he was the de facto trustee. The answer given in the affirmative was based on the clear language of the section itself. We understand that this view has been taken by at least three Benches of this Court, and this being so it is hardly proper to treat the appeal as involving a substantial question of law. As regards the remaining petition which relates to C. M. A. No. 125 of 1934, different considerations apply. (The judgment on this part of the case is reported in 46 M L W 587,[1] already cited, at p. 595.) The archakas claimed title to five plots bearing five distinct survey numbers. As in the other cases, so here the High Court agreeing with the lower Court held that under the grant the archakas possessed no beneficial interest. But as to what the grant comprised, the lower Court made a mistake due to inadvertence, and that mistake alone the High Court rectified. The result was that out of the five items held by the lower Court to belong to the deity, the High Court excluded two of them on

1. H. R. E. Board v. Koteswara Rao, (1937) 24 A I R Mad 852=(1937) 2 M L J 413=46 M L W 587.

2. Wali Mohammed v. Mohammed Baksh, (1930) 17 A I R P C 91=122 I C 316=57 I A 86 = 11 Lah 199 (P C).

the ground that the grant did not comprise them ; to this extent the decree of the lower Court was varied.

The proposed appeal by the archakas relates to the three items as to which the High Court's decree has affirmed the lower Court's decision. It is contended that the decree passed by the lower Court is single and indivisible and that the decree of the High Court which has not affirmed it in its entirety cannot be regarded as an affirming decree. In a recent case heard by Cornish J. and myself, a similar contention was raised which we refuted in a considered judgment. The point was elaborately discussed there and it is unnecessary to repeat the reasons which led us to the conclusion that the oneness of the decree does not preclude the question being considered, whether it comprises one decision or several decisions: 71 M L J 580.[3] The matter was discussed from the point of view first, of the case comprising several subject-matters and, secondly, of there being claims against several defendants, I put in the judgment, delivered by me, several typical cases in order to show the anomaly that would result, should the contention based on the singleness of the decree be allowed to prevail. The argument amounts to this : that when a decree is on its face single, it would be wrong to divide it up into parts. If this be correct, it would logically follow that when a decree deals with several alienees as from a Hindu widow, it should be treated as a single decree within the meaning of S. 110. This view was put forward but repeatedly repelled in several decisions such as 42 Mad 228[4] and A I R 1929 Mad 827.[5] In a Calcutta case, the learned Judges speak of "the enormity of the opposite view": 62 Cal 257.[6] In 71 M L J 580[3] already cited, two propositions were deduced as flowing from certain decisions of the Judicial Committee : first, when there are several subject-matters comprised in the lower Court's decree, each should be regarded separately for deciding whether the High Court's decree is an affirming one or not under S. 110 although in some cases the question whether the lower Court's decree consists of one subject-matter or several subject-matters may present some difficulty; secondly, as regards the subject-matter to which the proposed appeal to the Privy Council, relates, it makes no difference whatsoever whether the lower Court's decision has been varied to the prejudice of the applicant or in his favour.

Turning to the facts here, there can be no doubt that the excluded items stand on a footing different from the rest, and the High Court's decree must be treated as having affirmed the lower Court's decision in regard to three items and reversed it in regard to the remaining two. A careful reading of the relevant provisions will in my opinion dispel all difficulty. Ss. 109 and 110, Civil P. C., deal with the matter under consideration and must be read together. To quote the material words: (1) An appeal shall lie to His Majesty in Council from any decree passed in appeal by a High Court (S. 109). (2) Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law (S. 110). The contention put forward misses the significance of the two different expressions employed in these provisions. In connexion with the High Court, the words used are, "the decree", whereas in regard to the lower Court, the expression is "the decision". I fail to see why these two expressions should be held to mean exactly the same thing. It is reasonable to hold that the Legislature employed two different expressions to convey two different ideas. A single decree may comprise several decisions and each decision may relate to a distinct subject-matter. It is all the more necessary that this distinction should be kept in view, as by ignoring it several anomalies would result as already shown. As observed in my judgment in 71 M L J 580[3] cited above:

> As a question of construction, we fail to see why when there are several decisions in respect of several subject-matters, the decree embodying those decisions should, by some fiction, be regarded as one and entire.

After again considering the matter very carefully, I see no reason to depart from this view. It may be mentioned that this decision has since been followed in I L R (1937) 18 Lah 268.[7] In the result, leave is

3. Venkatasamy Chetty v. Sekkutti Pillai, (1936) 23 A I R Mad 881=166 I C 251 = 71 M L J 580=I L R 1937 Mad 121.
4. Vaithilinga Mudaliar v. Srirangathanni, (1919) 6 A I R Mad 275=49 I C 484=42 Mad 228=36 M L J 119.
5. Thayaramma v. Varadacharyulu, (1929) 16 A I R Mad 827=123 I C 844.
6. Bibhuti Bhushan Dutta v. Sree Pathi Dutta, (1935) 22 A I R Cal 146=154 I C 1072=62 Cal 257=38 C W N 1174.
7. Babulal v. Siri Ram, (1937) 24 A I R Lah 712 =172 I C 803=I L R (1937) Lah 268=39 P L R 877.

refused and the petition in C. M. A. No. 125 of 1934 also is dismissed. The applicant will pay the respondents costs in all the petitions. We fix the advocate's fee in C. M. P. No. 3311 of 1937 at Rs. 60 and in each of the remaining eight petitions at Rs. 30.

Abdur Rahman J.—While the case was being argued, I was placing a grammatical construction on the wordings of S. 110, Civil P. C., and was inclined to the opinion that if a decree passed by the High Court modified the decision of the Subordinate Court in any respect, a party would be entitled to get leave to appeal to the Privy Council as long as the subject-matter was of the requisite value; and that it was unnecessary for him to show that a substantial question of law was also involved in the case. In view of the fact however that there were a fairly large number of decisions of various High Courts taking a different view, I was not quite confident of the interpretation which was being placed by me. I had assumed of course that the word "decision" used in Section 110 was employed by the Legislature to express the decision of the entire suit. To a certain extent, I was relying on the interpretation placed on that word by their Lordships of the Privy Council in 25 All 109.[8] On a further consideration and after some discussion with my learned brother, I had to alter my opinion and fall in with his view, which he has now expressed in his judgment, to the effect that the word "decision" employed in S. 110 could be reasonably construed only in the manner suggested by him. I am still of the opinion that if the word "decree" had been used in the section in place of the word "decision", the interpretation placed by me initially would probably be the correct one. But having regard to the fact that a permission for appeal to the Privy Council was being hedged in by several qualifications, I had to agree that the word 'decision' must have been employed by the Legislature to convey something different from either a judgment or a decree. The decree may comprise a number of decisions in respect of various subject-matters which may have been permitted by the Civil Procedure Code to be joined in one suit and if the decision of every subject-matter can be called a decision of that subject-matter, there is no reason to hold that the decision must necessarily be taken to cover the decision of all the subject-matters involved in a suit. I would therefore agree with the order proposed by my learned brother.

C.R.K./D.S. *Leave refused.*

8. Tassaduq Rasul Khan v. Kashi Ram, (1903) 25 All 109=30 I A 35=8 Sar 337 (P C).

A. I. R. 1938 Madras 634

ABDUR RAHMAN J.

In re, Adiraju Somanna — Petitioner.

Civil Revn. Petn. No. 648 of 1937, Decided on 17th December 1937, from order of Dist. Court, East Godavari at Rajahmundry, D/- 14th April 1937.

(a) Civil P. C. (1908), S. 115—Order by District Judge declaring person tout under S. 36, Legal Practitioners Act can be revised by High Court under S. 115—S. 224 (2), Government of India Act, 1935, does not bar revision—S. 439 Criminal P. C. does not apply to such case.

An order passed by a District Judge declaring a person a tout under S. 36, Legal Practitioners Act is capable of being revised by the High Court under S. 115, Civil P. C. and sub-s. (2) of S. 224, Government of India Act does not bar such revision. S. 439, Criminal P. C., would not apply to such a case and the proceedings would not be open to revision under the Criminal Procedure Code. The revisional jurisdiction under S. 115, Civil P. C., however to be exercised in such case, being necessarily of an exceptional character cannot be invoked except in furtherance of justice : *A I R 1917 P C 71, Rel. on ; Case law discussed.* [P 635 C 1; P 637 C 1]

(b) Legal Practitioners Act (1879), Ss. 3, 36—Declaring person to be tout.

Before a person can be declared a tout, it must be found as a fact that he has acted in a manner which would bring him within the definition laid down in S. 3. [P 637 C 2]

(c) Practice — Judgment — Duty of Judge—Judges writing judgments should be dignified and restrained in expression of their opinion—They should avoid expressions giving rise to comment that they had made up their minds before case had started.

Judges writing judgments, more specially experienced officers, should while writing judgments be dignified and restrained in the expression of their opinion. They should try and avoid expressions which may attract a comment that the Judge had either made up his mind before the case had started or had identified himself with a case to an extent that he was unable to appreciate the case or weigh the evidence before him impartially and without any bias. It is usually unnecessary and in any case unsafe to indulge in generalizations. [P 637 C 2]

P. Somasundaram and G. Balaparameswara Rao — *for Petitioner.*

Govt. Pleader — *for the Government.*

Judgment. — This is a petition for revision against the order passed by Mr. Mack, District Judge of East Godavari at Rajahmundry declaring the petitioner to be a tout under S. 36, Legal Practitioners' Act.

A preliminary objection has been raised by the Government Pleader to the effect that the order passed by the lower Court is not open to revision. The point is of considerable importance as it involves the question of valuable rights of a citizen and has therefore to be carefully examined. The contention raised by the Government Pleader is based on the addition of sub-cl. 2 to S. 224, Government of India Act, 1935 which did not find a place in the corresponding S. 107 of the prior Act of 1919. Sub-cl. (2) of S. 224 of the present Act reads as follows :

> Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

Basing his reliance on the amendment, the Government Pleader contends that the High Courts in India could revise orders, similar to the one in question now, either under S. 15, High Courts Act or later under S. 107, Government of India Act (1919) before the new Act came into force, but this power has been taken away by the above stated amendment. He further urges that the provisions contained in S. 115 and S. 439, Civil P. C. and Criminal P. C. respectively have no application and the High Court is thus not entitled to revise the order although it is admitted by him that in a suitable case a petition by way of a writ of certiorari might be competent. The amendment contained in the new Government of India Act makes it clear that the High Court would not be entitled to revise the order in question under S. 224 of the Act, if it is not capable of being revised under any other provision of law. I am also in agreement with the contention that S. 439, Criminal P. C. would have no application to the present case. A bare perusal of the section would show that it is inapplicable. The only question then is whether S. 115, Civil P. C. does not authorize the High Court to revise the order.

The learned Government Pleader has placed reliance in support of his contention on a number of decisions and on going through them I find that the rulings given in 31 All 59,[1] 45 All 676[2] and 56 Bom 577[3] have either merely followed 21 All 181[4] or held that an order passed under S. 36, Legal Practitioners Act was capable of being revised under S. 15, High Courts Act or S. 107, Government of India Act (1919). The last proposition is undoubtedly sound but, as already held by me, has been rendered useless for this purpose by the addition of the amendment to the present Government of India Act. As for 21 All 181,[4] one would have to examine the pronouncement with respect and care that it deserves as it comes from an eminent Chief Justice like Strachey before one respectfully agrees with his conclusion or begs to differ from it with deference. On an examination of this decision, I find that although it has been stated in general terms that the provisions of S. 622, Civil P. C. (1882) do not apply the learned Chief Justice has given no reason for this opinion. This was probably considered to be unnecessary as it was found that the High Courts had very wide powers of superintendence under S. 15, High Courts Act, and could in a suitable case interfere with an order passed by a subordinate Court. Moreover the ground taken in that decision was that the finding was against the weight of evidence. This ground was not available in revision and the petition was dismissed for that reason. It was unnecessary to decide any further. In the circumstances, any expression of opinion by the learned Chief Justice on the point that the provisions of the Civil Procedure Code are inapplicable must be held to be obiter.

In view of the situation which has now come into existence on account of the addition to sub-cl. (2) to S. 224, Government of India Act, and in the absence of either any reasons having been specified in 21 All 181[4] or the finding on this point to be essential, one would have to examine the terms of S. 115, Civil P. C., carefully before one could arrive at a conclusion one way or the other. Before I examine this section, I must say a few words in regard to a Madras case, 44 M L J 437,[5] which was decided by an eminent Judge of this Court. A study of that decision however shows that the point which I have been called upon to decide in this case was neither raised before nor considered by him.

1. In the matter of the Petition of Kedarnath, (1909) 31 All 59 = 1 I C 143 = 1908 A W N 279=6 A L J 22.
2. In the matter of the Petition of Kashi Nath, (1924) 11 A I R All 69=79 I C 693 = 45 All 676=21 A L J 671.
3. Maganbhai v. Dinkar Rao, (1932) 19 A I R Bom 596=1932 Cr C 864=140 I C 553=34 Cr L J 47=56 Bom 577=34 Bom L R 1281.
4. In the matter of the Petition of Madho Ram, (1899) 21 All 181=1899 A W N 15.
5. Varadachariar v. Kalyanasundaram Iyer, (1923) 10 A I R Mad 188=69 I C 433=23 Cr L J 705=44 M L J 437.

He had merely laid down that inasmuch as no procedure was provided for an enquiry under S. 36, Legal Practitioners Act, the Court should adopt a procedure which does substantial justice to the parties and the provisions of O. 7, R. 11, Civil P. C., would not apply to the proceedings. This is surely no authority for the contention raised by the learned Government Pleader. The Government Pleader had also cited 12 Lah 385[6] in support of his contention. There is an observation in that case by Jai Lal J. that the proceedings under S. 36, Legal Practitioners Act, are of a quasi criminal nature but this was made in order to hold that the consent of the person complained against would not validate the otherwise invalid proceedings. It may be that according to the practice of that Court revisions from the order passed under S. 36, Legal Practitioners Act are entertained as criminal revisions, but in view of what I have stated above, I am of the opinion that S. 439, Criminal P. C., would not apply to a case of this kind and the proceedings would not be open to revision under the provisions of the Criminal Procedure Code.

As for the authorities cited by Mr. Somasundaram on behalf of the petitioner, I find that the learned Judges merely assumed jurisdiction in the decisions cited, viz. 1912 M W N 959,[7] 28 I C 918[8] and 62 I C 829,[9] without any discussion, which they undoubtedly had in any case before the new Government of India Act (1935) came into force and these cases are therefore of no assistance to me in deciding this point. There are some pertinent observations by an eminent Judge of the Calcutta Court in 11 C L J 513,[10] but even this decision affords no help to me. In the absence of any reference in that ruling to S. 622, Civil P. C., I must presume that the provisions of that section were not examined by the learned Judge in that case. The other two cases which were relied on by the counsel for the petitioner are 26 Mad 596[11] where a portion of the proceedings were ordered to be cancelled under S. 622, Civil P. C. by a Bench of this Court consisting of no less eminent a Judge than Bhashyam Ayyangar J. and another Judge. This case was followed by Walsh J. in 40 All 153[12] where in spite of the fact that the two cases of the Allahabad Court (viz. 21 All 181[4] and 31 All 59[1]) were brought to his notice, he decided to prefer the decision published in 26 Mad 596[11] and held that the High Court could interfere in a revision under S. 115, Civil P. C. and did not consider that it was necessary to invoke the aid of the superintendence section in the Government of India Act. In this state of divergence of opinion amongst the learned Judges of different High Courts, it becomes all the more necessary to examine the provisions of the Code of Civil Procedure more closely.

A reference to S. 115 would show that the High Court is competent to make such order as it thinks fit, if it finds that a case has been decided by any Court subordinate thereto, and in which no appeal lies, if such subordinate Court has either acted beyond or failed to exercise a jurisdiction or has acted in the exercise of its jurisdiction illegally or with material irregularity. It cannot be denied that the District Judge was acting in this case as a Court and not in an administrative capacity. The question then is whether the finding given by him against the petitioner and declaring him to be a tout would amount to a decision of the case pending before him. It has been held by their Lordships of the Privy Council in 40 Mad 793[13] that the term 'case' used in S. 115 of the Code is wider than the word 'suit' in which a plaintiff seeks to obtain a particular relief. Their Lordships have recorded their finding in the following words :

> It was next contended that the matter of the four petitions in which the order of 19th July 1913 was made, did not constitute a 'case' within the meaning of S. 115, Civil P. C. No definition is to be found in the Code of the word 'case'. It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an ex parte application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official

6. Chatur Bhuj v. Emperor, (1931) 18 A I R Lah 57=1931 Cr C 137=131 I C 238=32 Cr L J 672=12 Lah 385.
7. In re Somayajulu Ramamurthi, (1912) MWN 959=17 I C 251.
8. In re Sambayya, (1915) 2 A I R Mad 1001=28 I C 918.
9. Keramatali v. Emperor, (1921) 62 I C 829=22 Cr L J 589.
10. Hari Charan v. District Judge of Dacca, (1910) 11 C L J 513=6 I C 327.
11. Bavu Sahib v. District Judge of Madura, (1903) 26 Mad 596.
12. Kalka Prasad v. Emperor, (1918) 5 A I R All 271=44 I C 125=40 All 153=16 A L J 76=19 Cr L J 269.
13. Balakrishna Udayar v. Vasudeva Ayyar, (1917) 4 A I R P C 71=40 I C 650=40 Mad 793=44 I A 261 (P C).

duties. Their Lordships concur therefore with the High Court in thinking that the matter adjudicated upon was a case within the meaning of S. 115 of the Code.

Applying the abovementioned principle enunciated by their Lordships, I see no justification in rejecting the contention that the decision by the District Judge of the proceedings pending before him in which the petitioner was declared to be a tout would fall within the scope of S. 115, Civil P. C. In a number of cases arising under other enactments like the Guardians and Wards Act, Succession Certificate Act, Indian Arbitration Act, Provincial Insolvency Act, etc., it has been held by various High Courts that the orders passed by subordinate Courts, if not declared to be appealable under the special Acts, would nonetheless be capable of being revised under S. 115, Civil P. C. There is no reason to hold why the Legal Practitioners Act should not be treated in pari materia with other special enactments. S. 36, Legal Practitioners Act confers a special jurisdiction on subordinate Courts and inasmuch as the attendance in Court is an important valuable civil right of a citizen it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or with material irregularity. I would therefore hold that the decision of the District Judge is capable of being revised by me under S. 115, Civil P. C. The revisional jurisdiction which I am now invited to exercise is necessarily of an exceptional character and cannot be invoked except in furtherance of justice. I am consequently competent to scrutinize an order which seriously affects the petitioner's character and prospects with the object of satisfying myself if there has been a compliance by the lower Court with the provisions of the law. If I find that the order passed by the Court is justified by the evidence on the record I would decline to interfere with it. If on the other hand I find that there is no legal evidence on the record to justify the conclusion arrived at by the learned District Judge I would be constrained to interfere with his order. I might state here that as a Court of revision I cannot be expected to weigh the evidence which was led before the District Judge but if I find that there was no evidence at all from which the inference as drawn by the learned District Judge could be deduced I would have no alternative but to interfere.

With these remarks I shall first consider as to what is required by law to be proved against the petitioner before he can be declared to be a tout and then proceed to consider whether these requirements of law have been proved in this case. A tout has been defined by S. 3, Legal Practitioners Act to be a person (a) who procures, in consideration of any remuneration moving from any legal practitioner, the employment of the legal practitioner in any legal business, or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business; or (b) who for the purpose of such procurement frequents the precincts of Civil or Criminal Courts or of revenue offices, or railway stations, landing stages, lodging places or other places of public resort. Before a person can be declared to be a tout, it must be found for a fact that he has acted in a manner which will bring him within this definition. This necessitates an examination of the evidence on which the District Judge has acted in this case in order to ascertain whether there was any material on the record on which he was entitled to act and arrive at the decision that the petitioner was a tout.

Bearing the principles laid down by me in this judgment and the definition of a tout in mind, I shall address myself to the task of examining the facts and evidence in this case. (The judgment then narrated the facts and discussed the evidence and proceeded.) I must therefore hold that the learned District Judge has acted illegally and in any case with material irregularity in the exercise of his jurisdiction. The revision petition must therefore be allowed and the order passed by the District Judge quashed. I cannot part with this case without adverting to the manner in which the lower Court has written its judgment. I should expect experienced officers to be more dignified and restrained in the expression of their opinion. They should try and avoid expressions which may attract a comment that the Judge had either made up his mind even before he had initiated proceedings or had identified himself with a case to an extent that he was unable to appreciate the case or weigh the evidence before him impartially and without any bias. It is usually unnecessary and in any case unsafe to indulge in generalizations.

C.R.K./R.M. *Petition allowed.*

*** A. I. R. 1938 Madras 638**

BURN AND VENKATARAMANA RAO JJ.

Nagar Damodar Shanbhogue and others — Appellants.

v.

Gange and others — Respondents.

Appeal No. 461 of 1935, Decided on 27th January 1938, against order of Sub-Judge, South Kanara, D/- 28th November 1935.

***(a) Civil P. C. (1908), O. 21, R. 19—Decree in favour of one party for sale of property for recovery of arrears of rent — Same decree granting opposite party costs—O. 21, R. 19 applies — Person entitled to smaller amount cannot execute his decree.**

Under O. 21, R. 19 the remedy of each party against the other need not be precisely of the same nature. All that it requires is that two parties will be held entitled to recover sums of money from each other. A decree by *A* against *B* for a sum of money to be recoverable from his property is as much a decree to recover a sum of money from *B*. The decree need not necessarily be a decree directing *A* to recover the sum of money from *B* personally. The Rule does not say or provide in what manner the decree is to be executed. [P 639 C 1; P 640 C 1, 2]

Where therefore a party gets a decree for the sale of property for the amount claimed as arrears of rent and under the same decree the opposite party is entitled to costs, O. 21, R. 19 applies and the party entitled to smaller sum cannot execute the decree : *16 All 395; 23 Mad 121 and A I R 1936 Mad 626, Rel. on.* [P 640 C 2]

(b) Interpretation of statutes—New Act using same language used by former one relating to same subject—Use of words must be assumed to have been in same sense which decisions have attached to them.

If a new Act uses the same language which was used in a former Act referring to the same subject, and passed with the same purpose, and for the same object, the safe and well known rule of construction is to assume that the Legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them : *(1882) 14 Ch D 563, Rel. on.* [P 640 C 1]

B. Sitarama Rao and K. P. Sarvothama Rao — *for Appellants.*

K. Srinivasa Rao — *for Respondents.*

Venkataramana Rao J.—This is an appeal from the order of the learned Subordinate Judge of South Kanara ordering the arrest of the appellant in execution of the decree for costs in favour of the respondents in Appeal No. 223 of 1926[1] on the file of the High Court on appeal from the decree in O. S. No. 8 of 1924 on the file of the Subordinate Judge of South Kanara. The said suit, O. S. No. 8 of 1924, was filed by the appellant to recover a sum of money due in respect of a usufructuary mortgage executed by the defendants and also for arrears of rent in respect of certain leases executed by some of the defendants relating to the mortgaged property. The Subordinate Judge dismissed the plaintiff's suit on the ground that the appellant was not entitled to bring the property to sale as there was no personal covenant to pay. On appeal the learned Judges held that so far as the mortgage is concerned, there was no personal covenant which would entitle the appellant to the relief of selling the mortgaged property, but in regard to arrears of rent, as the mortgage property had been made a security for the arrears of rent, there was no bar to the enforcement of the charge by asking for the sale of the properties. Accordingly they passed a preliminary decree for sale for the amount claimed in respect of the arrears of rent. The relief that was ultimately awarded by the judgment of the High Court ran thus:

In the result, the appeal is partly allowed and a decree is given in plaintiff's favour for a sum of Rs 11,425-7-0 (on account of the arrears of rent claimed in Schedule B) with subsequent interest thereon at six per cent. per annum from the date of suit till the date fixed for payment and also proportionate costs in both the Courts, and thereafter with interest at six per cent. per annum on the aggregate amount. Time for payment is four months from this date. In case of default in payment the mortgaged properties will be sold subject to the usufructuary mortgage lien of the plaintiff under Ex. A. Liberty is reserved to him to bring a portion only of the mortgaged properties to sale for the realization of this decree amount free from such usufructuary mortgage lien. The respondent's costs in both the Courts, proportionate on the value of the claim disallowed, should be paid by the plaintiff : 56 Mad 892[1] at page 903.

Thus both the plaintiff and the defendants (respondent in the present appeal) were awarded proportionate costs. On a reference to the decree it will be seen that these costs were separately taxed. The ultimate decree that was drafted in pursuance of the judgment declared that the amount of principal, interest and proportionate costs in both the Courts calculated up to 6th July 1933 was Rs. 19,450.10.3 and in default of payment of the amount on or before 6th July 1933, the properties were directed to be sold. So far as the costs awarded in favour of the respondents were concerned, the decree ran thus :

1. Damodara Shanbhogue v. Chandappa Pujary, *reported in* A I R 1933 Mad 613 = 148 I C 1029=56 Mad 892=65 M L J 194.

"And this Court doth further order and decree that the appellant (plaintiff) do pay to the respondents 15, 17 to 24, 26 to 28 and 30 (defendants 16, 18 to 25, 27 to 29 and 31) Rs. 539-12-2 for their proportionate costs in opposing this appeal and also their proportionate costs in the lower Court which will be taxed and ascertained by that Court on the amount disallowed.

The net result is that under the same decree both the plaintiff and the defendants were entitled to recover sums of money from each other. The respondents in whose favour costs were awarded against the plaintiff-appellant sought to execute the same by applying for the arrest of the plaintiff. The plaintiff opposed the application on the ground that the defendants were not entitled to execute the decree as the amount decreed in his favour was far in excess of the amount awarded in favour of the respondents and therefore by virtue of O. 21, R. 19, they were not entitled to the relief they sought. This contention was overruled by the learned Subordinate Judge on the ground that there was no personal decree against the defendants but only a decree against the property. He therefore ordered the issue of a warrant of arrest. It is against this decision that this appeal has been preferred. The main question therefore is whether O. 21, R. 19, is applicable to the case. The relevant provision so far as is material runs thus :

Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then, if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

According to the plain language of the section, the contention of the plaintiff seems to be correct. The corresponding provision of the Civil Procedure Code of 1882 ran thus :

When two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party ; but satisfaction for the smaller sum shall be entered on the decree.

This section was the subject of judicial interpretation and it was almost uniform in holding that the remedy of each party against the other need not be precisely of the same nature. In 16 All 395,[2] there was a decree for redemption in favour of the plaintiff, the mortgagor, on payment into Court of a certain sum of money as and for amount due under the mortgage and also for costs of the suit upon a date fixed by the decree. The mortgage money including interest and costs amounted to Rs. 1004-7-0, the costs awarded being Rs. 31-1-6. The plaintiff-mortgagor was also awarded a sum of Rs. 6-10-0 for costs against the mortgagee defendant. The question was whether the plaintiff was entitled to deduct the costs of Rs. 6-10-0 from the amount which he was bound to deposit under the decree as a condition of redemption. *Held* he could. The learned Judges, Sir John Edge C. J. and Bannerji J., dissented from the decision in 5 All 272[3] and observed thus :

There is nothing in that section which limits its application to a case in which the remedy of each party against the other is of precisely the same nature. It appears to us that where one party is entitled to recover for example under S. 88 of Act No. 4 of 1882 the amount of the mortgage debt due by the other side by sale of the other side's property and the other side is entitled to recover under the same decree costs against the plaintiff personally, S. 247 applies, for the reason that there are two parties who are entitled under the same decree to recover from each other sums of different or the same amounts; and that it makes no difference that one of those parties is obliged to recover from the other the money due by executing a decree against the hypothecated property of the other, whilst his opponent is only entitled to recover the money decreed for costs personally from the other side. The object of S. 247 is to prevent each side executing a decree in respect of amounts due, whether for costs or otherwise under the same decree.

This case was followed by our High Court in 23 Mad 121[4] under precisely similar circumstances. In that case there was a decree directing that on plaintiff paying into Court or to the defendants within three months the mortgage money and the value of improvements, the defendants should surrender to the plaintiff the mortgaged property and if such payment was not made the property should be sold. There was also a decree in favour of the defendants in and by which the defendants should pay to the plaintiff certain amount being the costs incurred by them in all the Courts. The plaintiff applied for recovery of the costs by arrest in the same way as the defendants in this case have sought to arrest the plaintiff. The learned Subordinate Judge allowed the arrest holding that the words "recover from each other" in S. 247 contemplated personal liability on the part of those parties to pay each other

2. Bhagwan Singh v. Ratan, (1894) 16 All 395= 1894 A W N 133.

3. Kalka Prasad v. Ram Din, (1883) 5 All 272.

4. Sankara Menon v. Gopala Pattar, (1900) 23 Mad 121.

the sums decreed against each and that they must hold the same character and possess identical rights of enforcing execution and that as the decree in favour of the defendants could only be enforced by the sale of the property whereas the plaintiff would enforce the decree by arrest of the person, the provisions of S. 247 would not be applicable. This contention was overruled and the plaintiff was held not entitled to the relief he sought on the ground that S. 247 would apply in spite of the fact that the remedies were not of the same nature. So far as we know, this decision has not been questioned in any reported case before the enactment of the new Code. The Legislature has re-enacted S. 247 in almost identical terms as O. 21, R. 19. It must be taken to have known the said interpretation and to have accepted it. As observed by Lord James J. in (1882) 14 Ch D 563[5] at page 571:

> If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature when using well known words upon which there have been well known decisions uses those words in the sense which the decisions have attached to them: (*vide* also Mullah's Civil Procedure Code, Edn. 10, page 727).

The principle of 23 Mad 121[4] was applied even after the enactment of the new Code by our High Court. In 71 M L J 506,[6] there was a decree for specific performance in and by which it was decreed that on the plaintiff depositing into Court Rs. 500 within the time mentioned therein, the defendant was to execute and get registered a deed of conveyance in plaintiff's favour and the defendant was directed to pay the plaintiff a certain amount by way of costs. The plaintiff deposited into Court a sum of money, that is Rs. 500 less than the amount decreed in his favour. The question was whether the provisions of O. 21, R. 19 could be applied. The learned Judges (Venkatasubba Rao and Cornish JJ.) held they could. It seems to us that the plain language of the provisions of O. 21, R. 19 would not warrant any other interpretation. All that the provision requires is that two parties must be held entitled to recover sums of money from each other. A decree by *A* against *B* for a sum of money to be recoverable from his property is as much a decree to recover the sum of money from *B*. The decree need not necessarily be a decree directing *A* to recover the sum of money from *B* personally. The section does not say or provide in what manner the decree is to be executed. Even before the enactment of the new Code the provisions of O. 21, R. 19 were applied to the case of a decree for sale in enforcement of a mortgage or charge: (*vide* the observations of the learned Judges in 16 All 395[2] already referred to). The provisions of O. 21, R. 20 in the new Code of 1908 give effect to this view. In view of the provision and in view of the recent decision of the Privy Council in 16 Pat 127,[7] where their Lordships observe that the words of R. 20 "decree for sale in enforcement of a mortgage or charge" cannot be restricted to personal judgments such as may be given under O. 34, R. 6, the principle of 23 Mad 121[4] should govern the present case.

We therefore set aside the order of the learned Subordinate Judge and hold that the provisions of O. 21, R. 19 are applicable to the case and that the defendants (respondents) are not entitled to execute the decree for costs in their favour. It is not necessary to express any opinion having regard to the plain language of O. 21, R. 20, as to how far the decision in 56 Mad 339[8] is correct in that it holds that a mortgage decree cannot be set off against a money decree in the absence of a personal liability on the part of the mortgagor who holds the money decree. The respondents will pay the costs of the appellant in this appeal.

C.R.K./D.S. *Order set aside.*

5. Greaves v. Tofield, (1882) 14 Ch D 563=43 L T 100=28W R 840.
6. Chinnammal v. Chidambara Kothanar, (1936) 23 A I R Mad 626=165 I C 484=71 M L J 506=I L R (1937) Mad 59.
7. Hazariram Marwari v. Bansidhar Dhandhania, (1937) 24 A I R P C 39=166 I C 653 =64 I A 67=16 Pat 127 (P C).
8. Venkata Reddi v. Dorasami Pillai, (1933) 20 A I R Mad 63=140 I C 378=56 Mad 339=63 M L J 722.

A. I. R. 1938 Madras 640

BURN J.

Sree Meenakshi Mills Co. Ltd. and others — Petitioners.

v.

Assistant Registrar of Joint Stock Companies, Madura — Respondent.

Criminal Revn. Case No. 601 and Petn. No. 565 of 1937, Decided on 8th March 1938, from Judgment of Sess. Court, Madura Division, D/. 28th June 1937.

Companies Act (1913), S. 76—S. 76 requires distinct meeting every year and not same meeting being held once in each year.

Section 76 demands that there shall be one general meeting per year, and as many meetings as there are years. It does not mean that the same meeting can go on being held once in each year. S. 76 requires that a separate and distinct meeting should be held. [P 641 C 1]

Nugent Grant for T. M. Kasturi — *for Petitioners.*

K. Venkataraghavachari — *for the Crown.*

Order.—The conviction of the Company was in my opinion correct. S. 76 (1), Companies Act requires a general meeting to be held once at least in every year. The argument on behalf of the petitioners is that since the general meeting called on 30th December 1934 was adjourned to 31st March 1935 and was held on that date, it follows that a general meeting was held in 1934 and in 1935 and the general meeting held on 28th January 1936 was within 15 months of 31st March 1935. This is specious but unsound. It can be reduced to absurdity in a moment. If it were correct, a general meeting held in 1934 could be adjourned to 1935 and again adjourned to 1936 and so on without limit. But that would obviously not satisfy S. 76. S. 76 demands that there shall be a general meeting held once at least in every year, i. e. one meeting per year, and as many meetings as there are years. It does not mean that the same meeting can go on being held once in each year. The meeting on 31st March 1935 was not a different meeting from the one which began on 30th December 1934 ; it was the same meeting. S. 76 required that in 1935 a separate and distinct meeting should be held. The conviction of the Company is therefore correct and the fine as reduced by the learned Sessions Judge is not excessive. The officers however cannot be said to have been "knowingly parties to the default" in the face of the evidence that they took legal advice and acted accordingly. I set aside the convictions of accused 5, 6, 7 and 8 and direct that the fines imposed on them be refunded if collected.

C.R.K./D.S. *Order accordingly.*

1938 M/81 & 82

A. I. R. 1938 Madras 641

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

N. N. R. M. Lakshmanan Chettiar and others — Appellants.

v.

N. N. L. Ramasamy Chettiar and others — Respondents.

Appeals Nos. 49 and 239 of 1932, Decided on 13th December 1937, against decree of Sub.Judge, Tuticorin, D/- 1st December 1931.

Trust—Creation of — Funds held in trust for particular purpose—Purpose failing or coming to end—Resulting trust of such funds as remain arises in favour of contributors or their personal representatives—Suit for recovery of their shares by subscribers is governed by Art. 120, Lim. Act—Time runs from date on which there is failure of purpose.

Where funds are held in trust for a particular purpose, which fails or comes to an end, there arises a resulting trust of such funds as remain in favour of the contributors or, if they are dead, their personal representatives. The unexpended balance belongs to the subscribers rateably in proportion to their subscriptions. The liability on the part of the subscriber with whom the funds are kept in deposit, to pay interest on the sums remaining with him, is not inconsistent with the transaction being in the nature of a trust. A suit by the subscribers to the fund for the recovery of their shares in the fund is governed by Art. 120, Lim. Act, and time runs from the date on which there was a failure of the purpose and the resulting trust thereupon arose, and a suit filed within six years of the date is within time: *English case law referred.* [P 642 C 1, 2 ; P 643 C 1]

D. Ramaswamy Iyer — *for Appellants.*

M. Krishna Bharathi and S. Murugesa Mudaliar — *for Respondents.*

Venkatasubba Rao J.—This is a somewhat unusual kind of case and arises out of a combination of some thirty persons, owners of saltpans, who associated for the purpose of devising means of easy transport facilities, in respect of their salt from Arasady salt factory to Tuticorin. In 1909 they convened a meeting and passed a resolution that they were to subscribe Rs. 6 per salt-pan (there were about 3000 salt-pans) and with the sum of about Rs. 18,000 raised to construct a metalled road from Tuticorin to the salt factory. It was further resolved that in the first instance Re. 1 per salt-pan was to be subscribed, that the defendant's father Raman Chetty, one of the licensees, was to act as the treasurer and that the plaintiff and another were to look after and conduct the operations. It was further resolved that Raman Chetty was to be liable for interest, on the

sums with him, at nine annas per cent. per mensem. It is unnecessary to follow the history of this venture, for, it is sufficient to say that after prolonged negotiations with various public or semi-official bodies, it was found that nothing could be achieved and the money raised remained more or less unspent. It may be maintained that the plaintiff and Raman Chetty had a predominant interest, the former owning 1400 and the latter 1100 out of the total of 3000 odd salt-pans. There was a third person, one B. Venkataramanajulu Naidu, who also had some substantial interest, owning as he did 700 pans, the interest of the remaining twenty seven persons being thus small. The plaintiff has filed this suit in a representative character, having obtained the Court's leave under O. 1, R. 8, Civil P. C. The defendants are the sons of Raman Chetty, who died in 1929. The lower Court has curiously (it is unnecessary to discuss the grounds of its judgment) passed a decree in favour of the plaintiff for the entire amount held by Raman Chetty, including his own share therein, with interest at the stipulated rate.

The principle applicable to actions of this sort may be shortly stated: where funds are held in trust for a particular purpose, which fails or comes to an end, there arises a resulting trust of such funds as remain, in favour of the contributors or, if they are dead, their personal representatives: 28 Hals. S. 101; Godefroi on Trusts, Edn. 5, p. 49, (1900) 2 Ch 326[1] and (1914) 2 Ch 419.[2] The unexpended balance belongs to the subscribers rateably, in proportion to their subscriptions (see the last mentioned case). The defendants are the appellants. That the plaintiff can recover his own share on the principle mentioned above, is not now disputed. Nor does Mr. Sitarama Rao for the respondents contend that there should be a decree for the entire amount, including even Raman Chetty's share, as the lower Court has decided. The only question that remains then is one of limitation. The first contention of Mr. Ramaswami Ayyar for the appellants does not require serious notice. He contends that the case is not one of trust but must be viewed in the light of a deposit. For this, he relies upon the fact that under the resolutions of 1909, the amounts with Raman Chetty were to carry interest—which circumstance, it is suggested, shows that it was contemplated that his position was to be that of a banker with whom a deposit is made. It is difficult to follow how the liability to pay interest on the part of Raman Chetty is inconsistent with the transaction being in the nature of a trust. Instead of the moneys being invested with a third party, it was understood that Raman Chetty, being a member of the Nattukottai Chetty banking community, should retain them with himself and be liable for interest.

The transaction then amounting as it does to a trust, it is argued by Mr. Sitarama Rao that granting that S. 10, Limitation Act which refers to express trustees does not apply, time runs under Art. 120 from the date when there was a failure of the purpose and the resulting trust thereupon arose. This, in our opinion, is a sound contention and it has therefore to be ascertained when the venture was abandoned or the object became incapable of fulfilment. In 1910 the plaintiff no doubt demanded from Raman Chetty the return of the amount due to him, on the footing that the venture came to an end, by reason of its having become impossible to proceed with it. But this represents not the wish of the body of persons who associated, but of one single individual. Nor was it supposed to be the final and irrevocable act of the plaintiff himself. For, we find that on 29th December 1924, a meeting was convened of the licensees (the members of this body) and one of the resolutions passed was to the effect, that the construction of a metalled road having become impracticable, steps should be taken to have a trolly line or to obtain a motor lorry. Among those that attended the meeting were the plaintiff and Raman Chetty and in token of their approval they signed the proceedings. Here is a definite admission on Raman Chetty's part that the original purpose had not come to an end or failed; even should it be held that the abandoning of the metalled road constituted a deviation, it is difficult to escape the conclusion that Raman Chetty by reason of this resolution, held the moneys in trust. There is correspondence to show that till 18th January 1925 (the date of Ex. F), active measures were being adopted for giving effect to that resolution. That would quite

1. In re Abbott Fund ; Smith v. Abbot, (1900) 2 Ch 326=69 L J Ch 539=48 W R 541.
2. In re British Red Cross Balkan Fund ; British Red Cross Society v. Johnson, (1914) 2 Ch 419 =84 L J Ch 79=111 L T 1069=58 S J 755 =30 T L R 662.

suffice for our purpose, for, the suit was filed within six years from then, i. e. on 17th January 1931—the period prescribed by Art. 120, Lim. Act. The contention therefore that the suit is barred fails.

Then the form of the decree that has to be passed remains to be considered. It is unnecessary to inquire whether in the events that have happened, the resort at the time of the filing of the suit, to O. 1, R. 8, Civil P. C. can be justified. For during the pendency of the appeal, the plaintiff died and in his place were brought on the record his personal legal representative (respondent 2) and such of the original licensees as could be traced (respondents 3 to 9), respondent 3, being B. Venkataramanjulu Naidu to whom reference has been made. There can be no difficulty in passing decrees in their favour severally for the proportionate amounts payable to them. Interest will be allowed at the stipulated rate, namely nine annas per cent. per mensem, till this date and thereafter at six per cent. on the aggregate amounts. Decrees to that effect are accordingly passed. The defendants will file a statement in Court showing the amount payable to each of the respondent in pursuance of this judgment. The appellants will pay respondent 2 (the plaintiff's personal legal representative) his costs both here and in the lower Court on the amount for which we have passed a decree in his favour.

C.R.K./R.M. *Order accordingly.*

---

* A. I. R. 1938 Madras 643

VARADACHARIAR AND PANDRANG ROW JJ.

E. N. A. S. Narayana Iyer—Appellant.

v.

Moorthi Kendan and others —

Respondents.

Appeal No. 214 of 1933, Decided on 31st January 1938, against decree of Sub-Judge, Ottappalam, in O. S. No. 1 of 1930.

(a) Malabar Law— Nambudries — Rule of Hindu law regarding pious obligation does not apply to Nambudries.

The rule of the Hindu law as to the pious obligation of the descendants to pay their ancestor's debt is not applicable to Nambudries: *10 Mad 9; 15 Mad 333 and A I R 1915 Mad 696, Foll.; 34 Mad 496, Expl.* [P 644 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 17—Notice of application for leave granted to Official Assignee only—Leave granted cannot be so construed as to authorise suit against insolvent.

Where a notice of application for leave is granted only to the Official Assignee, and the insolvent is neither made a party thereto nor served with notice thereof, it cannot be said that the insolvent has no interest to safeguard or that the appearance of the Official Assignee is sufficient to enable the Court to deal with the considerations applicable to the insolvent personally as well as with the application as against the Official Assignee. Hence the leave granted against the Official Assignee cannot be so construed as to authorize a suit against the insolvent. [P 644 C 2]

*** (c) Presidency Towns Insolvency Act (1909), S. 17 — No distinction can be drawn between suits relating to property and suits against person of insolvent — Leave is necessary even to enforce personal remedy.**

An insolvent cannot be sued in a Court of law in respect of a claim provable in insolvency except with the leave of the Court. And having regard to the principle underlying S. 17, there is no justification for drawing a distinction between suits relating to the property of the insolvent and suits against the person of the insolvent provided of course the suit or proceedings relate to any claim provable in insolvency: *A I R 1916 Mad 734 and A I R 1927 Mad 919, Rel. on.* [P 644 C 2]

K. S. Krishnaswamy Ayyangar, Govt. Pleader, and C. V. Mahadeva Ayyar—*for Appellant.*

P. G. Krishna Ayyar, K. Kuttikrishna Menon and S. Venkatachala Sastry—*for Respondents.*

Varadachariar J.—This appeal arises out of a suit for recovery of money due under a promissory note (Ex. A) dated 18th November 1926 executed by defendants 1 and 2. As defendant had been adjudicated an insolvent, the Official Assignee in whom the estate of defendant 2 had vested was impleaded as defendant 3. Defendants 4 and 5 are the grandsons of defendant 1 by a predeceased son of his. Defendant 2 is the younger son of defendant 1. The plaint prayed for a personal decree against defendants 1 and 2, for a decree directing recovery of the amount from the properties of the Mana to which the parties belong and also for recovery of the amount from the estate of defendant 2 in the hands of defendant 3. As defendant 1 died pending the suit, the lower Court gave a decree against the assets of defendant 1 and against the assets of defendent 2 in the hands of defendant 3, but it dismissed the suit so far as it sought a personal decree against defendant 2 and also to the extent of the prayer against the properties of the Mana. Plaintiff has filed this appeal claiming the two reliefs refused to him by the lower Court.

The learned counsel for the appellant did not press the contention that a debt sought to be recovered was binding upon the Mana, it being clear from the evidence discussed in the judgment of the lower Court that that claim could not be substantiated. He however contended that as the Illom consisted only of the grandfather, his son and his grandsons and there were no collaterals, there was no reason why the Illom properties should not be made liable for defendant 1's debt by the application of the Hindu law doctrine of the pious obligation of the son and the grandson to pay the father's and the grandfather's debt. He relied in this connection upon the statement of the law in 34 Mad 496,[1] to the effect that Nambudries are ordinarily governed by the Hindu law except to the extent to which that law has been modified by custom, and he contended that the defendants have not pleaded or proved any custom in this case excluding the application of the rule of pious obligation to pay the debts of the ancestor. In view of the state of the authorities of this Court on this point, we do not think that the general observation in 34 Mad 496[1] could reasonably be interpreted in the manner in which the learned counsel for the appellant seeks to use them. As early as in 10 Mad 9,[2] it was laid down that the rule of the Hindu law as to the pious obligation of the descendants to pay their ancestor's debt is not applicable to Nambudries. The learned advocate for the appellant invited our attention to the comments on this case in Moore's Malabar Law and by the late Mr. Sundara Iyer J. in an article in 12 M L J. Even assuming that there was no necessity to decide that point in 10 Mad 9,[2] it cannot be denied that that view has been adopted and justified by later decisions of this Court —*see* 15 Mad 333[3] and 38 Mad 527.[4] We see no reason to differ from the view taken in these cases. We must accordingly hold that the lower Court was right in declining to grant a decree against the properties of the Mana.

As regards the claim for a personal decree against defendant 2, the learned counsel for the appellant raised two contentions. He first urged that under the terms of S. 17 Presidency Towns Insolvency Act, no leave of the Court was necessary for commencing a suit to enforce a personal remedy against an insolvent and that the section only applied to proceedings against the property of the insolvent. Alternatively, he contended that the leave which has in fact been obtained from the Insolvency Court, must be construed so as to authorize a suit not merely against the Official Assignee, but also against the insolvent. The second contention seems to us untenable in view of the terms of the application and the order thereon. Notice of that application was granted only to the Official Assignee and the insolvent was not either made a party thereto or served with notice thereof. It cannot be said that he had no interest to safeguard or that the appearance of the Official Assignee was sufficient to enable the Court to deal with the considerations applicable to the insolvent personally as well as with the application as against the Official Assignee. We are therefore unable to construe the order granting leave in the manner that the appellant contends for.

As regards the appellant's construction of S. 17, Presidency Towns Insolvency Act, there is no doubt the distinction that he points out between the language employed in the corresponding sections of the English Bankruptcy Act and the Provincial Insolvency Act of 1907 on the one hand and S. 17, Presidency Towns Insolvency Act, on the other so far as the first position relating to remedy is concerned, namely, that the former refer to remedy against the property or person of the debtor, whereas S. 17, Presidency Towns Insolvency Act, refers only to remedies against the property. On the question whether a remedy against the person of the insolvent can be sought without the leave of Court, appellant's learned counsel relied upon the observations of the Rangoon High Court in 13 Rang 623.[5] But the latter portion of S. 17 relating to "suits and proceedings", is quite general ; and having regard to the principle underlying that section, we see no justification for drawing a distinction between suits relating to the property of the insolvent and suits against the person of the insolvent provided of course the suit or proceedings relate to any claim provable in insolvency. The reasoning in 39

1. Vishnu Nambudri v. Akkamma, (1911) 34 Mad 496 = 6 I C 583 = 20 M L J 938.
2. Nilakandan v. Madhava, (1887) 10 Mad 9.
3. Govinda v. Krishnan, (1892) 15 Mad 333.
4. Kunhakutti Ammah v. Mallaprath, (1915) 2 A I R Mad 696 = 22 I C 546 = 38 Mad 527.
5. P. M. Hamid v. Mohommad Sheriff, (1935) 22 A I R Rang 415=159 I C 936=13 Rang 623.

Mad 689[6] and 50 Mad 977,[7] seems to us to justify the view that except with the leave of Court, it was not intended that the insolvent should be sued in a Court of law in respect of a claim provable in insolvency. The appeal accordingly fails and is dismissed with costs—one set of costs to be equally divided between respondent 1 on the one hand and respondents 3 and 4 on the other.

C.R.K./D.S. *Appeal dismissed.*

6. Easwara Iyer v. Govindarajulu Naidu, (1916) 3 A I R Mad 734=31 I C 192=39 Mad 689.
7. Alamelu Ammal v. Venkatarama Iyer, (1927) 14 A I R Mad 919=105 I C 165=50 Mad 977 =53 M L J 422.

A. I. R. 1938 Madras 645

PANDRANG ROW J.

In re Kallugudi Rachappa—Petitioner.

Civil Revn. Petition No. 1345 of 1937, Decided on 18th February 1938, from order of District Court, Bellary, Dated 9th September 1937.

(a) Court-fee—Deficiency in—Order returning plaint for necessary amendments is not fair—Proper order is to require deficiency to be made up within particular date and to reject it if order is not complied with.

It is open to a Court to have required payment of a particular amount as deficit court-fee within a particular date and, if such payment was not made, to reject the plaint, thus giving the prospective plaintiff the right to appeal from the order rejecting the plaint. But it is not fair to a litigant, who wants his suit to be filed and dealt with according to law, to return his plaint for necessary amendments thus compelling the litigant to accept the view of the Court as to the court-fee payable; otherwise he loses his right to appeal. [P 645 C 2; P 646 C 1]

(b) Practice — Amendment of pleadings — Power to direct amendments in plaint should not be exercised to impose additional burden—It is not Court's duty to advise plaintiff as to what relief he should ask for — If he asks for mere declaration, court-fee should be paid on relief he actually prays for—If prayer is found insufficient he is himself to blame.

The Courts' power to direct amendment of plaints should not be exercised for the purpose of imposing a burden on the plaintiff which he is not willing to accept. It is not the duty of the Court to advise the prospective plaintiff as to what relief he should ask for. If he is satisfied with a mere declaration, he has to pay court-fee on the relief that he actually prays for and not on the footing of the relief which according to the Court he ought to ask for. If it is found later that the prayer is not sufficient, the plaintiff will have to blame himself if he gets what he asks for and nothing more. On the other hand, if he changes his mind and wants to ask for further relief, he will have to obtain the Court's permission to amend the plaint accordingly and pay the additional court-fee required. [P 646 C 1, 2]

Thus, where a plaintiff asks for a mere declaration that certain decree is not binding on him, it is not right to a Court to say that the allegations in the plaint do not show that the plaintiff was not a party to a suit in question and so he is bound to sue for cancellation of the decree. [P 646 C 2]

V. S. Narasimhachariar and N. Appu Rao — *for Petitioner.*

Govt. Pleader — *for the Crown.*

Order.—The petitioner in this petition, Kallugudi Rachappa filed a plaint in the District Court of Bellary on 2nd August 1937. The plaint was returned to the petitioner plaintiff with an endorsement raising various points, one of which was that the plaintiff being a party to one of the decrees sought to be declared as not binding on him, the suit had to be valued under S. 8 (iv) (A) Court-fees Act, in respect of such declaration and requisite court-fee paid thereon. The plaint was re-presented with a reasoned argument by the plaintiff's vakil, the gist of which was that there was no necessity for the plaintiff to sue for cancellation or setting aside of the decree in question and that the court-fee already paid, viz. Rs. 477.7.0, was sufficient. Thereupon the learned District Judge, after hearing the arguments of the plaintiff's pleader as well as of the Government Pleader, passed an order to the effect that the plaintiff was bound to sue for the cancellation of the decree referred to above, viz. the decree in O. S. No. 14 of 1926, on the ground that the allegations in the plaint if proved would not show that the minor was not a party to that suit. This order was passed on 9th September 1937, and on 14th September 1937 the plaint was returned by the District Judge to the petitioner-plaintiff with the following endorsement :

In view of the order passed on 9th September 1937 this plaint is returned for necessary amendments. Returned. Time seven days.

There has been no order by the District Judge rejecting the plaint for non-payment of the deficit court-fee but only an order returning the plaint directing that it should be amended. The procedure adopted by the District Judge does not appear to be one which is fair to the litigant who wants his suit to be filed and dealt with according to law. It was no doubt open to the learned District Judge to have required payment of a particular amount as deficit court-fee within a particular date and, if such payment was not made to reject the plaint,

thus giving the prospective plaintiff the right to appeal from the order rejecting the plaint. The present order returning the plaint for "necessary amendments" compels the party to accept the view of the District Judge as to the court-fee payable; otherwise he loses his right of appeal. On the merits, I am of opinion, after hearing the arguments not only on behalf of the petitioner but also on behalf of the Crown, that the view of the learned District Judge is not according to law. The plaint, as it stands, does not ask for setting aside of any decree; in any case, it is not the duty of the Court to advise the prospective plaintiff as to what relief he should ask for. If he is satisfied with a mere declaration, he has to pay court-fee on the relief that he actually prays for, and not on the footing of the relief which according to the Court he ought to ask for. If it is found later that the prayer is not sufficient, the plaintiff will have to blame himself if he gets what he asks for and nothing more. On the other hand, if he changes his mind and wants to ask for further relief, he will have to obtain the Court's permission to amend the plaint accordingly and pay the additional court-fee required. It is not right to say that the allegations in the plaint do not show that the plaintiff was not a party to the suit in question or that his contention is merely that his father who was acting for him did not act with due diligence and honesty in prosecuting the suit. The plaintiff's father was himself a plaintiff in that suit, O. S. No. 14 of 1926, along with the present plaintiff who was then a minor.

The objection taken to the compromise decree in that suit is that the plaint itself was one in which the present plaintiff could not have been properly represented by his father and not that there was any lack of diligence or honesty in the conduct of that litigation. That was a suit to enforce the terms of a compromise in a previous suit in which the plaintiff's father, the present defendant 3, had admitted the validity of the adoption of the present defendant 1. It is therefore obvious that the father could not in the same plaint allege that the adoption was valid on his own behalf, and allege the contrary in his capacity as next friend of his minor son, the present plaintiff. It is, however, unnecessary to rely on this aspect of the matter. It is enough to say that in the present suit there is no prayer to set aside any decree but only for a declaration in respect of the two decrees for which the requisite court-fee has been paid. In my opinion, it was not right on the part of the Court below to have insisted that the petitioner-plaintiff should make certain amendments which would necessitate the payment of additional court-fee. The Courts' power to direct amendment of plaints should not be exercised for the purpose of imposing a burden on the plaintiff which he is not willing to accept as has been done in this case. The petition is therefore allowed and the Court below is directed to take the plaint on its file and dispose of it according to law, if the original plaint, which has been filed in this Court, is re-presented to the Court below within 14 days from the date of the actual return of the plaint to the petitioner by this Court.

V.B.B./R.K. *Petition allowed.*

A. I. R. 1938 Madras 646

ABDUR RAHMAN J.

M. J. Sheth & Co. — Petitioner.

v.

Ramiza Bi and another — Respondents.

Civil Revn. Petition No. 755 of 1937, Decided on 11th March 1938, from order of Dist. Munsif, Vellore, D/- 22nd June 1937.

(a) Civil P. C. (1908), O. 26, R. 5—Bangalore is not within British India.

Bangalore does not fall within the definition of British India as given in the General Clauses Act and cannot therefore be held to be a part of British India. [P 647 C 1]

(b) Commissioner—Order refusing issue of commission is revisable.

The High Courts have jurisdiction to interfere in revision even in interlocutory proceedings if they are satisfied that the decision against which the revision is filed is wrong and illegal. Hence a revision lies against an order dismissing an application for the issue of commission : *Case law referred.* [P 648 C 2]

S. Ramanujachariar — *for Petitioner.*

P. V. Srinivasachariar —

for Respondents.

Order. — This is a revision petition against the order of the District Munsif of Vellore dismissing an application made by the plaintiff for the issue of a commission to examine his witnesses residing at Bangalore. The District Munsif has passed a very perfunctory order and has really not applied his mind to the grounds mentioned by the plaintiff in his affidavit. He has chosen to dismiss the application, as it

appears to have been urged before him that the number of witnesses to be examined on commission was large and it would be rather expensive for the plaintiff to bring them down to Vellore. Had the District Munsif taken the trouble to read the affidavit filed on behalf of the plaintiff, he would have found a clear statement in para. 4 that his witnesses were permanent residents of Bangalore within the Native State of Mysore, and that they could not be compelled to go to Vellore to give evidence in the case. It is true that in that paragraph a further ground was added that it would be expensive and inconvenient for the plaintiff to bring his witnesses to Vellore; but the fact that the witnesses were residing within the limits of an Indian State was clearly alleged and it was stated in paras. 3 and 4 of that affidavit that being in the know of things it was essential for the plaintiff to produce them in order to establish his case. The facts mentioned by me would show that this application falls within the ambit of O. 26, R. 5, Civil P. C., and O. 26, R. 4, Civil P. C. has really no application to the facts of this case. The only question, then, on which the lower Court had to satisfy itself was whether the evidence of these persons was necessary. If it were of the opinion that it was, the lower Court had no further discretion in the matter and the commission should have been ordered to be issued as a matter of course.

The learned counsel for the respondents contended in the first instance that Bangalore should not be regarded as being outside British India inasmuch as the Maharajah of Mysore had ceded the Civil and Military Station of Bangalore for certain purposes to the British Government and had renounced the exercise of civil and criminal jurisdiction within that area. The argument has no substance and must be rejected. Bangalore does not fall within the definition of British India as given in the General Clauses Act and cannot therefore be held to be a part of British India. If it were a part of British India, the provisions of O. 26, R. 5 would not be applicable but one would have to look at O. 26, R. 4, Civil P. C. in order to decide if a commission should have been ordered to be issued. In view of my finding that Bangalore is beyond the limits of British India, it is unnecessary for me to consider O. 26, R. 4, Civil P. C. The learned counsel for the respondents next contended that the order being discretionary in nature was not open to revision and that the High Court should not interfere with it as the discretion has been exercised by the lower Court in favour of the respondents. A number of authorities have been cited by him in support of the above proposition and one will have to look into them closely before arriving at a conclusion.

Turning now to the authorities, I find that he placed his reliance to start with on two Bombay decisions, viz. 23 Bom 626[1] and A I R 1934 Bom 168.[2] In the first case an application for examination on commission of the defendant and his witnesses was refused, as the defendant had happened to be within the jurisdiction of that Court on the Sunday previous to the hearing of the petition and it was admitted that the witnesses frequently returned to Bombay in the ordinary course of their business. As for the second Bombay ruling relied on by the respondent's counsel, I find that the learned Chief Justice was dealing with O. 26, Rule 4, Civil P. C. and not with O. 26, Rule 5. Moreover he was mainly concerned in that case with the question whether an order refusing to issue a commission was appealable. Having come to the conclusion that it did not fall within the meaning of the word "judgment" as used in Cl. 15 of the Letters Patent, he held that an appeal from an order refusing to issue a commission was not competent. It is thus clear that both the Bombay decisions have no application to the facts of the present case. It is true that there are certain observations in the later judgment which may be of some assistance to the respondent, since it was suggested that the rights of the applicant in that case were not finally determined and that another remedy would be available to her when the matter comes up before the Appellate Court. She could then contend that the order refusing to issue a commission was wrong. With very great deference to the learned Chief Justice's opinion, I am unable to agree with his remarks although I must state that they were made with an entirely different object. But the respondent wishes to avail himself of them with the object of showing that another remedy was open to the petitioner and the order should not

1. Mowji v. Nemchand, (1899) 23 Bom 626= 1 Bom L R 384.
2. Dhanbai Burjorji v. Bablibai Shapurji, (1934) 21 A I R Bom 168=152 I C 264=36 Bom L R 272.

therefore be interfered at this stage. Taking this very case as an illustration, it seems to me that if all the important witnesses of the plaintiff are residing in Bangalore and a commission is not issued to examine them, the suit is bound to be dismissed. The plaintiff would then be left with the remedy of filing an appeal against the decree of dismissal and he will have then to ask for a remand on the ground that the trial Court was not justified in refusing to issue a commission and depriving him of the opportunity of producing his evidence and substantiating his allegations. Assuming that his contention is accepted in the end, it appears to me that it will be done after a great deal of mischief has been done. One of the primary concerns of the Courts of law ought to be to avoid unnecessary delay and waste of money as far as it is possible to do so in the administration of justice, and it is fairly apparent that this object would not be achieved if the order is found to be wrong or illegal and is not set aside now.

The third decision on which he placed his reliance was that of the Calcutta High Court in A I R 1928 Cal 421.[3] This again, in my opinion, has no application to the facts of the present case. An application for issue of commission was made in that case under O. 26, R. 1, Civil P. C. on the ground that the party was sick and unable to attend Court. The lower Court found for a fact, although its judgment is stated to have been not very happily worded, that the party applying for his statement to be recorded on commission was sick and not in a condition to appear in Court. It was only this fact, i. e. that of sickness which was held to have conferred jurisdiction on the lower Court to issue the commission. The learned Chief Justice of that Court, in view of the finding of fact, held that the order was not capable of revision. He refused to go into the question in that case, whether such orders could be revised by the High Court or not. This will be clear from the following observations which he appears to have made at p. 423 :

> In the present case it is not necessary for me to discuss that particular question. Given the fact that the Court is satisfied under R. 1, O. 26 that the person is sick and unable to attend Court and that the Court has exercised its discretion as to whether in those circumstances a commission should issue and has issued a commission, I am clearly of opinion that that discretion cannot be revised under S. 115, Civil P. C. whether the judgment of the Court below on this interlocutory application consists of a complete treatise on the subject or an incomplete treatise on the subject.

So far as the Madras view is concerned, there is a ruling 9 Mad 256,[4] which lays down that S. 622, old Civil P. C. was not applicable to applications for issue of a commission which has been either ordered or refused by the lower Court; but the decision, as in the second Bombay ruling cited above, is based really on the question whether the order issuing or refusing to issue a commission was in the nature of a decree. In subsequent authorities however, it has not been disputed that an order of this nature is subject to revision and in fact in no less than six cases both of this Court and that of Calcutta which were brought to my notice do I find that the orders passed by the lower Courts were actually revised by various Judges. It is hardly material for me to discuss the circumstances in which the orders were revised. It is quite sufficient to note for this purpose that in every one of them the orders passed by the Courts below were revised by the High Courts. See A I R 1926 Mad 345,[5] 65 M L J 334,[6] 1933 M W N 648,[7] 46 Mad 574,[8] 67 M L J 95,[9] A I R 1937 Mad 24[10] and 35 C L J 78.[11] An examination of these authorities has led me to the conclusion that the Courts have held that they had jurisdiction to interfere in revision even in interlocutory proceedings if they were satisfied that the decision against which the revision was filed was wrong and illegal and I see no reason to adopt another view. Coming to the merits of the petition, I find that the question of bona fides of the application was not even raised in this case and nothing has been said by the respondent's counsel in the course of his argument which would show that the

3. Phanindra Krishna v. Promatha Nath, (1928) 15 A I R Cal 421=106 I C 880=55 Cal 748=32 C W N 128.

4. In re Nizam of Hyderabad, (1886) 9 Mad 256.
5. Mahalakshmi v. Venkata, (1926) 13 A I R Mad 345=93 I C 446.
6. Subbiah Pillai v. Nellayappa Pillai, (1933) 20 A I R Mad 366=142 I C 201=65 M L J 334.
7. Kasi Chettiar v. Venkatachalam Chettiar, (1933) M W N 648.
8. Jagannatha Sastri v. Sarathambal Ammal, (1923) 10 A I R Mad 321 = 71 I C 530 = 46 Mad 574=44 M L J 202.
9. Rajagopala Pillai v. Kasiviswanathan Chettiar, (1934) 21 A I R Mad 399 = 150 I C 63= 57 Mad 705=67 M L J 95.
10. Muhammad Ibrahim v. Allah Pichai, (1937) 24 A I R Mad 24=167 I C 583.
11. Sarat Kumar Roy v. Ram Chandra Chatterji, (1922) 9 A I R Cal 42=68 I C 9=35 C L J 78.

examination of these witnesses is not necessary for the plaintiff to establish his case. I would therefore accept this revision, set aside the order of the Court below and order that a commission for the examination of the witnesses cited by the plaintiff and residing in Bangalore be issued in the ordinary course. The plaintiff is however directed to take care that the case is not unnecessarily delayed and it is for the District Munsif to see that no dilatory tactics are employed by either party in this matter. The plaintiff has succeeded in this application and must therefore get his costs in this petition.

C.R.K./D.S. *Revision accepted.*

A. I. R. 1938 Madras 649

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Melepat Madhathil M. R. Venkitaraya Ayyar and another — Appellants.

v.

Neelamane Sankaran Embrandiri and another — Respondents.

Letters Patent Appeal No. 82 of 1936, Decided on 25th January 1938, against Judgment of King J., D/- 14th April 1936 in S. A. No, 588 of 1932.

(a) Easement — Right of drainage of water from higher level to lower lands — Owner of higher land cannot introduce water foreign to the land—Owner of lower land is not bound to submit to artificial discharge of water from higher land.

There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of naturo and in undefined channels. The right however of the superior proprietor is not quite absolute. It would not, for instance, be within his right to introduce water which was foreign to the land. Further, there is no obligation upon the owner of the lower land to submit to an artificial discharge of water from his neighbouring lands. The upper proprietor may drain his land and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage or by introducing alterations in the mode of drainage cause the drainage water to flow on his neighbour's land in an injurious manner. Further, the upper owner is not entitled to do anything that will throw on the inferior tenement any water which would not naturally come there. True, the upper proprietor has the right to collect the water falling from the higher ground in one body in the course of draining land; but that right again is not absolute. It must not hurt the inferior tenement : *A I R 1915 Mad 852*; *(1915) 113 L T 55* and *A I R 1930 Mad 676*, *Rel. on.* [P 650 C 1, 2]

(b) Easement — Distinction between regular stream of water and one caused by melting of ice on hills.

There is a distinction to be taken in law between a regular flowing stream of water, though it sometimes may be dry, and those occasional bursts of water which in times of freshes or melting of ice and snow descend from the hills and inundate the country. [P 651 C 1]

Ch. Reghava Rao and M. Chinnappan Nair — *for Appellants.*

P. Govinda Menon — *for Respondents.*

Venkatasubba Rao J. — This is a Letters Patent Appeal from the judgment of King J. which has confirmed the concurrent decision of the two Courts below. The facts are fully stated in the judgment of the learned District Munsif as well as that of Mr. Stodart, the District Judge. The point for decision is whether the plaintiff was entitled to put up a dam to prevent the escape and overflow of water from the land of the defendants over his land. The plaintiff having been held to possess the right, the defendants have filed this Letters Patent Appeal. The relative positions of the lands in question may be briefly described. The plaintiff owns the plot A, which comprises plot D which the lower Courts have found belongs to him; the embankment of dam to prevent the overflow has been erected in the last-mentioned plot D. To the south of A and contiguous thereto are three plots — B, B.1 and C; B.1 is to the east of B and C is to the east of B.1. The former two plots belong to the defendants and the latter to a third party with whom we are not concerned. To the south of B.1 is plot E, of which also the defendants are the owners. A channel runs at the southern extremity of B and B.1, dividing B.1 from E and flowing northward into C. Till 1911, the water of this channel dispersed itself over the surface of C and did not come upon either the plaintiff's land or any of the defendant's plots. For the first time in that year, the owner of C turned the water away from his land into plot B.1 owned by the defendants. What really happened is clearly set out by the District Munsif. The channel in question brought rain water from some parambas a few furlongs off and along with the water, was carried a lot of sand and gravel. The part of C nearest B.1 became blocked up with silt and the owner of C, with a view to protect his lands, put up some dam which had the effect of diverting the weter, which then discharged itself over B.1. The defendants complaining that their lands were injured, filed a suit against the owner of plot C, which however owing to some compromise,

was later withdrawn. Finding that gradually mischief accrued to their own land, the defendants did certain acts to which we shall presently refer, which made the water overflow plot D, the plaintiff's land. The question, already stated is, whether the plaintiff was justified in putting up the embankment referred to above to prevent the overflow.

The contentions of Mr. Raghava Rao, the appellants' learned counsel, relating to the natural rights and riparian owners, seem quite beside the mark and do not call for notice. The law governing the point is thus stated in Peacock on Easements :

> There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels. (Edn. 3, p. 293.)

This principle is embodied in Illus. (i) to S. 7, Easements Act. The plaintiff does not dispute that his land is on a lower level than the defendants' plots. The right, however, of the superior proprietor is not quite absolute. It would not, for instance, be within his right to introduce water which was foreign to the lands (Coulson and Forbes on Waters, Edn. 5, pp. 142 and 143). Further, there is no obligation upon the owner of the lower land to submit to an artificial discharge of water from his neighbouring lands (Peacock on Easements, Edn. 3, pp. 293 and 294).

First, the water would not have entered the defendants' land, as must be evident from what has been stated above, but for the bund put up by the owner of C on his own plot to defend it from injury. The water on the upper land is not thus, what in the ordinary course of nature, rises in or falls upon it; in other words, it is foreign water so far as Plot B-1 is concerned. By the act of the owner of C and not in the natural course, did the water discharge itself upon B-1. Having entered that land, it stopped there and it was by a further act of the defendants, as will be shown, that it overflowed the plaintiff's plot. The natural right of the upper owner does not pertain to what may be termed foreign water, and the finding therefore that the water in question is foreign to the defendants' land, is fatal to their claim.

Secondly, as already observed, there is no obligation upon the inferior tenement to submit to an artificial discharge of water from the higher ground. When land is so located that water naturally or in the course of ordinary agricultural operations, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. The upper proprietor may drain his land, and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage or by introducing alterations in the mode of drainage, cause the drainage water to flow on his neighbour's land in an injurious manner (Kerr on Injunctions, Edn. 6, p. 231). Further, the upper owner is not entitled to do anything that will throw on the inferior tenement any water which would not naturally come there : 38 Mad 149[1] at p. 152. The effect of the finding here is, that the water, after it had been allowed to enter B-1, would in the ordinary course have diffused itself over B, B-1 and E (the defendant's plots); possibly some water might have also escaped on to the plaintiff's plot. But in the course of years since 1911, the channel was "so trained to run" (as the District Judge tersely puts it) by the defendants, that the water was diverted to the plaintiff's plot—that is the clear finding of the District Judge. They did something more; they strengthened a bund where the channel intersected E, with a view to prevent injury to that plot (*see* the Munsif's judgment). Thus it will be seen that the water descending on the plaintiff's land is not "water which drains naturally" (Kerr on Injunctions, p. 231). This finding again is equally fatal to the defendants' claim. True, the upper proprietor has the right to collect the water falling from the higher ground in one body in the course of draining his land; but that right again is not absolute. As observed by Lord Dunedin :

> If the water which would otherwise fall on the higher ground, *without hurting the inferior tenement*, should be collected in one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property. (The material words have been italicized) : (1915) 113 L T 55,[2] cited in Coulson and Forbes on Waters, Edn. 5, p. 142.

See also A I R 1930 Mad 676.[3] The limit of the right is in the above passage defined and from what has been stated above, it is clear

1. Ramaswamy Naicker v. Rasi Naicker, (1915) 2 A I R Mad 852 = 21 I C 62 = 38 Mad 149 = 25 M L J 276.
2. Gibbons v. Lenfarty, (1915) 113 L T 55 = 84 L J P C 158.
3. Chinnanna v. Veerappa, (1930) 17 A I R Mad 676 = 125 I C 529.

that it has been exceeded. Whether the water course here can be properly described as a 'stream' is a question we need not go into; for, by whatever name called, it ended naturally in plot C and did not flow further. But if the description given of it by the learned District Munsif is correct, it can hardly be regarded a natural stream. There is a distinction to be taken in law between a regular flowing stream of water, though it sometimes may be dry, and those occasional bursts of water which in times of freshes or melting of ice and snow descend from the hills, and inundate the country. (Angell on Water-courses, cited in Gale on Easements, Edn. 11, at p. 267 foot-note). As already observed, on this distinction nothing turns. In the result, the Letters Patent Appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 651

GENTLE J.

In the matter of Hindustan Commercial Bank (India) Ltd., Madras.

O. P. No. 204 of 1936 and Appln. No. 548 of 1937, Decided on 18th August 1937.

Trust — Creation of — Security deposit of employee in employer bank placed upon fixed deposit in his name—Payment of interest—Bank holds such deposit in trust—Insolvency of bank—Employee has right to follow assets of bank.

Where an employee of a Bank deposits certain amount for security for good behaviour and honesty and as a part of the engagement transaction, the security deposit is placed upon fixed deposit in the name of the employee, the moneys are held by the Bank in trust. The agreement to pay interest on such money deposited cannot destroy the character as such of those moneys. If subsequently the Bank becomes insolvent, the trust moneys can be followed so as to reach the assets of the Bank from whatever source they might come: *A I R 1936 Bom 296; A I R 1935 Mad 686 and A I R 1933 P C 148, Rel. on.* [P 651 C 2; P 652 C 1, 2; P 653 C 1]

T. R. Ramachandran (Official Liquidator) — *for Applicant.*

S. Srinivasaraghavan, T. R. Srinivasa Iyengar, E. S. Viswanathan, G. V. Ramalingam, T. S. Swaminathan, K. Venguswamy Iyer and S. Arunachala Iyer — *for Claimants.*

Order.—The matter now before me concerns the position of creditors Nos. 1, 7, 8, 15, 22, 35, 40, 41, 42, 47, 48, 51, 58, 73 and 75, also Nos. 9 and 26. The amounts of their claims have been admitted by the learned Official Liquidator. It is unnecessary for me to mention the exact sum for which each of these creditors has been admitted by him. The position taken up on behalf of these creditors and urged before me arises from the following circumstances. All of them were employees of the Bank. As a condition for obtaining employment, either the employees themselves or some person on their behalf paid to the Bank a sum of money by way of what was called security deposit in respect of the employment of the employees. That was a sum which was paid to the Bank as a gesture of honesty and by way of security for their faithful and honest service whilst in the employment of the Bank. There can be no doubt that the moneys paid by or on behalf of these employee creditors were paid for the purpose and under the circumstances I have mentioned. When the Bank advertised for employees as they did in the issue of the 'Hindu' dated 7th January 1935, the advertisement stated that cash security of Rs. 1000 in respect of each employee will be required. All the moneys paid by way of security deposit in respect of the employees' faithful service was placed upon fixed deposit and receipts were issued by the Bank to the payers of the sums in respect of each employee. On one of such receipts, if not more, it is expressly stated that the money, the subject of the fixed deposit, was by way of security deposit in respect of the employee. These fixed deposit receipts provided for various lengths of periods of time during which the moneys were to remain on deposit before they could be withdrawn by the depositors and also varying rates of interest. I am satisfied that the placing of these moneys on fixed deposit was the machinery by which the payments were acknowledged by the Bank and the method by which the Bank was intimating to the depositors that their moneys were safeguarded. Although in the majority of deposit receipts no reference is made to the object of payment, namely by way of security deposit, looking at each transaction and the necessary matters connected, as a whole it is quite clear to me, whether the deposit was made before, at the time of or after the actual employment, that the deposit formed a part and parcel of the engagement transaction. The moneys should have been held by the Bank in trust since expressly they were paid as security for good behaviour, recourse being had only by the Bank when they were

justified in looking to the employee to recoup them in respect of losses sustained by reason of some default or act by the employee. Interest was payable upon these moneys and in one case at least was paid. It is contended on behalf of the Official Liquidator that since there was an agreement by which interest was payable the moneys paid as security deposits cannot be the subject of a trust and reliance was placed to support that proposition upon the decision in 23 M L J 221,[1] the headnote of which is as follows :

> . . . . The amount paid in by the employee of the insolvent company and held in fixed deposit by the latter in their own name was not money held in trust.

The headnote does not quite fully set out the effect of the judgment which was that if interest was payable it was not the subject of a trust. A somewhat similar decision is found in 27 I C 343.[2] Since this decision, the matter has been before the Privy Council in 56 Mad 570.[3] In the two earlier cases it was apparent that the moneys paid by way of security deposit were used in the ordinary business of the depositees to the knowledge perhaps of the depositors. Dealing with this point their Lordships of the Privy Council in the last case I have mentioned at page 576 say as follows :

> Much argument was expended in the lower Appellate Court and before the Board on the doctrine of following trust funds, and it seemed to be suggested that though, if the fund in the present case had been improperly employed in the business of the trustees, the beneficiary would be entitled to a charge upon the whole of the assets (*see* S. 66, Trusts Act, 1882), no such right could be accorded to him if the employment of the funds in this way was in pursuance of the terms of the trust.

On moneys paid by a depositor, as were paid here, as security interest being payable, it was not part of the bargain that these moneys were, as I have said expressly, to be used in the business of the Bank. So far as the question of agreement to pay interest is concerned, in 38 Bom L R 541[4] at page 552, Kania J. says :

> It was next pointed out on behalf of the liquidator that the payment of interest and the fact that in the interval the fund was intended to be used by the company indicate that there was no fiduciary relationship but that the company stood in the position of a debtor only. In support of that contention reliance was placed on the decision in 34 Bom L R 728.[5] The question in that case was about the deposit made by the selling agents of a mill as security for the due discharge of the terms of the agency agreement. The company bound itself to pay interest on the amount deposited, and agreed to invest the amount in Government securities and keep the securities earmarked to the satisfaction of the agents.

Later on the learned Judge comments upon the earlier Bombay case and refers to (1866) 35 Beav 621,[6] and says in effect that the question of agreement to pay interest on moneys deposited, those moneys being trust money, cannot destroy the character as such of those moneys which still remained trust moneys. I respectfully agree with this conclusion. In my view, these moneys paid by the depositors when they reach the hands of the Bank were trust moneys and so remained so long as the moneys were in the hands of the Bank. The next question which arises is, whether there are moneys which can be traced to the Bank's assets which can be said to be these trust moneys. When a trustee spends money it is presumed that he spends his own money first before he exercises himself in respect of the moneys of which he is a trustee. I am told that the assets of this company, so far as they were represented by cash at the date of the petition for winding up amounted to Rs. 3 or 4 only, but the total assets represented either by moveable properties of various descriptions or of moneys due to the company amount to a not inconsiderable sum. The creditors in question allege that they are entitled to follow these moneys by reason of the provisions of S. 229, Companies Act, which enacts that the rules and provisions of the Presidency Towns Insolvency Act shall apply to companies winding up. S. 52 (1), Presidency Towns Insolvency Act provides that the property of the insolvent divisible amongst his creditors shall not comprise "(a) property held by the insolvent on trust for any other person." That means property at the date, so far as the company is concerned, of its winding up held by the company on trust. It does not mean that moneys which have been entirely dissipated are to be deemed to be held on trust,

1. Arbuthnot & Co. v. Sabapathy Mudaliar, (1913) 23 M L J 221=14 I C 579.
2. Malvankar v. Credit Bank of India Ltd., (1914) 1 A I R Bom 118=27 I C 343=16 Bom L R 733.
3. Official Assignee of Madras v. Krishnaji Bhat, (1933) 20 A I R P C 148=143 I C 162=60 I A 203=56 Mad 570 (P C).
4. In re Fazalbhai Mills Ltd., (1936) 23 A I R Bom 296=164 I C 328=38 Bom L R 541.
5. In re Maneckji Petit Manufacturing Co., (1932) 19 A I R Bom 311=140 I C 814=34 Bom L R 728.
6. Geo v. Liddel, (1866) 35 Beav 621=55 E R 1098.

but if the assets of the company can be traced showing the existence of trust property, then the creditors are entitled to rely upon the provisions of S. 52 (1) (a), Presidency Towns Insolvency Act. The question of tracing trust moneys has been considered in A I R 1935 Mad 686[7] — the relevant headnote being "(3)—Trust money invested in trustees' business firm within the meaning of S. 63, Trusts Act—"and Beasley C. J. in the course of his judgment at page 690 says :

> The right of the beneficiary to follow trust money does not depend upon the act of the trustee being a wrongful one, and that trust money invested in a business can be traced within the meaning of S. 63, Trusts Act, to the eventual assets of the business.

In (1815) 105 E R 721,[8] Lord Ellenborough at page 726 says :

> It makes no difference in reason or law into what other form, different from the original, the change may have been made . . . . for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such.

In 56 Mad 570,[3] their Lordships of the Privy Council at p. 578 referring to the facts of the case then before them say :

> In the present case once it was admitted that the Rs. 10,000 was a trust in the hands of T. R. Tawker & Sons to be invested in their business and was so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm.

In my view the payments made by the depositors in respect of the employees' employment to the Bank were trust moneys and that trust money can be followed so as to reach the assets of the Bank from whatever source they might come being clearly laid down, the tracing of assets in that way is the proper principle of law to apply in regard to these matters. The result is that the claims made by the creditors I have enumerated will be allowed. There is one other point with which I desire to deal. It is this. Two of the creditors, Nos. 1 and 35, having deposited moneys with the Bank by way of fixed deposit, a few days later wrote letters to the Bank purporting to grant to the Bank a lien on the amount of deposit in respect of the employment of employees. Although the language used is lien, and the method of carrying out the transactions was slightly different in regard to others, looking at the transaction as a whole I am satisfied that there should be no difference between these two depositors and the other depositors to whom I have referred. The result is that these two claims will be allowed, that is to say, there will be a declaration that the assets of the company coming into the hands of the Official Liquidator will be earmarked first of all to the discharge of the claim by the depositors up to the amount of the deposit with interest up to the date of the liquidation at the rates prescribed in the respective fixed deposit receipts. If the assets of the company are insufficient to discharge these debts in full, then the divisible assets will be divided pro rata amongst these creditors.

The creditors concerned are entitled to costs. There will be one set in respect of creditors Nos. 1 and 42—7—8, 47, 48 and 75—and 35, 40, 41 and 51 and one set for 22 and half a set for 58 and 73. So far as creditor No. 78 is concerned, he was originally a depositor and in the claim put forward on his behalf to the Official Liquidator claim is made not by way of return of deposit but in respect of three promissory notes which had been given to the depositors in discharge of the deposit indebtedness. No claim having been made against the Official Liquidator for the return of the moneys as deposits, that particular creditor will not have the benefit of the decision which I have given just now. The Official Liquidator will deal with the debts due to creditors Nos. 9 and 26 in the same way as he is directed to deal with the creditors whose claims I have just considered. The costs to be allowed are fixed at Rupees 25 each set.

C.R.K./V.B.B. *Application allowed.*

---

7. Veerapa Chetty v. Official Assignee, Madras, (1935) 22 A I R Mad 686=161 I C 891.
8. Taylor v. Plumer, (1815) 3 M & S 562=2 Rose 415=16 R R 361=105 E R 721.

A. I. R. 1938 Madras 653

HORWILL J.

In re Nondi — Accused.

Criminal Revn. Case No. 714 and Case Ref. No. 39 of 1937, Decided on 3rd February 1938, from order of Dist. Magistrate, South Arcot, Cuddalore, D/- 17th November 1937.

Madras Borstal Schools Act (5 of 1926), S. 8 —Sentence of detention in Borstal School must take effect at once and cannot be postponed to subsequent date — Sentence of detention for period lesser than two years is illegal.

The Borstal Act does not contain a provision corresponding to S. 397, Criminal P. C., and a sentence of detention in a Borstal School must take effect at once and cannot be postponed to

have effect from the date of subsequent release of the accused after the expiry of a term awarded on a previous occasion. So also a Magistrate cannot pass a sentence for detention for a lesser period than two years. [P 654 C 1]

Public Prosecutor — *for the Crown.*

Order.—The Stationary Sub-Magistrate of Tittagudi found the accused guilty of theft in two cases, C. C. Nos. 120 and 121 of 1934 on his file. As he thought that the accused should be dealt with under the Borstal Act he referred the case to the Sub-Divisional Magistrate of Chidambaram for orders under S. 8 of that Act. The accused was already under sentence of detention in a Borstal School for three years upon an order passed on 24th February 1934; and he was serving that sentence when the matter came before the Sub-Divisional Magistrate for orders in C. C. Nos. 72 and 73 of 1934. The Sub-Divisional Magistrate passed an order that the accused should be detained in a Borstal School for a period of one year in each case, the two sentences to run consecutively and to take effect after the expiry of the three years' sentence passed on 24th February 1934. If the Sub-Divisional Magistrate had read S. 8, Borstal Act before passing his order, he would have seen that he could not pass a sentence for detention for a lesser period than two years. The District Magistrate has referred this case to this Court because of this illegality and also because the Sub-Divisional Magistrate had ordered the sentence to have effect from the date of his release after the previous term of three years awarded on 24th February 1934. The Borstal Act does not contain a provision corresponding to S. 397, Criminal P. C.; and so a sentence of detention in a Borstal School must take effect at once and cannot be postponed. Even if the two sentences of one year to run consecutively be enhanced each to two years to run concurrently, these sentences would expire before the three years' sentence from 24th February 1934. Under these circumstances, to remove any doubt that may exist in the minds of the Borstal School authorities or others as to the effect of sentences imposed during the currency of a term already being served and because the accused is already serving a term of three years, the sentences passed under C. C. Nos. 72 and 73 of 1934 will be set aside as unnecessary.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 654

PANDRANG ROW J.

Penumatsa Ranga Razu of Vempa and another — Petitioners.

v.

Sree Rajah Kandregula Sreenivasa Jagannatha Rao Pantulu Bahadur Garu, Zamindar, Gazzavaram and Kalipatnam Estates — Respondent.

Criminal Revn. Cases Nos. 382 and 383 and Misc. Petn. No. 1259 of 1937, Decided on 20th January 1938, from order of Court of Joint and First Class Magistrate, Narsapur, D/- 17th June 1937.

(a) Criminal P. C. (1898), S. 145—Words "actual possession" mean actual physical possession as distinguished from constructive possession — Possession through tenants is not actual possession within meaning of S. 145.

The words "actual possession" in S. 145 mean actual physical possession, even though wrongful. The words are sufficiently clear and can only mean possession in fact as distinguished from possession implied by law or constructive possession. Where the possession that is claimed by a party to proceedings under S. 145 is the possession of his tenants, i. e. constructive possession and not actual possession, he cannot be said to be in possession of the land within the meaning of S. 145 : *A I R 1928 Cal 610 and A I R 1928 Cal 344, Rel. on.* [P 655 C 2]

(b) Criminal P. C. (1898), Ss. 145, 439—Party to proceedings under S. 145 admitting that he is not in actual possession of land — Refusal by Magistrate to take further evidence adduced by party does not result in failure of justice so as to make order open to revision.

Where in proceedings under S. 145, one of the parties admits that he is not in actual possession of the land in dispute and that the only possession which he claims is that of his tenant, a refusal by the Magistrate to take any further evidence adduced by the party cannot be said to have resulted in failure of justice to the party, so as to make the order passed by the Magistrate open to revision : *3 C L J 478, Rel. on.* [P 656 C 2]

(c) Revision—Powers of High Court—Expunging of objectionable remarks—Language used by Magistrate making reference to one of the parties, although objectionable, not harsh or uncalled for—High Court will not interfere in revision and direct remarks to be expunged.

Where the language used by a Magistrate, in an order passed by him, making reference to one of the parties, although objectionable, is not so harsh or uncalled for as to be corrected judicially, the High Court will not interfere and expunge the objectionable remarks in revision. All that can be said is, that the Magistrate should have used more decorum and more restraint in choosing his words. [P 656 C 2]

V. T. Rangaswami Ayyangar, K. Ramaswami Ayyangar, K. Kameswara Rao, Nugent Grant and A. Narasimha Aiyar — *for Petitioners.*

K. S. Jayarama Aiyar and N. Somasundaram — *for Respondent.*

Public Prosecutor — *for the Crown.*

Order. — These revision cases arise out of an order passed by the Joint Magistrate of Narsapur Division on 17th June 1937, under S. 145, Criminal P. C. regarding a dispute about a large extent of land which was till recently jungle or waste but has since been included in an irrigation project and has consequently increased in value. The dispute was between the zamindar of Gazzavaram and Kalipatnam estates and Mr. Addepalli Venkataraman, respondent 1 in the Court below, who describes himself as a Barrister of the Inns of Court at Dublin and an advocate of this Court and others who claim under respondent 1. Respondent 1 himself claimed the land in dispute under a document which according to him is a perpetual lease executed in his favour by the petitioner zamindar in 1923. The Magistrate found that actual possession was with the petitioner, and passed orders declaring that the petitioner is in possession and forbidding all disturbance of such possession by the other party. Respondent 1 is the petitioner in Criminal Revision Case No. 383 of 1937 and respondent 3 who claims under him as a tenant is the petitioner in Criminal Revision Case No. 382 of 1937. The criminal miscellaneous petition is by respondent 1 objecting to certain remarks made against him in the order of the Magistrate and praying that they should be expunged.

The only point which has been pressed in the revision petition is that the Magistrate acted irregularly and in fact, in disregard of the law, in not allowing respondent 1 to adduce all the evidence which he wanted to adduce in support of his claim. Respondent 3 also raises the same point though it is not his case that he was not permitted to adduce all the evidence which he wanted to adduce; in other respects, there is no attack on the Magistrate's jurisdiction or on the procedure followed by him during the inquiry. The learned Magistrate after examining respondent 1 found that respondent 1 was admittedly not in possession of the land in dispute and therefore did not allow him to adduce any further evidence and thereby protract the enquiry needlessly. If, as a matter of fact, respondent 1 was admittedly not in possession of the land in dispute or any portion thereof, it cannot be said that the refusal to take further evidence on his behalf has resulted in any failure of justice, because, when the claimant himself has admittedly no case, any number of witnesses cannot improve upon it. It is however argued by Mr. Grant that the admission made by respondent 1 has been misunderstood by the learned Magistrate, and that this misunderstanding was also shared by respondent 1 himself when he made the admission; in other words, according to Mr. Grant, when respondent 1 admitted that he was not in possession for some time before the preliminary order of the Magistrate, what he meant was that he was not himself in actual physical possession and that he did not intend to abandon his claim to actual possession based on the actual possession which, according to him, was with his tenants. Whether such ignorance of law on the part of respondent 1, who is a Barrister-at-law, can be said to be excusable is doubtful. The evidence of respondent 1 shows that a good portion of the land had been sold by him, and he could not have reasonably believed that the possession of his vendee was his possession even in the eye of the law.

I think however that respondent 1 really meant only to admit that he had no actual possession of the land in dispute, and that he did not intend to give up or abandon the claims of those who claimed under him. But that does not mean that he had any real claim to actual possession himself. The words "actual possession" found in S. 145, Criminal P. C., have been considered in several cases and one of such cases is 56 Cal 290[1] which was decided by a Full Bench of the Calcutta High Court in 1928. It was there held that the words "actual possession" mean actual physical possession, even though wrongful. In 55 Cal 826[2] it is realistically described as the possession of a man who has his feet on the land, who is sowing it and so on. The words are in my opinion sufficiently clear and they can only mean possession in fact as distinguished from possession implied by law, or constructive possession.

It has been argued that the tenant's actual possession is the landlord's actual possession, but it is conceded that if the dispute about the land is between a landlord and his tenant, this doctrine cannot possibly be applied. The exception has admittedly to be made in the case of a dispute

1. Agni Kumar Das v. Mantazaddin, (1928) 15 A I R Cal 610=113 I C 181=56 Cal 290=48 C L J 193 (F B).
2. Ambar Ali v. Piran Ali, (1928) 15 A I R Cal 344=109 I C 231=29 Cr L J 563=55 Cal 826 =47 C L J 233=32 C W N 275.

between co-owners inter se. I am unable to accept the view that the Legislature meant by the words 'actual possession' one thing in a certain set of cases and another thing in another set of cases; that, in other words, in disputes between landlords and tenants or between co-owners they mean one thing, whereas in disputes between other persons, they mean another. The meaning of the words must be the same in all cases. The question is whether respondent 1 can be said to have had actual possession on the date of the preliminary order. The only possession which he claimed was the possession of his tenants, that is to say, constructive possession as distinguished from actual possession. The tenants were, moreover, parties themselves and they had every opportunity to adduce evidence in support of their claim of actual possession. In these circumstances, it is impossible to say that there has been any failure of justice by reason of the refusal of the Magistrate to allow respondent 1 to adduce further evidence. In fact it would appear that a good many of the witnesses cited by respondent 1 were actually examined on behalf of respondent 3 and in this way there has been really no prejudice to respondent 1.

Mr. K. S. Jayarama Ayyar has brought to my notice the case 3 C L J 478[3] in which there was a similar refusal by the Magistrate to examine certain witnesses produced by the petitioner in support of his claim. A Bench of the Calcutta High Court held that as the petitioner's case had broken down after the examination of the petitioner and his chief witness, the Magistrate was entitled to exercise his discretion and refuse to allow further witnesses to be examined on the side of the petitioner. The present case is really a stronger case, because there was not merely the breaking down of the case, so to speak, but the actual giving up of his case by the claimant himself, namely respondent 1. He chose to rest his case entirely on the actual possession of his tenants and not on any actual possession of his own. It is not quite clear, moreover, that witnesses were actually tendered by him for examination and that the Magistrate refused to take their evidence. It is possible that what really took place was that the Magistrate declined to issue further process. Whatever it may be, and even assuming that the Magistrate was not justified in the circumstances in refusing to allow further evidence to be adduced in support of respondent 1's claim, I am clearly of opinion that there has been no failure of justice by reason of such refusal in the circumstances of the case, and there is therefore no reason to interfere in revision, in view of the provisions of S. 537, Criminal P. C. Criminal Revision Cases Nos. 382 and 383 of 1937 are accordingly dismissed.

The remaining petition for expunging certain remarks does not require detailed consideration. No doubt the learned Magistrate has used strong language in describing respondent 1's evidence and conduct. Mr. K. S. Jayarama Ayyar contends that the language is not stronger than the occasion called for, while the petitioner's advocate contends otherwise. It is certainly a matter in which there can be a reasonable difference of opinion, and I must say that the language is not so objectionable or uncalled for that I should correct it judicially. I have to say at the same time that the learned Magistrate would have done well if he had observed greater decorum and more restraint in choosing his words. I do not think the learned Magistrate intended to wound the feelings of respondent 1 by referring to his "muddled brain" and describing him as "the villain of the piece" and the "origin of the whole trouble" and it cannot be said in the circumstances of this case that criticizm and even strong criticizm, of respondent 1's conduct and evidence was out of place. All that can be reasonably urged is that the criticizm might have been more mildly worded, but this is not to say that the criticizm actually levelled was so harsh that it should be revised or corrected in revision. This petition is also therefore dismissed.

C R.K./R.M. *Petition dismissed.*

3. Samir Sheikh v. Jahed Sheikh, (1906) 3 C L J 478.

A. I. R. 1938 Madras 656

BURN J.

In re Kannegati Chowdarayya and another — Appellants.

Criminal Appeals No. 456 and 465 of 1937, Decided on 22nd February 1938, against sentences of Sess. Court, Guntur Division, in Case No. 22 of 1937.

(a) Penal Code (1860), Ss. 361, 363 — Accused convicted under S. 363 for having deceitfully enticed away his own child from custody of his mother, who was deserted by him and in whose custody child was since its

birth for more than three years—No proof of purpose for which child was taken away—Conviction held not proper.

A person who is in fact the father of the child alleged to have been kidnapped by him and therefore in law entitled to the lawful custody of the child does not come within the scope of S. 361 and his act in taking away the child from the keeping of the mother does not amount to an offence of kidnapping from lawful guardianship. [P 658 C 2]

Where the accused was convicted under S. 363 for having deceitfully enticed away his own child from the custody of his mother, who had been deserted by him, and in whose keeping the child had been since its birth for more than three years and all that was proved was that the accused got by deceitful means the child from the custody of his mother to his own and there was no proof of the purpose for which the accused caused the child to be taken away from the keeping of the mother :

Held that the accused was wrongly convicted under S. 363, as his act did not amount to an offence under S. 361 : *A I R 1931 Cal 446 and A I R 1919 All 36, Rel. on.* [P 659 C 1]

(b) Evidence Act (1872), S. 105—Evidence for prosecution itself showing that act of accused falls under exception in Penal Code—Accused need not prove that it falls within any exception.

Under S. 105, it is no doubt the duty of the accused to show that his offence falls within any of the exceptions in the Penal Code but where it appears from the prosecution evidence itself that the act falls within an exception, the accused will be clearly relieved of the burden. [P 659 C 1]

S. Vepa, N. V. B. Sankara Rao and T. Krishnamurthi — *for Appellants.*

Public Prosecutor — *for the Crown.*

Judgment.—This is a case of an unusual kind. In fact I am informed that it is the first case of its kind. The appellant in C. A. No. 456 of 1937 was accused 1 and the appellant in C. A. No. 465 of 1937 was accused 2 in S. C. No. 22 of 1937 on the file of the learned Sessions Judge of Guntur. Along with them two Mahomedans were tried and the charges upon which they were put up for trial were that accused 1 kidnapped a minor boy from lawful guardianship with intent that he should be murdered (S. 364, I. P. C.). Accused 2, 3 and 4 were charged with abetment of this offence. The learned Sessions Judge found accused 1 guilty of an offence under S. 363, I. P. C. holding it not proved that the kidnapping was in order that the little boy might be murdered. Accused 1 has been sentenced to 7 years' R. I. Accused 2 was convicted of abetment of the offence under S. 363, I. P. C. and sentenced to five years' R. I. Accused 3 and 4 were acquitted. The remarkable feature of this case is that accused 1 is the father of the boy, whom he is said to have kidnapped from the keeping of the boy's mother (P. W. 1). P. W. 1 and accused 1 were married several years ago and according to P. W. 1 her husband deserted her. She filed a suit for maintenance and this was compromised on terms by which accused 1 gave her some land to defray her costs and some additional land for her maintenance. This compromise took place on 19th July 1933 and in 1936 P. W. 1 put the decree in execution and got delivery of the lands. In the meanwhile in 1935 accused 1 had filed a suit in the Court of the District Munsif, Guntur, to set aside the compromise entered into in July 1933 on the ground that it had been obtained by fraud. A copy of the plaint has been filed as Ex. L and it shows that accused 1 alleged that his marriage with P. W. 1 had never been consummated, that her child was illegitimate, and that she was actually pregnant as the result of adulterous intercourse at the time the compromise took place. The plaint was dated 22nd November 1935. In that it is alleged that P. W. 1's son was born on 2nd January 1934.

In these circumstances on 11th April 1937 it was alleged that accused 1, with the help of the other three, kidnapped his own son from the guardianship of the little boy's mother. Learned counsel for the appellants has argued that the evidence of P. Ws. 1 to 5 who speak to the kidnapping ought not to be accepted. P. W. 1 is the mother of the child; P. W. 2 is a woman with whom P. W. 1 was lodging while she was in Guntur for the purposes of her litigation : P. W. 3 is another woman who was lodging in the same house, and P. Ws. 4 and 5 are boys aged 13 and 11 respectively who were employed in sweetmeat shops in Guntur. The boys described how accused 2 picked up the child in front of their shops, took him down a side lane and handed him over to accused 1. These two boys picked out accused 1 and 2 at an identification parade which was held on 12th April and there is really no reason for rejecting their evidence. In addition to this there was a confession (Ex. C) made by accused 2 to the Taluk Magistrate, Guntur, on 17th April. The learned Sessions Judge discarded this confession on the ground that the Taluk Magistrate had not in spirit observed the proper precautions to ensure that the confession should be voluntary. Mr. Vepa who appears for the appellants contends that the learned Sessions Judge was right. The learned

Public Prosecutor on the other hand contends that the learned Sessions Judge was wrong, and that there are no proper reasons for supposing accused 2's confession to have been anything but voluntary. I do not see any necessity to discuss this question at length, because I am satisfied, as the learned Sessions Judge was, that the other evidence in the case is sufficient to establish the fact.

The facts proved therefore are that the little boy (the son of accused 1 and P. W. 1), who had been brought up by his mother from the date of his birth, and who was in her keeping on 11th April 1937 was taken from her keeping by accused 2 who handed him over to accused 1, and who must of course have been acting under instructions from accused 1. Accused 1 does not now deny the paternity of the child. He alleges that he was ill-advised when he filed his suit against his wife. He says that the plaint was not drafted on his own instructions but on the advice of his pleader's clerk. This is not of course true. The pleader was examined as P. W. 12 and he testified that the plaint (Ex. L) was prepared in accordance with the instructions of accused 1. His evidence is no doubt true. The interesting question which arises is whether in these circumstances accused 1 can be held guilty of an offence under S. 363, I. P. C. I am told that there is as yet no record of any case in which a father has been convicted of kidnapping his own child from the guardianship of the child's mother. I have therefore to decide the matter as well as I can without the assistance of any reported cases. There is no doubt of course that P. W. 1, the mother of the child, was on 11th April 1937 the lawful guardian of the child for the purposes of S. 361, I. P. C. The parties being Hindus, the father is the lawful guardian, whose rights of guardianship until they are taken away by a decree of a competent Court or surrendered by himself are paramount to those of any other person. The father having acquiesced in the retention by the mother of the custody of this child from the date of his birth for over 3 years and 3 months, the mother clearly comes within the meaning of the explanation to Sec. 361, I. P. C. It was observed by Rankin C. J. in 58 Cal 897[1] :

> I do not doubt at all that the explanation to S. 361 was intended to extend the meaning of the words 'lawful guardian' beyond their ordinary scope. It is extended to include any person lawfully entrusted with the care or custody of such minor or other person. I do not doubt either that where, by consent of the relatives, a minor has been allowed to be in the custody of a particular relative, the definition given by the section will be satisfied. In such a case there may be no definite transaction of entrustment, but the consent of the relatives would be quite sufficient to make the guardianship lawful guardianship.

Therefore what we have proved in this case is that the child was in the keeping of his mother who was a lawful guardian within the meaning of S. 361, I. P. C., and that the child was taken or enticed away out of her keeping. S. 361 says that "whoever takes or entices ..... is said to kidnap" and there can be no doubt that the word "whoever" will include P. W. 1's husband. But this is not quite sufficient. The exception to S. 361 states as follows:

> This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Now, if a person who in good faith believes himself to be entitled to the lawful custody of a child cannot commit an offence under S. 361, I. P. C., it seems to follow *a fortiori* that a person who is in fact the father of the child, and therefore in law entitled to the lawful custody of the child cannot come within the scope of Sec. 361, I. P. C. In this case it can be said on behalf of accused 1 that he did not merely in good faith believe himself to be entitled to the lawful custody of his child, but that he was beyond the possibility of any challenge entitled to the lawful custody of the child, and that therefore his act in taking the child from the keeping of his mother could not amount to an offence of kidnapping from lawful guardianship. I think this contention is correct. The learned Public Prosecutor has drawn my attention to the final words of the exception to S. 361, I. P. C., "unless such act is committed for an immoral or unlawful purpose." He points out that according to the finding of the learned Sessions Judge, accused 1 had a strong motive to get the child away from his mother in order to stifle any suit for partition on behalf of the child. The learned Public Prosecutor suggests that this is an immoral or unlawful purpose, and invites my attention to the case

1. Saharali Mahommad v. Kamizuddin Mahammad, (1931) 18 A I R Cal 446=1931 Cr C 598 =132 I C 246=32 Cr L J 888=58 Cal 897= 35 C W N 195.

reported in 62 Cal 629.[2] That was a case in which the father of an illegitimate child was said to have taken the child away from his mother at the age of ten days, in order to hush up a scandal. It was held that in such circumstances the father of the illegitimate child might not be protected by the exception to S. 361, I. P. C. There was however no decision in the case, the appeal being remanded for re-hearing, but I notice that in the judgment of Henderson J. it is observed that it is for the prosecution to show that the act was committed for an immoral or unlawful purpose. By S. 105, Evidence Act, it is of course the duty of the accused to show that his offence falls within any of the exceptions in the Penal Code; but where it appears from the prosecution evidence itself that the act falls within the exception, the accused will clearly be relieved of that burden. In this case the exception itself states that S. 361 does not extend to the act of a person who in good faith believes himself to be entitled to the lawful custody of the child, unless such act is committed for an immoral or unlawful purpose; and that, as Henderson J. observes, lays upon the prosecution the burden of proving that the act was committed for an immoral or unlawful purpose.

In the present case it cannot be said that the prosecution has established that the act of accused 1 was committed for an immoral or unlawful purpose. The charge against accused 1 was that he had caused this child to be kidnapped in order that he might be murdered, but the learned Sessions Judge has expressly found that that charge was not established. No other object was attributed to accused 1 and it is not in my opinion justifiable to say that even though he has not been proved to have intended to murder the child, yet he must have had some other unlawful or immoral purpose. In the absence of proof of the purpose for which the accused caused the child to be taken away from the keeping of his mother, all that we have proved is that the father of the child by deceitful means got the child from the keeping of his mother to his own. This in my judgment is not an offence under S. 361, I. P. C. and I am fortified in this opinion by the reasoning of Rankin C. J. in the case in 58 Cal 897.[1] The learned Chief Justice quoted with approval the decision in 42 All 146[3] as authority for the proposition that

> the explanation to S. 361 cannot be used to mean that, as against a person who, in fact, is the civil guardian of the minor, mere de facto guardianship can be set up so as to convict the real civil guardian of an offence under S. 361.

I therefore find that the appellant in C. A. No. 456 of 1937 has been wrongly convicted of an offence under S. 363, I. P. C. I set aside the conviction and acquit him. The conviction of the appellant in C. A. No. 465 of 1937 also for abetment must be set aside for the same reason. He is also acquitted. The appellants have been released on bail and I direct that their bail bonds be cancelled.

C.R.K./R.M. *Conviction set aside.*

2. Mahendranath Chakravarti v. Emperor, (1935) 62 Cal 629=39 C W N 396.

3. Emperor v. Sital Prasad, (1919) 6 A I R All 36=54 I C 402=42 All 146=21 Cr L J 50=18 A L J 64.

A. I. R. 1938 Madras 659

HORWILL J.

In re Peer Masthan Rowther
Petitioner.

Criminal Revn. Case No. 417 and Cri. Revn. Petn. No. 385 of 1937, Decided on 4th February 1938, from judgment of Sub-Divisional Magistrate, Devakottai, D/- 8th March 1937.

(a) Madras Local Boards Act (14 of 1920), S. 214 (2) — Warrant to attach property for arrears of tax—Facsimile stamp of President's signature is sufficient.

The omission of the regular signature of the President does not invalidate a warrant issued to attach certain property for arrears of tax. The affixture of a facsimile stamp is sufficient : *A I R 1930 Mad 430, Expl.* [P 660 C 2]

(b) Penal Code (1860), Ss. 186, 353 — Warrant need not be legal.

Sections 353 and 186 do not pre-suppose the existence of a legal warrant. There is no duty laid upon bill collectors and other persons to make independent inquiries regarding the validity of the warrant : *A I R 1924 Mad 895 and 25 Mad 729, Disting.; A I R 1925 Mad 613, Ref.; A I R 1917 Mad 889 and (1936) M W N Cr 35, Rel. on.* [P 660 C 2]

R. Swaminatha Aiyar — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—The Panchayat Board of Tirupatur issued a warrant to P. W. 1. The Bill Collector went to attach the property of a certain person, the brother of the accused named in the warrant in certain houses. Two doors were attached in one of these houses and just as P. W. 1 was tak-

ing them, the accused opposed, and in the attempt to take the doors he caused injury to the foot of P. W. 1. For this the accused has been convicted by the Sub-Divisional Magistrate of Devakottai of an offence under S. 353, I. P. C. The taluq Magistrate found him guilty under S. 186, I. P. C. also, but the Sub-Divisional Magistrate, rightly holding that the offence under Sec. 186, I. P. C., was included in the offence under S. 353, I. P. C., quashed the conviction under the lesser charge. It is argued in this petition that the warrant was illegal in that the property ordered to be distrained did not belong to the person who was in arrears in the payment of tax to the Panchayat and that the warrant was not signed by the President but contained only an impression of a facsimile rubber stamp of the President. It is contended that on that account the accused was entitled to resist P. W. 1 and cannot be held guilty of any offence in defending his own property. According to S. 214 (2), Local Boards Act:

> Every license, permission, notice, bill, summons or other document which is required by this Act or by any rule, bye-law or regulation made under it to bear the signature of the President or of any officer of a Local Board shall be deemed to be properly signed if it bears a facsimile of the signature of the President or of such officer as the case may be, stamped thereon.

It is contended that this sub-section applies only to licences, permissions, notices, bills, summons and documents of a similar nature and not to warrants under which the right of a person to the possession of property is affected. The learned advocate for the petitioner contends that the principle of ejusdem generis should be applied; but I am unable to think of any common classification under which licences, permissions, notices, bills aud summons may all be grouped. If it is possible to say that the specified documents belong to a particular class of documents, then there would be some ground for the argument that only documents of this class are affected by this rule. With regard to the interpretation of the corresponding section of the District Municipalities Act, the ruling of Jackson J. in A I R 1930 Mad 430[1] has been referred to. The argument of Jackson J. is :

> It is clear from Appendix A, Sch. 4, District Municipalities Act, that the warrant must bear the signature of the chairman. Signature must be taken in its accepted sense of sign manual. The fact that in S. 2 (20), Civil P. C. sign is used as including stamp has no bearing on the Madras District Municipalities Act. The only departure from the general rule is that if the chairman happens to be illiterate under S. 3 (29), Madras General Clauses Act, he may affix his mark.

In other words Jackson J. thought that as the District Municipalities Act, unlike the Civil Procedure Code contains no special section conferring on the chairman the right to use the facsimile stamp, a warrant must be signed. It is clear therefore that the attention of Jackson J. was not drawn to the provisions of S. 327, District Municipalities Act which contains provisions similar to those of S. 214, Local Boards Act. I hold that the affixture of a facsimile stamp is sufficient; and the omission of the regular signature of the President did not invalidate the warrant. On the question whether the Panchyat Board had any right to attach this particular property the accused has let in some evidence to show the existence of ill feeling between himself and the President of the Panchayat Board and the passing of correspondence about this house and other property; but even if this evidence be true, it does not follow that the property distrained did not belong to the person mentioned in the warrant. Even assuming that the property attached belonged to the accused and not to his brother, the warrantee, I would still be of opinion that the accused was rightly convicted under S. 353, I. P. C. and that this section and S. 186. I. P. C. do not presuppose the existence of a legal warrant. Section 186 runs :

> Whoever voluntarily obstructs any public servant in the discharge of his public functions shall be punished. . . . . .

It is clear that P. W. 1 was a public servant and I do not think it can be doubted that he was discharging his public functions. He was armed with what appeared to be a legal warrant ; and it was his duty to carry out the directions in the warrant and not to question it. There is no duty laid upon the bill collectors and other persons executing warrants to make independent enquiries regarding the validity of the warrant ; nor would it be possible for him to do so. To a charge under S. 353, a defence based on the illegality of the warrant would be even weaker; for S. 99, I. P. C. does not give the right of private defence against a public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law. Reference has been made to three judgments of single Judges in which it was held that

1. D. Madar Sahib v. Emperor, (1930) 17 A I R Mad 430=1930 Cr C 335 = 124 I C 139=31 Cr L J 639=53 Mad 508.

if the act was illegal the public servant could be lawfully resisted. Of these three decisions, that of Spencer J. in 47 M L J 447[2] can be distinguished on the ground that the village munsif who took the warrant went beyond the terms of the warrant and executed it against a person not mentioned in the warrant. In such a case he might not be protected. A Bench case relied on by the appellant is 25 Mad 729,[3] where the manager of the landlord supported by a number of retainers, went to the tenant's house and demanded payment of arrears. Upon failure of the tenant, the accused, to pay the rent demanded, the manager and others attempted to drive away the cattle of the accused. The accused objected and prevented this. It was held that there was no presumption that the act done was a lawful one and that it had not been proved that the accused had committed any offence; but there was no question in this case of a public servant acting under colour of his office. The attention of the learned Judges who delivered the judgments reported in 67 M L J 510[4] and 48 M L J 97[5] was not drawn to the decision of a Bench in (1916) 2 M W N 183,[6] a case in which a survey officer inadvertently trespassed on some lands and began measuring it and planting stones. He was resisted in his act and it was pleaded that as the public servant did an unlawful act the accused was entitled to resist him. The learned Judges repelled this argument and carefully discussed a long catena of cases of this Court on the question as to how far a person was entitled to resist a public officer who was doing an act that was not legally justifiable; and they held that in Madras it had been held consistently that if the public servant acted in good faith, it would be an offence to oppose him even though he were acting illegally. That decision has recently been followed by King J. in 1936 M W N (Cr) 35.[7] The result is that the petition fails and is dismissed.

C.R.K./V.B.B. *Petition dismissed.*

2. Narasimham v. Sub-Inspector of Police, Prathipad, (1924) 11 A I R Mad 895=83 I C 1007 =26 Cr L J 223=47 M L J 447.

3. King-Emperor v. Gopalaswamy, (1902) 25 Mad 729=1 Weir 57.

4. Suryanarayana v. Thota Simhadri, (1934) 21 A I R Mad 664=1934 Cr C 1287=152 I C 481 =67 M L J 510=36 Cr L J 111.

5. Murugappa Naicker v. Emperor, (1925) 12 A I R Mad 618 = 85 I C 286=26 Cr L J 750 =48 M L J 97.

6. Public Prosecutor v. Madhava Bhonjo Santo, (1917) 4 A I R Mad 889 = 86 I C 161 = 31 M L J 805=(1916) 2 M W N 183=17 Cr L J 481.

7. Simhadri Naidu v. Emperor, (1936) M W N Cr 35.

A. I. R. 1938 Madras 661

MADHAVAN NAIR AND STODART JJ.

Putti Ramachar and others — Appellants.

v.

P. V. Venkata Row and others — Respondents.

Appeal No. 259 of 1932, Decided on 9th December 1937, against decree of Sub-Judge, Trichinopoly, in O. S. No. 76 of 1929.

(a) Will — Construction — Will as it stands creating lawful and well recognized mode of devolution — It is not open to Court to draw inferences.

Where a will as it stands creates a lawful and well recognized mode of devolution, the Courts are not at liberty to draw inferences. The testator must be held to have intended the legal effects of his words. [P 662 C 2]

(b) Religious Trust—Appointment of trustees — Religious trust created by will — Testator appointing his son as trustee without further directions — He must be deemed to have prescribed line of succession in that son and his heirs.

Where a testator creating a religious trust by his will appoints his son to the office of the trustee without any further directions, he must be deemed to have prescribed a line of succession in that son and his heirs, although he does not make any provision for succession after that son's death. The will by implication makes provision for the appointment of trustees to succeed him and confers the office on his heirs after him. The appointment amounts to grant of a heritable trusteeship to the particular son and other sons of the testator cannot claim to be declared trustees on the ground that the appointment of the first trustee was only for his lifetime: *40 Cal 274 (P C), Rel. on ; Case law discussed.* [P 664 C 1, 2]

(c) Madras Hindu Religious Endowments Act (11 of 1927), Ss. 62, 63 and 73—In case of temple governed by the Act, reliefs for framing scheme of management and for rendering of accounts by existing trustee cannot be claimed in ordinary suit for declaration of right to trusteeship — Court is not entitled to institute system of rotation entitling plaintiff to enjoy office along with existing trustees.

In the case of a temple governed by the provisions of the Hindu Religious Endowments Act, reliefs for framing of a scheme for future management of the trust and for rendering of account by the existing trustees cannot be claimed in an ordinary suit for declaration of the plaintiffs' right to be appointed trustees. S. 73 provides that no suit in respect of the administration or management of a religious endowment shall be instituted

except as provided by the Act. There is no practice in existence under which the Court can institute a system of rotation entitling the plaintiffs to enjoy the office along with the existing trustees. To prescribe a scheme by which the existing trustees should be deprived of their offices, if only for a time, is not within the competence of a Civil Court in its ordinary jurisdiction. The Court however will recognize and enforce a system of rotation which by the consent of co-trustee has been in force for many years. But when no system of rotation exists, the only course open to a co-trustee is to proceed under the provisions of the Hindu Religious Endowments Act in the case of religious institution, and under S. 92, Civil P. C. in the case of other charitable trusts : *A I R 1936 Mad 294 ; 27 Mad 192 ; 32 Mad 167 and 19 All 428, Rel. on.* [P 665 C 2]

S. Ramaswamy Iyer — *for Appellants.*

T. V. Muthukrishna Iyer and K. G. Srinivasa Iyer — *for Respondents.*

Stodart J. — Plaintiffs are the appellants. Their grandfather Ramachar had three sons. In 1891 he died leaving a will in which he founded a religious trust and appointed his second son Venkatasubbarayar to carry out its objects, namely the building of a temple, the installation in it of certain idols and the regular conduct of worship of the said idols. Venkatasubbarayar died in 1924 having performed the duties of trustee and was succeeded by his three sons, defendants 1 to 3, who have continued in office till 1929 when this suit was filed. Plaintiffs are the sons of the youngest son of the founder. They seek to be declared trustees on the ground that the appointment by the testator of Venkatasubbarayar was only for his life, that on Venkatasubbarayar's death in 1924 the office became vacant and the trusteeship vested in all the heirs of the founder, namely themselves, defendants 1 to 3 and defendants 5 and 6 who are sons of Ramachar's eldest son, and who now support the plaintiffs. The lower Court held that the appointment of Venkatasubbarayar was for himself and his heirs. The appeal therefore is that the lower Court is wrong in its interpretation of the will. Other questions have been raised but this is the principal question which we have to decide. The relevant clauses of the will are :

I have set apart the undermentioned lands for charity; for the cost of building Hanumantharayan's temple; for the worship and the daily upkeep of the same. For the purpose of conducting this charity my second son, Venkatasubbarayar, has been appointed to the management ;

and again :

Whereas, I have appointed ..... Venkatasubbarayar, my second son as, manager to administer the charities out of the dedicated properties if the said charities be not conducted properly the leading persons in the village shall intervene and conduct the said charity properly. The Madhwas (testator was a Madhwa Brahmin) shall take an interest in the affairs of this charity and see that the puja and other duties to the God are performed by Madhwas alone .... My sons Venkatarayar, Venkatasubbarayar and Venkataramanachar shall have no right whatever in the properties dedicated to the said charities, the properties given as stridhanam to my daughters and the properties set apart for the puja of Lakshminarayanaswami and Hanumantarayaswami.

Appellants' case briefly is that according to the law as established by the leading cases of the High Courts in India the appointment of a trustee without indicating how the trust is to devolve after his death confers on him a trusteeship only for life. It will be necessary therefore for us to examine the authority cited in support of this proposition. The learned Subordinate Judge in construing the will observes that if the testator had wished his eldest and youngest sons to participate in the management of the trust after Venkatasubbarayar's death he might well have made a provision to that effect in the will itself. We might add that he might also have made a similar provision in favour of his existing grandsons, the present defendants 5 and 6 — then aged 12 and 7 respectively — since in the natural course they were likely to survive their uncle. We think these omissions do lend support to the inference that the testator intended the heirs of Venkatasubbarayar to be his successors in the office of trustee. Moreover in the clause in which the testator makes provision for the conduct of the trust in the event of Venkatasubbarayar's misconduct, the omission of testator's eldest and youngest sons is, we think, significant. The duty of intervention is cast on the leading men of the village. It may be inferred that if the testator had intended his two other sons to be trustees on Venkatasubbarayar's death he would have thought them fit to supersede Venkatasubbarayar in the event of the latter's misconduct. If however the will as it stands creates a lawful and well recognized mode of devolution we are not at liberty to draw these inferences. The testator must be held to have intended the legal effect of his words.

It may also be surmised that on Venkatasubbarayar's death plaintiff 1 and defendant 5 at least were not very certain of their right to succeed him in the office of trustee. For plaintiff 1, within six weeks of Venkatasubbarayar's death, set up an

alleged will, Ex. H, in which Venkatasubbarayar is made to appoint his nephews as well as his own sons to be trustees after his death. Defendant 5 appears as an attestor of this will. Plaintiff 1 sent it to the Collector for safe custody — a novel method of publishing it—but after that no one has attempted to enforce its terms up to the time of this suit when it is put forward by plaintiffs in support of their case. The lower Court has found it to be a forgery and that decision has not been appealed against. If plaintiff 1 and defendant 5 thought that they had a clear right to share in the trusteeship why did they fabricate this will? It remains to examine the cases which the appellants have cited in support of their case. 40 Cal 251,[1] cited in the lower Court and also before us, does not in our opinion help the appellants. The trust there was founded by the members of a Hindu family at the time of partition. In the partition deed and in a trust deed drawn up 12 years later there were provisions which showed that the family as a body intended to retain control of the trust. Nor was it contended by any party to the suit that after the death of the shebait who was first appointed, the office devolved on his heirs. So far as we can see that case is only relevant to the present discussion because it reiterates a rule laid down in 1890 by the Judicial Committee in 17 Cal 3[2] which is :

> According to Hindu law, when the worship of a Thakur has been founded, the office of shebait is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing or some circumstances showing a different mode of devolution : See p. 20 of the report.

Another case cited here on appellants' behalf is 11 C L J 2.[3] There the rule is laid down that when the established line of succession fails the management of the trust reverts to the representatives of the founder. See p. 12 of the report :

> The representatives of the founder have from 1813 exercised control direct or indirect over the management of the endowment and it is difficult to appreciate how it can seriously be contended that they have no right to intervene when it is found that the succession to the office of trustee has wholly failed.

According to the first of these cases therefore the trusteeship vests in the founder's heirs when the mode of its devolution has not been laid down by its founder and is not governed by some usage or course of dealing. According to the second case the trusteeship vests in the founder's heirs when the mode of devolution prescribed by the founder fails by reason of the line of succession dying out. 22 C L J 404[4] is an example of the first rule. The testator left the property to the idol appointing as executors in succession his widow, his youngest son, and lastly an elder son Brojendra. He did not provide for the devolution of the office after Brojendra's death. The Calcutta High Court held that on that event the trusteeship vested in the founder's heirs. But the question in the case now under appeal is whether in appointing his son to the office, though he did not make any express provision for the succession after that son's death, the testator must be held to have prescribed a line of succession in that son and his heirs. Learned counsel for the respondent contends that this is the proper interpretation of the will and that his view is fortified by the decisions of the Privy Council. We think he is right. 41 Mad 296[5] dealt with the case of a grant for charitable purposes by the then Rajah of Tanjore to his family priest. Plaintiff was one of the natural heirs of the last Guru and he claimed to be entitled as such to participate in the management of the charities. The Judicial Committee held that having regard to the nature of the charity and the manner in which the office of trustee was dealt with by the British Government on the cessation of the Tanjore Raj, the grant devolved on that one of the heirs who was the holder of the priestly office for the time being. It is clear that the Judicial Committee would have decided in the plaintiffs' favour, if it had not felt compelled to construe the grant in the sense stated. It sets out first the general proposition in the following words:

With regard to what are called private charities such as endowments for the support of the family idol, the law as laid down by various decisions in India and apparently accepted in one case by the Privy Council, *Ramanatha Chetty* v *Murugappa Chetty*[6] is that if there is no contrary provision in

1. Raj Krishan Dey v. Bepin Behari Dey, (1913) 40 Cal 251=18 I C 961=17 C L J 189.
2. Gossami Sri Gridharji v. Romanlalji Gossami, (1890) 17 Cal 3=16 I A 187=5 Sar 850 (P C).
3. Sital Das Babaji v. Pratap Chandra Sarma, (1909) 11 C L J 2=3 I C 408.
4. Kunjamani Dasi v. Nekunja Behari, (1916) 3 A I R Cal 312 = 32 I C 823=22 C L J 404= 20 C W N 314.
5. Sethuramaswamiar v. Meruswamiar, (1917) 4 A I R P C 190=43 I C 806=45 I A 1 = 41 Mad 296 (P C).
6. (1906) 29 Mad 283 = 33 I A 139 = 16 M L J 265 (P C).

the original grant the right of management passes to the natural heirs of the original grantee.

Then the Committee states briefly its reason for not applying this rule to the case before it :

> The devolution of the management to the heirs of the original donee was inconsistent with the purpose of the founder when he created the endowments.

It is contended for the appellant that this was a case where the endowment had already descended from father to son several times and was admittedly hereditary. But there is no doubt that the Privy Council were considering the terms of the original grant which was "to my royal priest Sethubhaswami." We would observe parenthetically that the expression "private charity" in the passage first quoted above means a charity founded by a private person. *Ramanathan Chetty* v. *Murugappa Chetty*,[6] cited by the Privy Council as an example of such an endowment, relates to the founding of a public temple as in the case we are now considering. It is reported in 29 Mad 283.[6] Then there is the case, 40 Cal 274,[7] than which nothing could be more decisive against the appellants' case. As here, the trust was founded by a will; as here the testator provided that his son should be shebait (though not before attaining his majority); and, as here, the testator made no provision for the devolution of the office in succession to his son. It was held in the High Court of Calcutta that :

> The will nowhere gives the son an absolute right to the shebaitship on attaining majority. We consider that he had only under the will a right to the shebaitship for his life.

In the Judicial Committee the judgment is :

> Their Lordships are of opinion that the decision of the High Court cannot be supported. There is in their Lordships' view an absolute gift of the shebaitship to the son, Mukunda Murari Pal.

The plaintiff in that suit was the son of Mukunda Murari Pal, and he claimed to be entitled on the death of his father, and his claim succeeded. The case of *Kunjamani Dasi*[4] in the Calcutta High Court was decided after the foregoing decision in the Privy Council; but the learned Judges who decided it did not in terms explain how the facts before them differed from the facts in 40 Cal 274.[7] There is obviously a difference. The succession prescribed was to the testator's widow, then to his youngest son and lastly to an elder son Brojendra. Nothing was said as to the succession on Brojendra's death. And the learned Judges who decided the case held that on that event the shebaitship vested in the heirs of the testator. At the end of their judgment however referring to 40 Cal 274,[7] they observed :

> Precisely the same result follows if we hold, on the authority in 40 Cal 274,[7] that the shebaitship vested absolutely in Brojendra and on his death devolved on his heirs, namely his four surviving brothers.

For, it so happened that the heirs of Brojendra were also the heirs of the founder. Learned counsel for the appellant has also relied on certain observations made by a Bench of this Court in 1928 M W N 127.[8] By a compromise in a partition suit which was embodied in the decree two brothers Upendra and Ramakrishna set apart some properties for religious purposes and agreed that Ramakrishna was to be the trustee. In the event of his misconduct, it was prescribed that the younger brother Upendra should take possession of the endowed property and perform the duties of the trust and moreover that he was at liberty to do this by way of execution of the decree itself. Ramakrishna made default and Upendra proceeded in execution to recover the properties. Before he had completely done so he died. But before he died he executed a trust deed and a will in favour of his son Venkatarayya appointing him trustee and empowering him to continue the execution. On an application in execution by Venkatarayya the Courts held that he was not entitled to be trustee and not entitled as such to proceed with the execution. In the course of that decision Kumaraswami Sastri and Wallace JJ. said :

> The general rule of law is that the founder of a trust or his heirs have got the right to appoint trustees in case of failure of trustees, or where the deed of trust does not make provision for the appointment of trustees to succeed the incumbents mentioned in the deed.

Stress is laid by learned counsel for the appellants on the last clause. But the respondent's case it that where the deed confers the trusteeship on the founder's son without further words, it does, by implication, make provision for the appointment of trustees to succeed him. It confers the office on his heirs after him. The strongest case relied on for the appellants is 49 Cal

7. Tripuari Pal v. Jagat Tarini Dasi, (1913) 40 Cal 274 = 17 I C 696 = 40 I A 37=17 C L J 159=17 C W N 145 (P C).

8. Venkataraya Prabhu v. Vasudeva Prabhu, (1928) 15 A I R Mad 897=108 I C 294=1928 M W N 127.

459.[9] A Hindu testatrix appointed her grandson Udoy Chand to perform the worship of an ancestral idol out of the income of certain Government securities, and the worship of another ancestral idol out of the income of a certain garden, purchased in the idol's name and of two houses which by the will were gifted to Udoy Chand himself. Their Lordships of the Privy Council held that the will was most obscure but agreed with the Calcutta High Court that no heritable shebaitship was established by it. There is no indication in this judgment that the facts were regarded as the same as the facts in 40 Cal 274[7] or that the rule laid down in that case was intended to be modified. All we can say is that without knowing more of the details of the will by which the trust was founded and of the reasons which induced the Calcutta High Court to interpret that will in the way it did, we are unable to hold that this case helps the appellants. We do not think it necessary to refer to the other cases which with considerable learning have been expounded by learned counsel on both sides. On the merits we think this appeal must fail. The appointment of Venkatasubbarayar amounted to a grant of a heritable trusteeship.

Before concluding there are some other points of the lower Court's decision which we must briefly notice. Plaintiffs in addition to the main relief, namely the declaration of their right, prayed that a scheme should be framed for the future management of the trust and that defendants 1 to 3 might be directed to render account of their management. But these latter reliefs cannot be obtained in an ordinary suit since the suit temple is governed by the Madras Hindu Religious Endowments Act. S. 73 of that Act sub-s. (3) provides that no suit in respect of the administration or management of a religious endowment shall be instituted except as provided by this Act. And under sub-s. (1) it is the Hindu Religious Endowment Board itself or some person having interest and having obtained the Board's consent who is competent to institute a suit to obtain a decree directing accounts and inquiries. As for the framing of a scheme of management that is governed by Ss. 62 and 63 of the Act. Nevertheless it is contended by learned counsel for the appellants that in a private suit for the office of trustee the plaintiff can obtain a decree settling a scheme so long as the scheme involves only the method in which the plaintiff is to enjoy the office along with existing trustees. It is urged that it is the practice in such cases for the Court to institute a system of rotation. We do not admit the existence of any such practice. To prescribe a scheme by which the existing trustees should be deprived of their office if only for a time is not within the competence of a Civil Court in its ordinary jurisdiction. A trustee can be removed only by a suit under S. 73, Hindu Religious Endowments Act. Before that Act he could be removed only by a suit brought under the provisions of S. 92, Civil P. C. See 27 Mad 192[10]:

> The view that one of several co-trustees is not entitled to ask a Court to partition the duties of the trust between himself and his co-trustees so as to give him the exclusive possession and management for (say) six months in the year putting the other trustees entirely aside . . . . is one to which no exception can be taken.

See also 32 Mad 167,[11] and the earlier case in 19 All 428,[12] which are direct authorities on the point. The Court however will recognize and enforce a system of rotation which by the consent of co-trustees has been in force for many years. See again 27 Mad 192[10] and also the recent case in 70 M L J 424.[13] But where no system of rotation exists the only course open to a co-trustee who wishes to have one established is to proceed under the provisions of the Hindu Religious Endowments Act in the case of a religious institution and under S. 92, Civil P. C. in the case of other charitable trusts. Lastly we would observe that one finding of the lower Court is wrong. It held that the suit was barred by S. 73, Hindu Religious Endowments Act as it was a suit for the appointment of additional trustees. It is not a suit of that nature. This finding is not supported by learned counsel for the respondent. In the result the appeal is dismissed with costs of respondents 1 to 4.

C.R.K./R.M. *Appeal dismissed.*

9. Gopal Lal Sett v. Purnachandra Basak, (1922) 9 A I R P C 253=67 I C 561=49 I A 100=49 Cal 459 (P C).

10. Ramanathan Chetty v. Murugappa Chetty, (1904) 27 Mad 192=13 M L J 341.

11. Thandavaraya Pillai v. Shunmugam Pillai, (1909) 32 Mad 167=2 I C 341=19 M L J 59.

12. Sri Raman Lalji v. Sri Gopal Lalji, (1897) 19 All 428=1897 A W N 103.

13. Alasinga Bhattar v. Venkatasudarsana Bhattar, (1936) 23 A I R Mad 294=164 I C 82=70 M L J 424.

✻ A. I. R. 1938 Madras 666

LEACH C. J. AND MADHAVAN NAIR J.

Sukkira Goundan and others — Petitioners.

v.

Palani Goundan — Respondent.

Civil Misc. Petn. No. 4682 of 1937, Decided on 2nd March 1938, for leave to appeal to His Majesty in Council against decree of High Court, D/. 28th July 1937.

✻ Civil P. C. (1908), S. 110, Cl. 2 — Suit for partition of property worth more than Rs. 10,000—Decree of High Court declaring plaintiff's share to be of value less than Rs. 10,000—Leave by defendant to appeal to Privy Council challenging decree—Case does not come under Clause 2.

In order to satisfy the conditions of S. 110, Cl. 2, the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards and not the rights affecting property whose value as a whole is Rs. 10,000 or upwards. [P 667 C 1]

Where therefore in a suit for partition of property worth more than Rs. 10,000 a decree is passed by the High Court declaring the plaintiff to be entitled to a share worth less than Rs. 10,000 and the defendant wishes by an appeal to Privy Council to challenge the decree, the case does not come under Cl. 2 of S. 110 as the value of the claim is less than Rs. 10,000, though the value of the property as a whole is more than Rs. 10,000: *A I R 1918 Mad 632, Foll. ; Case law discussed.* [P 666 C 1; P 667 C 1]

T. V. Muthukrishna Aiyar and P. N. Appuswami Ayyar — *for Petitioners.*

K. Periaswami Goundar — *for Respondent.*

Leach C. J.—This is an application for a certificate for leave to appeal to His Majesty in Council. The suit out of which this petition arises was filed by the respondent in the Court of the Subordinate Judge of Dindigul for the partition of the estate of a joint family of which he claimed to be a member. He valued the estate as a whole at Rs. 25,987 and his own share at Rs. 8662-5-4. The petitioners who were defendants denied that the respondent was a coparcener, and their defence prevailed in the trial Court. On appeal to this Court, however, it was held that the respondent was a coparcener and was entitled to have delivered to him property of the value of Rs. 5162-5-4. The petitioners challenge the correctness of this Court's judgment and wish to appeal to the Privy Council. The only question which falls for decision is whether the case falls within Cl. 2 of S. 110, Civil P. C. The section reads as follows :

In each of the cases mentioned in Cls. (a) and (b) of S. 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree of final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

The learned advocate for the petitioners rightly concedes that the subject matter of this suit does not amount to Rs. 10,000, the subject matter being merely the share of the respondent in the estate. Therefore the case does not fall within Cl. 1. But he says that the decision of this Court on appeal does involve some question respecting property worth more than Rs. 10,000 and therefore the case comes within Cl. 2. The value of the estate taken as a whole is far more than Rs. 10,000 and the contention is that as the decree has directed a partition of this estate it affects property of the required value. The learned advocate relies on the judgment of the Calcutta High Court in 10 C W N 564[1] and the judgment of the Allahabad High Court in 54 All 858.[2] 10 C W N 564[1] was also a suit for the partition of a joint family estate and Maclean C. J. and Mookherjee J. held that it was the whole estate which had to be looked at and not merely a particular share which one of the parties might claim. This construction was accepted by the Allahabad High Court in 54 All 858.[2] The Bombay High Court has however interpreted Cl. 2 of S. 110 differently and this Court has agreed with it. The opinion of the Bombay High Court is expressed in 6 Bom L R 403[3] which was decided by Jenkins C. J. and Russell J. It was there held that, where the relief is at less than Rs. 10,000 the value of the matter in dispute in appeal is not of the prescribed value. In such circumstances the decree itself does not involve any claim or question to or respecting property of the prescribed value and consequently the case does not fulfil the requirements of the section. The learned Chief Justice pointed out that, if the Court were to give effect to the contention that regard must be had only to the value

1. Bhagwant Sahai v. Pashupathi Nath Bose, (1906) 10 C W N 564=3 C L J 257.
2. Muhammad Asghar v. Mt. Abida Begum, (1933) 20 A I R All 177=138 I C 670=54 All 858=1932 A L J 730.
3. De Silva v. De Silva, (1904) 6 Bom L R 403.

of the whole estate, it would follow that, if the sole subject matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or more, a right to appeal to the Privy Council would exist, which would be giving to the words of the section a meaning which was not justified. This decision was followed by the Bombay High Court in 23 Bom L R 374[4] and in 49 Bom 149.[5] It has been suggested in the course of the argument that the Bombay High Court gave expression to a contrary opinion in 25 Bom L R 77,[6] but we do not regard the judgment there as repudiating the decision in 6 Bom L R 403[3] which was again followed in 49 Bom 149.[5]

This Court considered the question in 33 M L J 481,[7] which was an application for leave to appeal to His Majesty in Council heard by Sadasiva Aiyar and Spencer JJ. Sadasiva Aiyar J. expressed the opinion that in order to satisfy the conditions of S. 110 the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards and he quoted with approval the decision in 6 Bom L R 403.[3] Spencer J. delivered a judgment to the same effect. This decision is binding on us and disposes of the application. I may add that 6 Bom L R 403[3] was also followed by the Patna High Court in 4 Pat L J 415.[8] That was a case where a puisne mortgagee whose interest in the property which was worth only Rs. 4000 was applying for leave to appeal to the Privy Council from an order refusing to set aside the sale of the property ordered in a mortgage suit, the property being valued at over Rs. 10,000. The application for leave to appeal will be dismissed with costs.

C.R.K./D.S. *Application dismissed.*

4. Manilal v. Banubai, (1921) 8 A I R Bom 266 =63 I C 588=23 Bom L R 374.

5. Nariman Rustomji v. Hasham Ismayal, (1925) 12 A I R Bom 137=85 I C 191=49 Bom 149 =26 Bom L R 1261.

6. Appayya v. Lakham Gowda, (1923) 10 A I R Bom 176=72 I C 127=25 Bom L R 77.

7. Appala Raja v. Rangappa Naicker, (1918) 5 A I R Mad 632=40 I C 680=33 M L J 481.

8. Gosain Bhaunath Gir v. Behari Lal, (1919) 6 A I R Pat 305=52 I C 723=4 Pat L J 415.

A. I. R. 1938 Madras 667

HORWILL J.

In re Kamalammal and another
Petitioners.

Criminal Revn. Cases Nos. 393 and 394 and Petns. Nos. 361 and 362 of 1937, Decided on 30th March 1938, from order of Juvenile Court, Madras, D/- 16th June 1937.

Madras Suppression of Immoral Traffic Act (5 of 1930), S. 6 (2)—Search of house made by Inspector under warrant not under S. 6 (1) but under Ss. 13 and 14 issued by Commissioner who was not satisfied that there were girls in house under 18 years of age—Search resulting in finding of girls—Order of Magistrate under S. 6 (2)—Order held could not be deemed to be under S. 6 (2).

An Inspector raided a house and found three girls. The warrant under which the search was made was not under S. 6 (1) but under Ss. 13 and 14 issued by Commissioner who was not satisfied that there were girls in the house under 18 years of age carrying on the business of prostitution. His order was merely one authorizing the Inspector to ascertain whether certain offences under the Act were being committed there. The Magistrate of the Juvenile Court passed an order under Sec. 6 (2) :

Held that as the search was not under S. 6 (1) the order passed by the Magistrate was not an order under S. 6 (2). [P 668 C 1]

S. Sinnaswamy — *for Petitioners.*

Crown Prosecutor — *for the Crown.*

Order. — The Magistrates of the Juvenile Court, Madras, passed an order under S. 6, Cl. (2), Suppression of Immoral Traffic Act, that the three girls found in a house which was considered by the police to be a brothel should be committed to the Rescue Home attached to the Vigilance Association. The police searched a certain house and rescued these three girls and filed a case against the mother of two of the girls under S. 5 of the Act for keeping a brothel. After enquiry the Magistrate acquitted her as there was no evidence that that woman (Kamalammal) had been actually allowing the house to be used for purposes of prostitution although there was evidence which I do not think the Magistrate disbelieved that two of the girls were actually engaged in prostitution when the house was raided by the police.

The only objection which can be raised to the order passed by the Magistrates is that it was not really passed under S. 6 (2) at all, in that the search made by the Inspector of the house in question was not made under S. 6 (1). If the search had been made under S. 6 (1), then the Magis-

trates would be competent to pass an order under S. 6 (2), even though in some independent proceedings a Magistrate had found that the person accused of running a brothel was not in fact doing so. It appears true that the warrant under which the Inspector made the raid of this house was issued, not under S. 6 (1), but under Ss. 13 and 14. It was issued by the Commissioner of Police, Madras, to the Inspector authorizing him to enter into the premises of No. 65, Elephant Gate Street, for the purpose of ascertaining whether an offence punishable under Ss. 9, 10, 11 or 12 of the said Act has been or is being committed, whether any woman or girl is living therein in respect of whom an offence punishable under Ss. 9, 10, 11 or 12 of the Act has been committed and to arrest them under S. 13 in case he is satisfied that any of the offences punishable under the said sections had been committed.

The Commissioner of Police is also a Magistrate ; and if the nature of the warrant issued indicated that the Commissioner was satisfied that the girls under the age of 18 years had been carrying on business of prostitution in a brothel, then it might be argued that although the order was issued under S. 13, it might be considered to be an order under S. 6 (1) also. But it is clear from the order that the Commissioner of Police was not satisfied that there were girls in the house under 18 years of age carrying on the business of prostitution. His order was merely one authorizing an Inspector to ascertain whether certain offences under the Act were being committed there. The order passed by the learned Magistrates of the Juvenile Court was not therefore an order passed under S. 6 (2) and has therefore to be set aside. This is unfortunate, as I have no doubt that the girls would be better off where they are now than in the house of ill fame from which they have been taken. The petitions are therefore allowed and the girls against whom the order has been passed by the Magistrates of the Juvenile Court will be released.

C.R.K./D.S. *Petitions allowed.*

A. I. R. 1938 Madras 668

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Kumaraswamy Goundan — Appellant.

v.

Palanisamy Goundan and others — Respondents.

Appeal No. 16 of 1937, Decided on 7th March 1938, against decree of Sub-Judge, Coimbatore, in O. S. No. 245 of 1934.

Trusts Act (1882), S. 59—Chit transaction—Stake-holder in position of trustee while taking mortgages from successful bidder — Stake-holder adjudged insolvent and his property sold by Official Receiver—Suit under S. 59 is maintainable by beneficiaries.

In a chit transaction the security bond made it clear that the position of the stake-holder was that of a trustee while taking mortgages from the successful bidder. The stake-holder was adjudged insolvent and his properties were sold by auction by Official Receiver :

Held that the stake-holder ceased to perform and rendered himself incapable of performing the duties that devolved upon him as a trustee and hence a suit under S. 59 was maintainable by the beneficiaries. [P 668 C 2]

V. Ramaswamy Iyer and S. Kuppuswamy — *for Appellant.*

A. C. Sampath Iyengar — *for Respondents.*

Venkatasubba Rao J.—We agree with the lower Court that the suit was maintainable at the instance of the plaintiffs. The terms of the security bond (Ex. A) make it perfectly clear that the position of the stake-holder was that of a trustee while taking mortgages from the successful bidder ; that is the clear effect of the security bonds. The facts set out in para. 10 of the plaint, which have not been denied, show that the execution of the trust by the trustee, defendant 4, has become impracticable. Not only was the stake-holder adjudged insolvent (that of itself may not be sufficient) but it is also averred that his properties were sold by auction by the Official Receiver and purchased by the plaintiffs. The stake-holder ceased to perform, and rendered himself incapable of performing, the duties that devolved upon him as trustee. These facts bring the case within S. 59, Trusts Act and confer a right of suit on the beneficiaries. The appellant's contention in this respect therefore fails.

The next contention raises the question of registration. The amount secured by the suit mortgage bond is Rs. 13,000, but the plaintiffs are content to treat the principal sum as being only Rs. 8000. In claiming

the lesser amount, they rely upon and give effect to Ex. F, which recites that the chit transaction has come to an end and that the principal sum due from defendants 1 and 2 must be taken as Rs. 8000. But it is now contended for them that Ex. F being unregistered, the plaintiffs cannot rely upon it for varying the terms of the mortgage deed. Mr. Sitarama Rao urges by way of answer, that he will be in a position to show that the continuance of the chit is not a condition precedent to the arising of the liability under the deed of mortgage: *vide* 44 M L W 710[1] at p. 713. If this be so, defendants 1 and 2 committed default, when they failed to pay the fourth instalment, and under the provisions of the deed, the entire amount became immediately payable. This plea as to registration was not taken in the Court below and although the question is one of law, the appeal cannot be disposed of, if the point is now allowed to be raised for the first time without the plaintiffs being afforded an opportunity of making good their contention. That is to say, the parties must now be allowed to adduce fresh evidence and the case be remitted to the lower Court for that purpose.

The defendants do not deserve in a case of this sort any indulgence whatsoever. They gain substantially from the course adopted by the plaintiffs and we see no reason why we should make an order that the case should, after the lapse of more than three years (it being not improbable that some requisite evidence has in the mean while disappeared), be directed to be retried. The second contention also therefore fails. The lower Court's judgment is upheld and the appeal is dismissed with costs. Three months for sale.

C.R.K./D.S. *Appeal dismissed.*

1. Maruda Konar v. Veerammal, (1936) 23 A I R Mad 985=168 I C 402=(1937) 2 M L J 17=44 M L W 710.

---

* A. I. R. 1938 Madras 669

ABDUR RAHMAN J.

M. Doraiswami Iyengar—Petitioner.

v.

G. Radhakrishna Chetty — Respondent.

Civil Revn. Petn. No. 1523 of 1936, Decided on 11th February 1938, from order of Full Bench of Court of Small Causes, Madras, D/. 5th October 1936.

*** (a) Presidency Small Cause Courts Act (1882), S. 38—Powers of Full Bench under S. 38—Nature explained — It has no power to order amendment of plaint nor has it jurisdiction to order re-trial after proposed amendment has been permitted by trial Court.**

A Full Bench of the Court of Small Causes, when called upon to exercise its powers under S. 38 is not a Court of Appeal and cannot therefore arrogate to itself the powers of an Appellate Court. In other words its jurisdiction is merely revisional in nature and it can only interfere and exercise the powers mentioned in S. 38, when it finds some question of law or of usage having the force of law to have been wrongly decided, or when it holds that the verdict of the trial Judge was not based on any legal evidence, or possibly when it finds that no reasonable person could have arrived at the conclusion to which he had arrived. In no other circumstances is it possible for the Full Bench to interfere with a finding of fact for the simple reason that it is otherwise declared to be final and conclusive : *A I R 1917 Bom 53, Not foll. ; 19 Mad 96 ; A I R 1917 Mad 135 (F B) and A I R 1930 Cal 806, Foll.* [P 670 C 2 ; P 671 C 1]

As for a re-trial it cannot be ordered, unless the trial has been vitiated by some legal defect in omitting to observe some rule of procedure or on account of some mistake in appreciating or applying the correct rule of substantive law or the discovery of some important matter or evidence which may necessitate a further re-hearing or re-consideration. The Full Bench Court has no powers to order an amendment of the plaint for the simple reason that they have not been conferred on it by the Act, nor can it be reasonably contended, that although it may not have the power to order an amendment, it would have jurisdiction to order a re-trial after the proposed amendment has been permitted by the trying Judge. Assuming however that in a suitable case it has the power to order a re-trial for this purpose, it is essential for the Full Bench Court to consider whether the proposed amendment could be legally ordered to be made. [P 671 C 1, 2]

(b) Madras High Court Rules—Rules of practice, O. 41, R. 7 — Word 'ordinarily' — Interpretation.

The use of the word 'ordinarily' in R. 7, O. 41 does not indicate that the grounds required to be established may be wholly different to the grounds mentioned in the rule. The word can, on general principles, be taken to include only such grounds as are similar to those specified in the rule. [P 671 C 1]

(c) Pleadings — Amendment — Party cannot place inconsistent case—Amendment cannot be permitted when party wishes to change specific legal relation.

It is true that the powers of a trial Court in matters relating to the amendment of pleadings are very extensive and have to be liberally exercised but it must not be overlooked that a party is not competent to place an alternative case which is not consistent with the case set up originally by him and that too at a very late stage. Nor can it be permitted when a party wishes to change the specific legal relation which he had alleged in his plaint or written statement with which he came into Court. [P 671 C 2]

(d) Pleadings—Amendment of plaint—Should not be granted if it takes away right accrued to defendant by lapse of time.

The power to make the amendment in plaint should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time: *A I R 1921 P C 50, Foll.* [P 672 C 2]

C. R. Rajagopalachariar—*for Petitioner.*

S. B. Satya Nadar and N. C. Rangaswamy—*for Respondent.*

Order. — This is a revision petition against an order made by the Full Bench of the Court of Madras Small Causes remanding the case for a re-trial under S. 38, Presidency Small Cause Courts Act. The only question which has to be determined is whether it had jurisdiction to do so in the circumstances. The facts of this case briefly are that a suit for recovery of a price, alleged to be due from the defendant on account of a pair of diamond kammals was filed by the plaintiff. The defendant's plea, which prevailed before the trial Judge, was that he was acting merely as a broker in the transaction and was not personally liable. He had also urged that the diamonds were delivered to one Doraiswami Naidu, with whom, to use his words, "the plaintiff had entered into direct dealings and settled the terms with him." The learned Judge did not however believe this part of the defendant's statement but having come to a finding that he was acting as a broker in the transaction, the suit for the price of goods was dismissed. The plaintiff then made a petition under S. 38 of the Act, to the Full Bench of that Court in which the grounds taken by him in the plaint were reiterated : *vide* grounds 4 and 5. It appears from the order passed by the Full Bench Court that the case was not disposed of on the merits, but, as admitted by the counsel for the respondent, a re-trial ordered, on his verbal application for leave to amend the plaint. This was made with the object of including an alternative case which was neither to be found in the plaint nor in the grounds of appeal.

The petition for leave to make the proposed amendment was partly based on the case set up by the defendant and partly on the finding of the trial Court. Instead of continuing to rely on the jural relationship of a vendor and a vendee, the plaintiff now wanted to adopt the position that since the defendant himself had pleaded to be a broker, and the trial Judge had come to a finding that a privity of contract had not been established between him, i. e. the plaintiff, and Doraiswami Naidu, he should be allowed to sue as a principal for the recovery of his diamonds from his agent and failing their return, should be granted a decree for their value. The request was granted by the Full Bench and the case was ordered to be re-tried after giving an opportunity to the plaintiffs to make the application for leave to amend. It might be noticed here that the Judge, who had tried the case, was a member of the Full Bench and the sentence towards the end of its judgment,

that defendant shall have liberty to plead to the amended plaint and both parties may lead evidence in respect of the amendment at the re-trial,

when considered along with the object as to why the suit was being remanded can legitimately give rise to an impression that the acceptance of the petition for leave to amend by the trial Court was more or less a foregone conclusion. The answer to the question as to why the application for leave to amend the plaint was not considered by the Full Bench Court itself and why it left to the trial Judge to go through this formality, is probably to be found in the fact that the Full Bench Court was probably conscious of its limitations under S. 38 of the Act and felt doubtful if an application for leave to amend the plaint could be granted by it. It is hardly necessary for me however to go into the reasons why this particular course was adopted by the Full Bench Court. I would have to investigate these questions and come to a finding myself, whether it was acting within its jurisdiction in remanding the case for that purpose.

It might be stated at the outset that every decree or order of the Small Cause Court passed in a suit has been declared by S. 37 to be final and conclusive except as provided by Chap. VI, Presidency Small Cause Courts Act or by any other enactment for the time being in force. It is true that S. 38 of the Act has been couched in general terms but a number of cases decided by this Court beginning with 19 Mad 96[1] and ending with the Full Bench case 40 Mad 355,[2] have laid down in clear terms that a Full Bench Court of Small Causes, when called upon to exercise its powers

1. Sadasook Gambirchand v. Kannayar, (1896) 19 Mad 96.

2. Sikandar Rowther v. Ghouse Mohideen Marakayar, (1917) 4 A I R Mad 135 = 38 I C 346 =40 Mad 355=32 M L J 213 (F B).

under S. 38 is not a Court of Appeal and cannot therefore arrogate to itself the powers of an Appellate Court. In other words its jurisdiction is merely revisional in nature and it can only interfere and exercise the powers mentioned in S. 38, when it finds some question of law or of usage having the force of law to have been wrongly decided, or when it holds that the verdict of the trial Judge was not based on any legal evidence, or possibly when it finds that no reasonable person could have arrived at the conclusion to which he had arrived. In no other circumstances does it seem to be possible for the Full Bench Court to interfere with a finding of fact for the simple reason that it is otherwise declared as stated above to be final and conclusive.

I am not unaware of the view taken in Bombay in 42 Bom 80[3] but the view taken in Calcutta in 57 Cal 612[4] is different and corresponds with the interpretation placed on that section in this presidency for a very large number of years. I would therefore follow the view expressed by this Court in the rulings cited above. As for a re-trial it cannot, in my opinion, be ordered, unless the trial has been vitiated by some legal defect in omitting to observe some rule of procedure or on account of some mistake in appreciating or applying the correct rule of substantive law or the discovery of some important matter or evidence which may necessitate a further re-hearing or re-consideration. A reference to the rules of practice framed by the High Court and given in O. 41 confirms the view taken by me. It has been argued before me that the use of the word "ordinarily" in R. 7 indicates that the grounds should not necessarily be confined to those enumerated in that rule and confers a power on the Full Bench Court to order a re-trial on grounds other than those mentioned there. The contention is however unsound; first of all no extraordinary circumstances have been shown to exist in this case which would help the respondent in bringing the exercise of the powers by the Full Bench Court within the ambit of the rule framed by the High Court, even if the word 'ordinarily' is interpreted in the manner in which the counsel for the respondent wishes to do so; secondly the use of the word "ordinarily" does not indicate that the grounds required to be established may be wholly different to the grounds mentioned in the rule. The word can on general principles be taken to include only such grounds as are similar to those specified in the rule.

Once the powers of the Full Bench Court have been correctly understood, it should not be difficult to perceive that it has no powers to order an amendment of the plaint for the simple reason that they have not been conferred on it by the Act. Bearing in mind the limitations placed on the Full Bench Court and the interpretation placed on S. 38 in the various authorities of this Court and that of Calcutta, it cannot be reasonably contended that although it may not have the power to order an amendment, it would have jurisdiction to order a re-trial after the proposed amendment has been permitted by the trying Judge. Assuming however that in a suitable case it had the power to order a re-trial for this purpose, it was essential in my opinion for the Full Bench Court to consider whether the proposed amendment could be legally ordered to be made in this case. It would be manifestly so as the order of a retrial would be meaningless if the application for leave to amend were not granted by the trial Court after the case was remanded.

This brings me to the question whether the amendment sought to be made was such as could be ordered by the trial Court —if it had been approached with that request either before the trial was over and decision announced or after the case was remanded. It is true that the powers of a trial Court in matters relating to the amendment of pleadings are very extensive and have to be liberally exercised but it must not be overlooked that a party is not competent to place an alternative case which is not consistent with the case set up originally by him and that too at a very late stage. Nor can it be permitted when a party wishes to change the specific legal relation which he had alleged in his plaint or written statement with which he came into Court. The plaintiff had alleged in this case that he had sold the diamonds to the defendant. His claim was negatived as it was found that they were not sold by him. He maintained the same position in his grounds to the Full Bench Court and when he discovered that he was about to fail even then, he suggested an alteration of the basis of his

3. Sonoo Narayan v. Dinkar Jagannath, (1917) 4 A I R Bom 58=43 I C 486=42 Bom 80=19 Bom L R 944.

4. Baldeo Das v. Balmukand Brijmohan, (1930) 17 A I R Cal 806=128 I C 204=57 Cal 612=34 C W N 413.

claim and wished to admit now for the first time that the defendant was a broker and might be permitted to be sued as such. This could not be permitted obviously. The law on this subject is too well known to require any authority,—but if one is needed a reference to pages 549 and 550 of Mulla's Civil Procedure Code (Edn. 10) should be enough. There was yet another difficulty for the plaintiff to get over before his application for leave to amend could be permitted. The sale of diamonds has taken place according to the plaintiff in April 1931. He had filed a suit for their price in 1934 within the statutory period of limitation provided for these suits. His claim was dismissed by the trial Court in February 1935. The application for leave to amend appears to have been made verbally to the Full Bench Court in October 1936. The plaintiff's claim for the recovery of the diamonds was obviously barred on that date as the defendant had denied his liability in the notice, Ex. C, long before the civil suit was filed. By inserting these facts in the plaint which was filed in 1934 the plaintiff wished to steer clear of the bar. The question is, if he should have been permitted to do so. A great deal of reliance was placed before me in this connexion on a ruling by their Lordships of the Privy Council in 48 Cal 110[5] and appears to have been so done before the Full Bench Court. Their Lordships had in that case permitted a suit for declaration of pre-emption rights to be converted into a suit for possession on the basis of the same rights. But in their Lordships own words the circumstances in which the plaintiff had sued for mere declaration were stated to be as under :

> The real reason appears to be that the title to the property was in some confusion that the vendees were not in actual possession nor in receipt of the rents, for the rents had not been paid and as to part, the plaintiffs themselves appear to claim that they were already in possession on their own account. It may therefore be that they regarded the peculiar conditions of the case as rendering the claim for possession inapplicable and they possibly thought that all difficulty had been avoided by the simple process of claiming declarations of right.

The real reason why the amendment was ordered by their Lordships may be gathered from the following words :

> But if once it be accepted that they were attempting to establish those rights, there is no sufficient reason shown for disturbing the judgment of the Judicial Commissioner, who thinks they should be at liberty to express their intention in a plainer and less ambiguous manner. It may be noticed that in the claim the relief sought is so awkwardly set out that it would be quite open to the interpretation that they had in fact claimed pre-emption and not a declaration of the right.

When referring to the powers of the Court in these matters their Lordships observed :

> That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases (see for example 11 M I A 468[6] at page 485), where such considerations are outweighed by special circumstances of the case, and their Lordships are not prepared to differ from the Judicial Commissioner in thinking that the present case is one.

The general rule of law has been laid down by their Lordships in clear terms ; but they were admittedly dealing with an exceptional case where certain special circumstances were found to exist which justified a departure from the general law. What are the special circumstances of this case ? I have been able to find none and I would not therefore be justified in departing from the general rule and in taking away from the defendant a legal right which had accrued to him by lapse of time. The conclusion thus seems to be inevitable that the amendment such as is proposed on behalf of the plaintiff could not be legally ordered in this case by the trial Court. Much less could it be ordered by the Full Bench Court when its powers, as stated above, are considerably limited. I would therefore hold, in the circumstances of this case, the Full Bench Court had exceeded its jurisdiction in ordering a re-trial. The order is consequently set aside and the decree of the trial Judge restored. The respondent will bear the petitioner's costs of this petition in this Court and of the petition filed by him before the Full Bench Court.

C.R.K./D.S. *Order set aside.*

5. Charan Das v. Amirkhan, (1921) 8 A I R P C 50=57 I C 606=48 Cal 110=47 I A 255 (PC).

6. Mohammad Zahoor Ali Khan v. Rutta Koer, (1866) 11 M I A 468=9 W R 9 = 2 Suth 107 =2 Sar 320 (P C).

---

* A. I. R. 1938 Madras 672

LEACH C. J. AND LAKSHMANA RAO J.

Muna Sona Sundaram Chettiar — Appellant.

v.

Sona Theeanna Chokalingam Chettiar — Respondent.

Appeal No. 222 of 1933, Decided on 18th January 1938, against decree of Sub-Judge Devakottah, in O. S. No. 124 of 1928.

*** (a) Master and servant — Contract of service for definite period — Before completion of period, employer terminating employment and employing another servant at cheap salary — Discharged servant is entitled to salary for full period unless employer shows that he had opportunity of other employment which he refused.**

Where a person has agreed to employ another, he is not entitled to put an end to the employment simply because he finds that his business is not proving as profitable as he anticipated or because he finds that he can get somebody to perform the duties at a small salary. If the employment was for a definite period, the employer is bound to pay the stipulated salary for the whole period unless he shows that the discharged servant had an opportunity of other employment, but refused to avail himself of it. In other words, the principle that a person must do what he can to mitigate damages applies to a contract of service just as it applies to an ordinary commercial contract. [P 674 C 1]

Where the contract was to serve the master in Madras and if it has not been shown by the master that there was other employment for the discharged servant in Madras or in any part of the Presidency, the master fails to prove that the servant could have obtained other employment even if he shows that he offered the servant an employment in Rangoon. [P 674 C 1, 2]

*** (b) Master and servant—Contract of service for definite period — During employment servant remaining absent from place for certain period but performing master's duties — Employer not electing to dismiss him but continuing his services—Servant is entitled even to salary for period during which he was absent.**

Where a contract of service is for a definite period and during the employment the servant remains absent for certain period from the place but performs his master's duties and the employer does not elect to dismiss the servant (assuming that he is in law entitled so to dismiss) but continues his services, he is liable under the contract to pay the agreed wages for the full period and cannot deduct wages for the period during which the servant was absent: *(1915) 1 K B 698, Rel. on.* [P 675 C 1]

P. Satyanarayana Rao—for Appellant.

A. Lakshmayya and D. Venkataratnam — for Respondent.

Leach C. J. — The appellant was the defendant in the Court below. He had served the respondent as the chief agent of the respondent's money-lending business at Madras. The contract of service commenced on 19th November 1925, the appellant having executed what is known as a salary chit. Under the terms of the contract, he was to serve the respondent in the capacity of chief agent of his Madras business for a period of three years at a salary of Rs. 7175. The respondent's business in Madras did not prove as successful as he anticipated, and on 5th January 1928 he terminated the appellant's employment and appointed another agent at a lower salary. The suit out of which this appeal arises was filed by the respondent for an account of the appellant's agency. He calculated that there would be due to him on the taking of accounts a sum of Rs. 11,923-6-0. A preliminary decree for accounts was passed in due course, and on consideration of the Commissioner's report a decree for Rs. 4952-13-6 was passed in favour of the respondent. The appellant appeals against the final decree on three grounds. In the first place he says that he has been disallowed his salary for 10½ months whereas he is entitled in law to payment for this period. In the second place he contends that he has been disallowed three months' salary, wrongly on the ground that he had absented himself from Madras on private affairs. In the third place he says that a sum of Rs. 982-9-6 was wrongly debited to him in respect of certain piecegoods transactions.

With regard to the appellant's claim that the lower Court was wrong in disallowing his salary for 10½ months, the learned advocate for the respondent has taken the objection that the suit was not a suit for wrongful dismissal and consequently no allowance can be given to the appellant in respect of this period. This point was not taken in the pleadings or in the course of the trial. It is manifest that all questions at issue between the parties in respect of the agency were gone into and decided in the course of the trial. The respondent's complaint was that the agent had overdrawn his salary when he should not have done so and evidence was given on this question. The trial Court on the case presented by the parties held that the appellant had wrongly overdrawn his salary for 10½ months, and he challenges this finding in this Court. We consider that he is entitled to do so. The nature of the objection is obviously one which the Court should not take notice of at this late stage.

The learned trial Judge disallowed the appellant's salary for 10½ months on the ground that the respondent was entitled to dismiss the appellant when he found that his business was not proving profitable. This is an erroneous view of the law. The respondent had entered into a contract with the appellant under which the appellant was to serve him in Madras for a period of three years certain, and the appellant was always ready and willing to carry out his duties. The real reason why the respondent dispensed with the appellant's services after

a little over two years was that he found he could get another agent at a lower salary. Where a person has agreed to employ another he is not entitled to put an end to the employment simply because he finds his business is not proving as profitable as he anticipated or because he finds that he can get somebody to perform the duties at a small salary. If the contract provides for termination of employment by notice the employer can lawfully terminate the employment on giving the required notice. In a case like the present where the employment was for a definite period, the employer is bound to pay the stipulated salary unless he shows that the discharged servant had an opportunity of other employment, but refused to avail himself of it. In other words, the principle that a person must do what he can to mitigate damages applies to a contract of service just as it applies to an ordinary commercial contract. The principle is concisely stated in Halsbury's Laws of England, Vol. 10, Para. 143, page 113 in the following terms :

> It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect; but he is under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by a wrong doer. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant.

In this case the respondent is in the position of the defendant. The authority for the statement that the burden of proof is upon the defendant is to be found in (1873) L R 8 C P 167[1] at page 181 and (1928) 2 K B 604[2] at page 614. It has not been suggested before us that the appellant did anything which would justify his dismissal. All that has been urged is that the learned trial Judge was right in his view that the respondent could close his business at any time without regard to his obligations to the defendant. This is clearly wrong, and as it has not been shown that the appellant could have obtained other employment he is entitled to payment for the full period of three years. I should mention that at one time it was suggested that the respondent had offered him employment at Rangoon and that he refused to go there after agreeing to do so. The record does not show that he ever did agree to go, but it was suggested in the early part of 1927, that is, nearly nine months before the employment was terminated, that the appellant should go to Rangoon to look after the respondent's interests there. Nothing however came out of this suggestion. The respondent himself had to admit in the course of his evidence that he did not remember whether the appellant agreed to go or not. But even if the respondent had offered the appellant employment in Rangoon in 1928, which he did not, we do not consider that the appellant would have been bound to accept. His contract was to serve the respondent in Madras, and it has not been shown by the respondent that there was other employment for the appellant in Madras or in any part of the Presidency. The position therefore is that the respondent has failed to prove that the appellant could have obtained other employment, and having failed in this respect the appellant is entitled to his salary for the full period agreed upon. Accordingly, we allow him his salary for the period from 5th January 1928 when his services were terminated, to the end of the agreed period of three years.

Coming now to the disallowance of salary for three months on the ground that the appellant had absented himself from Madras, I would point out that no suggestion has been made that the appellant ever neglected his employer's interests or in any way failed to perform his duties. It is true that he was away from Madras for a total period of four months. He was compelled to leave Madras on account of ill-health for 1½ months and on another occasion he was away for 26 days owing to death of his son-in-law, but during this period he transacted business on behalf of his principal. The other periods were periods of two or three days. It was the practice of the appellant to inform his employer that he was going away, and except in one letter, Ex. 152, there is no suggestion of objection. In the exhibit referred to, the criticism can hardly be described as an objection. This particular letter related to a short period of absence without previous intimation. What is important is that in spite of the appellant being away the respondent took no steps to terminate his employment on the ground of absence. When he did termi-

1. Roper v. Johnson, (1873) L R 8 C P 167 = 42 L J C P 65=28 L T 296=21 W R 384.

Finlay & Co. v. N. V. Kwik Hoo Tong Handel Maatschappij, (1928) 2 K B 604=69 L J K B 817,

nate his employment it was on another ground. And what is more, the last period of absence was in March 1927, nearly nine months before the appellant's services were dispensed with for the reason which I have indicated. Assuming that the respondent was entitled in law to dispense with the appellant's services on the ground of his absence from Madras, he did not choose to do so, but continued his employment. Having continued the employment he is liable under his contract to pay the agreed wages. In this connexion I will quote the following passage from the judgment of Lush J. in (1915) 1 K B 698[3] at page 705 :

> Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases, terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the contract is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract . . . . . Having elected to treat the contract as continuing it was continuing. They might have had a right to claim damages against the servant, but they could not justify their act in suspending the workman for the one day and refusing to let him work and earn wages.

In the present case there was no suggestion that the appellant had broken his contract and it was not terminated because of absence from Madras. His employment therefore continued despite his absence. The learned trial Judge allowed the appellant's salary for one month of absence, but he is entitled to salary for the total period. Therefore he will be paid his salary for the three months which have been disallowed.

The only other question which remains to be decided is whether the appellant was wrongly debited in respect of Rs. 982.9.6 in connexion with the piecegoods business. The appellant says that this piecegoods business was that of his principal, and the respondent denies this. We consider that the appellant has failed to prove that it was his principal's business. All that we know is that the appellant sent to Rangoon two consignments of piecegoods and he entered the expenses in his principal's books. A sum of Rs. 1154.5.6 was subsequently remitted from Rangoon to Madras as being part of the sale proceeds. The sum of Rs. 982.9.6 represents the difference between this sum of Rs. 1154.5.6 and the cost of the goods. The appellant therefore would have his principal held liable for the loss on the transaction. Before he can succeed in this contention, he must show that the business was in fact his principal's. As I have said he has failed to do so, and therefore the trial Court was right in debiting this sum to the appellant and not to the respondent. The result is that the appellant has succeeded on two out of his three objections to the decree of the lower Court and the decree will be modified to this extent. The appellant will be entitled to costs calculated on the amounts in respect of which he has succeeded and will pay costs on the amount in respect of which he has failed.

C.R.K./D.S. *Decree modified.*

3. Hanley v. Pease and Partners, Ltd., (1915) 1 K B 698=84 L J K B 532=1915 W C & Ins Rep 178=112 L T 823=79 J P 230.

A. I. R. 1938 Madras 675

PANDRANG ROW J.

In re Ramaswamy Goundan and others — Petitioners.

Criminal Revn. No. 715, Petn. No. 670 and Misc. Petn. No. 1090 of 1937, Decided on 27th January 1938, from order of Dist. Magistrate, Coimbatore, Dated 20th September 1937.

Criminal P. C. (1898), S. 215—For committal of one accused prosecution not relying only on confession of other accused but also on other evidence —Commitment cannot be said to be liable to be quashed on question of law.

The confession made by one accused is not evidence against the other accused. Under S. 30, Evidence Act such confession can only be taken into consideration against other accused but that does not mean that the confession can take the place of evidence so far as the other accused are concerned. So if the confession of one accused is the only material relied upon by the prosecution against the other accused for his committal, then a point of law would arise and the committal would have to be quashed. But where there is other evidence, it is not possible to say that the committal is liable to be quashed on a point of law. [P 676 C 2]

K. S. Jayarama Iyer and G. Gopalaswami — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — The first of these petitions is for quashing the committal of accused 2 in P. R. C. No. 6 of 1937 on the file of the Sub-Magistrate of Perundurai to the Sessions Court for trial. The revision petition is to set aside the order of the District Magistrate of Coimbatore which set aside the order of discharge made by the Sub-Magistrate in the same case in respect of

accused 1 and 4 to 6 and directed the committal of these 4 accused to the Court of Session for trial along with accused 2 and 3 who were committed by the Sub-Magistrate to the Sessions. These two petitions arise out of the same case, viz. a case of murder and of abduction also against six persons, the first of whom is the village Munsif of Sullipalayam, the second is his brother-in-law, the third a village servant, the remaining accused being the servants of accused 1 and belonging to the chuckler caste. The case for the prosecution is that accused 3 actually took the deceased, Kasturi Asari, on 4th June 1937, to the place where he was subsequently murdered by the remaining accused and that all the six accused took part in burying the dead body. Though the murder is said to have taken place on 4th June, no complaint was made even to the effect that the deceased was missing till 15th June. Thereupon investigation proceeded rapidly and the dead body was discovered on 20th June. Accused 3 who was known to have taken the deceased with him was questioned by the investigating officer and he is said to have made a confession and it is this confession that is mainly relied upon by the prosecution. I do not wish to say anything about the quality of the evidence in the case or its sufficiency. The committal of accused 3 for trial has not been objected to and his trial must in any case proceed, and I would guard myself against saying anything which might embarrass the trial in the Sessions Court.

As regards the petition for quashing the committal, quashing can be only on a point of law as is clear from S. 215, Criminal P. C. The grounds on which the committal of accused 2 is sought to be quashed are (1) that it is against law, (2) that it is not justified as the evidence against him is the same as that against the accused who were discharged by the Sub-Magistrate and (3) that the evidence of P. W. 12 that he saw accused 2 on the night of 4th June apart from its improbability and the denial of P. W. 14 who accompanied him that he saw anybody, does not carry the case of the prosecution any further and cannot amount to corroboration of the statement of accused 3. There is nothing to show that the order of committal is against law in the sense that there was any error of law in the proceedings of the Magistrate before committal. So far as the ground that the evidence against accused 2 is the same as that against the other accused who have been discharged is concerned, it is not sustainable because there is the evidence of P. W. 12 available against accused 2 which is not available against the other accused who were discharged.

The question whether the other accused who were discharged were rightly discharged by the Sub-Magistrate or were improperly discharged arises for consideration in the revision petition. There is, in my opinion, no point of law strictly so-called arising in this case which would justify the quashing of the committal. It is perhaps necessary that I should say, as I am asked to do so by Mr. K. S. Jayarama Iyer, that in my opinion the confession made by accused 3 is not evidence against the other accused. Under S. 30, Evidence Act, such confession can only be taken into consideration against other accused but that does not mean that the confession can take the place of evidence so far as the other accused are concerned. No doubt, if the confession of accused 3 is the only material relied upon by the prosecution against accused 2, then a point of law would arise and the committal would have to be quashed. But that is not the case here. There is other evidence and it is therefore not possible to say that the committal is liable to be quashed on a point of law. The petition for quashing the committal is therefore dismissed. As regards the order of the District Magistrate setting aside the order of discharge so far as accused 1 and 4 to 6 are concerned and directing their committal to the Sessions, the reasons given by the learned District Magistrate for setting aside the order of discharge and directing committal to the Sessions are neither sufficient nor satisfactory.

The learned District Magistrate appears to have thought that the case against all these four accused was supported by exactly the same evidence as the case against accused 2 and 3. So far as accused 3 is concerned, it is obviously not so, for, as against him, there is his own confession which can be regarded as equivalent to evidence against him. So far as accused 2 is concerned, as I have pointed out, there is the specific evidence of P. W. 12 against him which does not implicate the other four accused. The main reason given by the learned District Magistrate is that the Sub-Magistrate's order does not convince him that the case of accused 1 and 4 to 6 is

any different from that of accused 2 and 3. This observation hardly appears to do justice to the Sub-Magistrate, who, in his order, has carefully marshalled the entire evidence in the case, applied his mind to the details of it, and given satisfactory reasons for distinguishing the case against accused 2 and 3 from the case against the remaining four accused. In other words, this is a case in which the learned Sub-Magistrate had done his duty satisfactorily and his order should not have been interfered with except for good and sufficient reasons. Such reasons are not to be found in the order of the learned District Magistrate and I am myself not able to find sufficient reasons from the record which would justify interference with the order of the Sub-Magistrate. It therefore follows that the order of the Sub-Magistrate discharging accused 1 and 4 to 6 must stand and that the order of the District Magistrate committing them to the Sessions for trial should be set aside.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 677

VARADACHARIAR AND KING JJ.

G. M. Kasim Ali and others —
Appellants.

v.

Ratna Manikka Mudaliar and others —
Respondents.

Appeal No. 172 of 1932, Decided on 3rd December 1937, against decree of Sub-Judge, Chingleput, in O. S. No. 48 of 1923.

(a) Minor—Alienations by guardian—Necessity—Sales by minor's guardian to discharge debt—Alienations to different persons and for amounts undoubtedly due—No suggestion that alienees acted together — Fact that guardian does not make best use of sale proceeds of one alienation does not make the rest any the less binding on minor's estate—Alienee deliberately not making enquiries and paying larger consideration than really due—Fact that vendor is respectable does not make alienation binding.

Where the guardian of a minor alienated some property of minor to pay off a mortgage debt to different persons for amount which was undoubtedly due on the mortgage and there is no suggestion that they acted together or any one of them had knowledge of the transaction entered into by another, the fact that the guardian does not make the best use of the sale proceeds of one of the alienations cannot affect the purchaser and the sales are binding on the minor's estate. [P 679 C 1]

But where the alienation is for a larger amount than the balance due on the mortgage and the alienee failed to examine the mortgage deed and the endorsements thereon, which would have put him on guard, the mere fact that the vendors were respectable persons and so he did not make the enquiry, does not make the alienation binding on minor. [P 679 C 1]

(b) Mahomedan Law—Gift—Gift to brothers jointly — Donees take as tenants-in-common and not as joint tenants.

Joint tenancy is unknown to Mahomedan law. Thus, where a Mahomedan testator by a deed of settlement settles part of the property on the plaintiff and part on his brother, they take as tenants-in-common and not as joint tenants: *25 Cal 670 (P C), Rel. on.* [P 681 C 1]

(c) Limitation Act (1908), Art. 44 — Suit contemplated by Art. 44 is suit for possession —Suit should be filed against parties in possession including persons deriving title from alienee —Alienee disposing whole or portion of property before suit—Second alienee is not affected by result of minor's suit against his alienor—Suit against him should be brought within three years of attaining majority.

The suit contemplated by Art. 44 is a suit for possession and not a mere suit for declaration. Thus, such a suit must be instituted against the parties in possession including persons deriving title from the alienee. [P 681 C 1]

The position of alienees deriving title pendente lite is of course different, because they will be bound by the result of the suit against the alienee; but where the purchaser from the guardian had alienated the whole or a portion of the property before the suit, the alienee from the purchaser will certainly not be bound by any adjudication which the ward may obtain against the original purchaser. If the ward seeks to dispossess the second alienee, the question of the validity of the alienation must undoubtedly be re-tried, and the policy of Art. 44 is that a question of that kind should be investigated and decided within a period of three years after the attainment of majority by the ward; and on principle, it can make no difference whether the later alienation is of the whole property or only of a part of the property: *23 Mad 271 (P C), Rel. on.* [P 681 C 2]

(d) Transfer of Property Act (1882), S. 51—Alienation by guardian set aside as unwarranted—Alienee may be entitled to benefit of S. 51.

Though an alienation by the guardian of a minor was not warranted by law, the alienee may be entitled to the benefit of S. 51, if the circumstances justify that he must have bona fide believed that he was absolutely entitled to the property and made improvements: *40 Cal 555 (P C), Rel. on.* [P 682 C 2]

T. M. Krishnaswami Iyer, K. S. Rajagopala Iyengar and R. V. Raghavathathachariar — *for Appellants.*

C. S. Venkatachariar, M. S. Venkatarama Iyer, S. Sankara Iyer and N. S. Srinivasa Iyer — *for Respondents.*

Varadachariar J.—This appeal arises out of a suit brought by the appellants' predecessor (the original plaintiff) for recovery of possession of several items of

property alienated during his minority by his father acting as his guardian. Most of the properties now claimed belonged to one Asma Begum who, by a deed of settlement, Ex. A, settled them on the original plaintiff and his deceased brother. By the same document the donor settled certain other properties upon another brother of the plaintiff and another set of properties upon Mabub Begum, the plaintiff's mother, The plaint schedule comprises two other small items which were subsequently acquired for the plaintiffs' benefit by his father under Exs. H and 15. The evidence shows that these minor items were purchased with borrowed money. At the time that Asma Begum executed Ex. A, the properties given to the plaintiff and his deceased brother were subject to a mortgage (evidenced by Ex. B) in favour of two Hindu ladies securing repayment of a sum of Rs. 5000 and interest. Ex. A stated that the gift was made subject to this mortgage. The settlement deed also referred to a sum of Rs. 2500 raised by Mabub Begum by the pledge of her own jewels and made available to the settlor for the purpose of making repairs and improvements to the Victoria Diamond Jubilee Market which formed one of the properties given to the plaintiff. It went on to state that the sum of Rs. 3400 which was due for principal and interest under this head had been excused by Mabub and that accordingly there was nothing due under that head, meaning apparently that it was not necessary for the settlor to make any provision for its discharge.

During the years 1903 and 1904, Hyder Sheriff, the plaintiffs' father, sold the suit properties to several persons under Exs. 2, J, K, L and 3. All of them refer to the mortgage debt under Ex. B as necessitating the alienation to enable the vendor to discharge the debt. Ex. 3 also refers to money having been borrowed for acquiring under Exs. H and 15, the two minor items comprised in Ex. 3. Hyder Sheriff died in 1905 and Mabub Begum died in 1910. The plaintiff's brother who was the other donee along with the plaintiff of the properties now in question predeceased Hyder Sheriff. After Hyder Sheriff's death, the plaintiff was represented by certain other persons appointed guardian by the Court. He attained majority in 1920 and filed this suit in July 1923, for recovery of possession of the suit properties alleging that the alienations by his father were all unnecessary and invalid. The learned Judge in the Court below dismissed the suit, holding that the alienations were justified by necessity as otherwise the debts payable by the plaintiff could not have been discharged. Hence this appeal by the supplemental plaintiffs who came on the record as the legal representatives of the original plaintiff.

An extreme contention was put forward on behalf of the plaintiff in the Court below that the principal and interest due under Ex. B could have been discharged by careful management, out of the income of the properties of the minor and that none of the sales was therefore necessary. The lower Court has rightly found that there is no reasonable basis for this contention and as that extreme contention was not pressed before us, we do not refer to it in detail. On 20th November 1903, the date of the first sale (Ex. 2), the position was that interest up to the end of 1902 had been paid though the learned Judge doubts the genuineness of the endorsements on Ex. B relating to the interest payments. In any event, the amount of Rs. 5000 undoubtedly remained due on that day and a sale of some of the hypotheca for Rs. 3750 was certainly justified by the necessity of having to pay off the mortgage. It might be mentioned in this connexion that the term fixed in the mortgage for payment had expired by this time and the evidence of D. Ws. 6 and 7 examined on commission justifies the view of the lower Court that the mortgagees were pressing for payment. There is accordingly no justification for the attack against Ex. 2.

Out of the amount realized by the sale under Ex. 2, it appears from the endorsements on Ex. B that only a sum of Rs. 3520 had been paid towards principal and interest due under that document as late as 22nd November 1903. What Hyder Sheriff did with the balance of the sale proceeds under Ex. 2, it is not possible to say. On 30th November 1903 and 1st December 1903, Hyder Sheriff executed three sale deeds Exs. J, K and L for Rs. 1200, 900 and 1500 respectively. It also appears from these documents that he received some small amounts in advance. Here again from the endorsements on Ex. B we find that only a sum of Rs. 500 was endorsed on 28th November 1903. It has been argued on behalf of the appellants that the amount remaining due under Ex. B about the end of November 1903

or the beginning of December 1903 could have been discharged by the sale proceeds under Ex. L and the balance that remained under Ex. 2 and that in this view the sales under Exs. J and K were unwarranted. We do not think that this line of attack is open to the plaintiff. All the three sales were in favour of three different individuals and had been arranged before the end of November. It is not suggested that they acted together or that any of them had knowledge of the transaction entered into by the other. Every one of them would in those circumstances have only believed that the sale to himself was necessary to enable Hyder Sheriff to pay off the balance undoubtedly remaining under Ex. B. The fact that Hyder Sheriff did not make the best use of the moneys raised under Exs. J, K and L or of the balance available under Ex. 2 cannot affect the purchasers in the absence of proof that they were parties to any improper scheme or purpose of Hyder Sheriff. We must accordingly confirm the decree of the lower Court even as regards Exs. J, K and L.

The position as to Ex. 3 is somewhat different. It is a sale of June 1904 for a sum of Rs. 6500. As stated already, part of the consideration for that sale is stated to be for the discharge of a sum of Rupees 1125 borrowed for purchases under Exs. H and 15. The only other purpose recited in the document is the discharge of the debt (or debts) due on the market, etc., to the mortgagees under Ex. B. An examination of Ex. B and the endorsements thereon on the date of the sale under Ex. 3 would have undoubtedly enabled the alienee to understand that on that date nothing like the amount of the sale price under Ex. 3 was required to discharge the mortgage debt. The alienee examined as D. W. 3 admits that he knew of the previous sales by Hyder Sheriff and states that as Hyder Sheriff and Bashacharlu who were bringing about the sale were respectable men, he did not think it necessary or proper to make further enquiries and ascertain what was the amount that was still due under Ex. B. This is obviously no defence at all. It might be that he acted honestly in the transaction in view of the status of the persons with whom he was dealing, but that is not sufficient to make the transaction binding on the minor.

D. W. 3 has further stated that the sale under Ex. 3 was intended not only to discharge the debt remaining due under Ex. B and the money borrowed for the purchases under Exs. H and 15 but also to pay off large sums due to the same creditors on a jewel pledge which Mabub Begum had made. It has been suggested on the plaintiffs' side that this is an after-thought, as Ex. 3 itself makes no reference to any such jewel pledge loan. It seems to us that there is some force in this suggestion of the plaintiff. All that the alienee can rely on is the use of the plural in Ex. 3, referring to 'debts' due on the market, etc. We do not however pursue this point, because even if Ex. 3 could be read as referring to any such jewel pledge loan, the alienee has still to show that that was a loan which the minors' estate was liable to discharge. The factum of the loan has no doubt been spoken to by D. Ws. 6 and 7 whose evidence has been accepted by the lower Court; but that evidence and the evidence of D. W. 3 make it clear that the jewel loan referred to can only be the jewel loan mentioned in Ex. A itself. But Ex. A certainly does not make the gift in favour of the plaintiff and his brother subject to the liability to discharge that loan.

On behalf of the alienee, Mr. Venkatachariar has argued that there must have been some contemporaneous agreement between the donor and Hyder Sheriff and Mabub Begum that the latter would pay off the debt raised by Mabub Begum on the pledge of her jewels as they were getting the properties for Mabub Begum and for the boys. There is very little basis in the evidence or in the probabilities in favour of any such agreement. It is true that Mabub Begum having raised the loan on the pledge of her own jewels was liable to discharge the debts but beyond the recital in Ex. A that the settlor was released from liability in that connexion, no reference is made in Ex. A itself as to how or by whom that loan was to be discharged. Even assuming that there was an agreement between the settlor and Mabub Begum and Hyder Sheriff of the kind alleged by Mr. Venkatachariar, it is difficult to see how the minors' estate could be made liable for that debt. A further suggestion is accordingly made that as the money had been borrowed for the improvement of the Diamond Jubilee Market, it must have been expected to be discharged out of the sale thereof or as a charge thereon. We cannot assume what the settlor would have provided if it had been made

clear to her that some provision should be made for the discharge of her debt. Mabub Begum herself was a donee under Ex. A and the parties might well have thought that she would herself have discharged the pledge loan.

It seems to us doubtful whether any additions can be made by oral evidence to the terms of Ex. A so as to import a condition that the plaintiff and his brother took the gift subject to the liability to discharge the pledge loan. Even if this course was permissible, there is absolutely nothing in the evidence or in the probabilities to warrant an agreement of that kind and much less to make an agreement of that kind, if indeed it was entered into by Mabub and Hyder Sheriff, binding upon the minor. It has been suggested that any other inference would amount to an imputation against Hyder Sheriff that he acted in fraud of the minors' right. We do not think that this necessarily follows, because the parents might well have thought that as all their property would be going to the minors, it was immaterial how they discharged the jewel pledge loan. But even assuming that any such inference is inevitable, we do not see how an inference of the minor's liability can be drawn in the circumstances. We must accordingly hold that there was no justifying necessity for the alienation under Ex. 3. The question then arises as to what relief the plaintiff is entitled. Two matters have got to be dealt with in this connexion: one, that the gift under Ex. A was in favour of the plaintiff and his brother, and the other, that the alienee under Ex. 3 alienated portions of the property purchased by him in favour of defendants 17 and 18 and these latter defendants were not impleaded as parties to this suit till March 1931. The first question is material as bearing on the quantum of share that the plaintiff will be entitled to recover.

If the deceased brother of the plaintiff was entitled to a half share in severalty, that half share would, on his death, have admittedly devolved on Hyder Sheriff and Mabub Begum, the parents, and any suit by them, to recover that half share, even assuming that Hyder Sheriff could have impeached his own acts, would have been barred long before the present suit was instituted. It has accordingly been contended on behalf of the plaintiff that the deceased brother of the plaintiff did not take any interest in severalty and that the gift under Ex. A in favour of the plaintiff and his brother created only a joint tenancy with the result that on the brother's death in 1905, the whole property passed to the plaintiff by survivorship. This contention has been accepted by the learned Judge. We are free to say that the matter is not beyond doubt, but, having given the matter our best consideration, we have come to a different conclusion. Mr. Venkatachariar went the length of contending that a gift in the nature of a joint tenancy will be invalid under the Mahomedan law and he relied upon certain passages in text books bearing upon the validity of a joint gift. They show considerable conflict of opinion amongst the Mahomedan lawyers; but the distinction emphasized in those passages is not between a joint tenancy and a tenancy in common but between a gift of properties physically divided and a joint gift without such physical division. It may be a question of some nicety whether this line of argument can be seriously relied on at this time of the day, in view of the observations of the Privy Council in 35 Cal 1,[1] and it is not by any means clear how far this line of argument would affect the present case. But we think it unnecessary to pursue it, because we have accepted Mr. Venkatachariar's alternative contention that the gift under Ex. A does not really create a joint tenancy in the sense known to the English law. It cannot be denied that that kind of joint tenancy is unknown to the Mahomedan law and the creation of that kind of interest is scarcely likely to have been intended by the donor. There is also great force in the argument urged by Mr. Venkatachariar that it could hardly have been the donor's intention that even if one of the two brothers died after attaining majority and leaving children, the other brother should take the property by survivorship to the exclusion of the children of the deceased brother.

The only basis in the document for the claim of joint tenancy is the use of the word 'jointly' in the conveying clause. It is no doubt in a sense a technical term of the English law and there is some force in the argument that as the document appears to have been drawn up on the lines of English precedents and in the English language, the Court should place on that word its ordi-

1. Ibrahim Goolam Ariff v. Saiboo, (1908) 35 Cal 1 = 34 I A 167 = 4 L B R 154 = 6 C L J 695 = 11 C W N 973 (P C).

nary interpretation in the English law. But in the later clauses of the document, there is nothing whatever to suggest that the lady contemplated anything analogous to devolution by survivorship. On the other hand, the use of the term 'jointly' in that particular context is capable of another reasonable explanation, namely that in the same document the lady was making gifts in favour of two other individuals there being a separate gift in favour of each individual. As the plaintiff and his brother were minors at the time, represented by their father, the lady apparently thought that it was unnecessary to make a separate gift to each of them. That might well account for the use of the word 'jointly'. On the principle recognized by the Judicial Committee in 23 Cal 670[2] it seems to us reasonable to construe this document consistently with the principles of the Mahomedan law and hold that the plaintiff and his brother took the gift only as tenants-in-common. In this view the plaintiff is entitled only to recover a half share of the properties covered by Exhibit 3.

It remains to consider the effect of the omission to implead defendants 17 and 18 till March 1931. According to S. 22, Lim. Act, these defendants must be treated as having become parties to the litigation only in March 1931. If Art. 44, Lim. Act could be applied even in respect of the claim to recover the properties in their possession, the suit will undoubtedly be barred to that extent. The learned Subordinate Judge has however decided this question in favour of the plaintiff on the ground that as the purchase by them was only in 1922, they had not had adverse possession for 12 years thereafter and that as the suit was instituted in time against defendant 1, it must be held to be in time against these defendants as well. We find it difficult to follow this line of reasoning. Before us, the learned counsel for the appellants put his argument in a somewhat different way. He contended that Art. 44, Lim. Act, would be applicable only to the suit against an alienee from the guardian and not to suits against persons who might derive title by an alienation by such alienee. He maintained that so far as the persons of the latter kind are concerned, Art. 144 is the only Article applicable. We are unable to accede to this contention. It is too late now to deny that Art. 44 contemplates a suit for possession. In 23 Mad 271[3] at page 279 the Privy Council observed that if the suit under Art. 44 was not brought within the time limited, S. 28, Limitation Act would apply and extinguish the plaintiff's rights. This can only be on the footing that the suit contemplated is a suit for possession and not a mere suit for declaration. If it is a suit for possession, it must obviously be instituted against the parties in possession.

The position of alienees deriving title pendente lite is of course different, because they will be bound by the result of the suit against the alienee; but where the purchaser from the guardian had alienated the whole or a portion of the property before the suit, the alienee from the purchaser will certainly not be bound by any adjudication which the ward may obtain against the original purchaser. If the ward seeks to dispossess the second alienee, the question of the validity of the alienation must undoubtedly be re-tried, and the policy of Art. 44 is that a question of that kind should be investigated and decided within a period of three years after the attainment of majority by the ward. It seems to us fantastic to hold that even if the original alienee had parted with the whole property in favour of a stranger, the requirements of Art. 44 will be satisfied by obtaining a decree against the original alienee in the absence of the later purchaser, and on principle, it can make no difference whether the later alienation is of the whole property or only of a part of the property. Mr. T. M. Krishnaswami Ayyar admitted that Art. 44 will apply to a suit against an heir or legal representative of the original alienee. We do not see how the position will be different as regards the purchaser from him. It is no doubt true that the purchaser is not for all purposes in the same position as an heir or a legal representative of his vendor, but so far as the property purchased is concerned, he is entitled to all the protection which the vendor was entitled to and in that sense he is his representative though not a legal representative. Mr. Krishnaswami Iyer raised a question by way of analogy as to the applicability of Art. 44 to a suit against a trespasser, who had trespassed on the possession of the alienee. He put it to us whether even such a suit was to be brought within the three years period

2. Jogeswar Narain Deo v. Ram Chandra Dutt, (1896) 23 Cal 670=23 I A 87=7 Sar 18 (P C).

3. Gnana Sambanda Pandara Sannadhi v. Velu Pandaram, (1900) 23 Mad 271=27 I A 69=7 Sar 671=10 M L J 29 (P C).

limited by Art. 44. Whether the Article will be directly applicable or not, it may be a question whether the trespasser cannot plead that in the absence of a suit under Art. 44, the title of the ward had been extinguished by the operation of S. 28, Limitation Act. Whatever may be the position of a trespasser, a person claiming title under the original alienee can certainly say that till that alienation is vacated his possession cannot be disturbed.

We accordingly hold that as against defendants 17 and 18, the suit would be barred if the alienation in their favour is real and they had taken possession in pursuance thereof prior to the date of the suit. The circumstance relied on by the learned Subordinate Judge that the encumbrance certificate obtained by the plaintiff did not disclose the alienation in their favour seems to us of no consequence. It has not been suggested that this omission was the consequence of any fraud played by these defendants. If it was a mistake, either of the plaintiff in wording his application or of the office in granting the certificate, it is of no avail to the plaintiff. Defendants 17 and 18 are the wife and brother-in-law respectively of defendant 1 and the plaint contains a specific allegation that the alienations in their favour are nominal. The bearing of this question on the plea of limitation does not seem to have been very clearly realized in the Court below. There are no doubt some statements in the evidence bearing upon the nature of the alienations in favour of defendants 17 and 18, but having regard to the interests involved, we do not think it proper to decide this question upon the existing evidence. It will be fair to have a specific issue raised on the point and to give an opportunity to both the parties to lead evidence bearing upon the question whether the sales by defendant 1 in favour of defendants 17 and 18 were nominal transactions and whether these defendants were in possession of the properties covered by the sale deeds in their favour, before the date of the suit.

The only other question remaining for consideration is the relief that plaintiff is entitled to as against defendant 1 and as against defendants 17 and 18 if the suit as against the latter should be held to be in time. Some of the properties covered by Ex. 3 have been acquired by the Government under the Land Acquisition Act and the compensation amount has been paid either to defendant 1 or to defendants 17 and 18. The claim of the plaintiff to a share of the amount paid to defendants 17 and 18 will, to some extent, depend on the question of limitation above referred to. As regards defendant 1, there is no plea of limitation; but there is a claim made by him for the value of improvements. The evidence undoubtedly shows that he has made some improvements but in the view that the lower Court took, it was unnecessary to give a definite finding on this point. In respect of the properties in defendant 1's possession, the plaintiff will be entitled to recover a half share subject to the obligation to reimburse defendant 1 to the extent to be presently mentioned. He will also be entitled to a half share of the amount of compensation received by defendant 1 subject to the like obligation. Though we have held that the alienation in favour of defendant 1 was not warranted by law, we see no reason to think that defendant 1 is not entitled to the benefit of S. 51, T. P. Act. The circumstances justify the conclusion that he must have bona fide believed that he was absolutely entitled to the property.

The lower Court will have to determine how far the property in his possession or the compensation amount received by defendant 1 was enhanced as a result of the improvements effected by him after his purchase and defendant 1 will be entitled to credit therefor. The principle to be applied is indicated by the Privy Council in 40 Cal 555[4] at p. 564. After making this deduction, defendant 1 will also be entitled to reimbursement in respect of a proportionate share of the sum of Rs. 1125, which was undoubtedly a binding debt and also a like share in respect of the balance due under Ex. B on the date of Ex. 3 after making allowance for the endorsements made up to 2nd December 1903. The liability in respect of these two sums will have to be distributed on all the properties covered by Ex. 3 and only a corresponding proportion will be deducted in respect of the property in the possession of or the compensation received by defendant 1. If the Court should ultimately hold that the suit is in time even as against defendants 17 and 18, a similar calculation for improvements, if any, made by them, as also a proportionate share for which they can claim credit in respect of the sum of Rs. 1125, and the

4. Kedar Nath v. Mathumal, (1913) 40 Cal 555=18 I C 946=77 P R 1913=17 C W N 797 (P C).

balance under Ex. B must also be determined. If they are in possession of any of the properties covered by Ex. 3, the plaintiff will be entitled to recover a half share therefrom just as in the case of the properties, if any, in the possession of defendant 1, but this again will be subject to the same obligation to recoup them in respect of the improvements and in respect of the liability to the two items of debt. On amounts if any, found due to the plaintiff after the above deductions had been made, the plaintiff will be entitled to interest at 6 per cent. per annum from 1st July 1930 to date of payment.

In the result the appeal is dismissed so far as it relates to the properties covered by Exs. 2, J, K and L. Defendants 5 and 6 will be entitled to their costs of the appeal. To the extent necessary to give relief to the plaintiff on the lines above indicated, the decree of dismissal is set aside, so far as it relates to the properties covered by Ex. 3. The case will be remanded to the lower Court for framing an issue on the lines suggested above in respect of the sale in favour of defendants 17 and 18 and for disposal of the other questions above indicated in the light of the foregoing observations. The costs of the appeal, so far as it relates to the properties covered by Ex. 3 will be provided for in the revised decree of the lower Court.

C.R.K./V.B.B. *Order accordingly.*

---

* A. I. R. 1938 Madras 683

STODART J.

Valluri Pattabhiramayya—Petitioner.

v.

Gurrala Krishna Rao—Respondent.

Civil Revision Petn. No. 954 of 1936, Decided on 15th February 1938, from decree of Sub-Judge, Rajahmundry, D/- 11th March 1936.

***(a) Limitation Act (1908), S. 20—Period of limitation for suit expiring on Sunday — Payment of interest made on next day does not give fresh start for limitation.**

The "period" in S. 20 means a definite space of time. "Prescribed for a suit" must mean "prescribed by the Limitation Act" and the only place where a "period" in the sense of a definite space of time is provided for in the Act is S. 3. The time prolonged for filing suit owing to accidental circumstances which are provided for in S. 4 namely the Court being closed on the last day of limitation is not a "period." Hence, where the period of limitation expires on Sunday, the payment of interest made on next day does not give fresh start for limitation. [P 683 C 2]

(b) Limitation Act (1908), S. 31—Prescribes special period *(Obiter.)*

Section 31 prescribes a special period of limitation in certain cases: *A I R 1930 Mad 991, Approved.* [P 684 C 1]

(c) Limitation—Fresh promise—Record made on promissory note by payee held did not amount to fresh promise.

A payment of interest was made after the expiry of the period of limitation. A record was made on the suit promissory note and the words used were 'paid ten rupees towards the debt in this pronote': The payee did not even say "my debt" or "what I owe under the pronote":

Held that the expression "debt in this pronote" did not amount to fresh promise. [P 684 C 1]

D. Narasa Raju — *for Petitioner.*

N. Vasudeva Rao for V. Govindarajachari — *for Respondent.*

Order.—Two points arise for decision. The period of limitation for the suit expired on 9th October 1932. A payment of interest was made on 10th October 1932. The suit being eventually filed on 10th October 1935 was dismissed as time-barred. The Court refused to hold that the payment made on 10th October 1932 satisfied the conditions of S. 20, Lim. Act. The party relied on the fact that as 9th October was a Sunday, a suit could have been filed on 10th October under S. 4 of the Act, and that the payment was therefore within the time indicated in S. 20. The Court rejected this contention. It is again argued before me. But I agree with the lower Court. S. 20 requires the payment to be made within the period prescribed for a suit. "Period" to my mind means a definite space of time. "Prescribed for a suit" must mean "prescribed by this Act" and the only place where a "period" in the sense of a definite space of time is provided for in the Act is S. 3. There the expression used is "period prescribed therefor by Sch. 1." This payment was made after 9th October 1932 on which date the said period expired. The payment therefore does not avail to start a fresh period of limitation.

The argument is that "period prescribed" means the time in which a suit may be filed having regard to the accidental circumstances which are provided for in S. 4, namely the Court being closed on the last day of limitation. The time so prolonged is not in my opinion a "period." Nor on the foregoing reasoning do I think it can be described as "the period prescribed for the suit." The decision of this Court in 32

M L W 502,[1] contains observations which lean towards the interpretation now contended for, but the point did not arise in that suit and I am not bound to follow what after all was a mere opinion which has no application here. That decision is concerned with the meaning of S. 31, Lim. Act. I respectfully agree with that decision that S. 31 prescribes a special period of limitation in certain cases. It is in Part 5 of the Act headed "Savings and Repeals."

The second point is that the record made on the suit promissory note in evidence of the payment in question on 10th October 1932 amounts to a fresh promise. The words are "paid ten rupees towards the debt in this pronote." I agree with the lower Court that the expression "debt in this pronote" does not amount to a promise. It is in my opinion merely descriptive. The payee does not even say "my debt" or "what I owe under the note." It has been argued that to hold that time for a suit cannot be extended by part payment or acknowledgment made on a certain date although a suit for the debt could be filed on that date under the provisions of S. 4 is to perpetuate an anomaly. I do not think the position is anomalous. The civil revision petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

1. Seshayya Chetti v. Subbadu, (1930) 17 A I R Mad 991 = 128 I C 867=54 Mad 445 = 59 M L J 881=32 M L W 502.

A. I. R. 1938 Madras 684

HORWILL J.

Thiagaraja Iyer — Appellant.

v.

Narayanaswami Pillai and others — Respondents.

Second Appeal No. 91 of 1937, Decided on 16th March 1938, against decree of Sub.Judge, Mayavaram, in A. S. No. 24 of 1936.

Execution — Usufructuary mortgage by legal representative — Part consideration being to discharge debt of deceased— Mortgagee knowing that debts of deceased not fully discharged and consideration for mortgage not applied towards discharge of such debts — Subsequent decree by creditor of deceased — Property mortgaged attached in execution — Executing Court held could not attach property on purely equitable grounds—Property could be attached only subject to mortgagee's rights.

A legal representative had given an undertaking that he would pay off certain debts of deceased. He mortgaged usufructuarily a substantial item of property and the consideration for it was partly to discharge a debt of the deceased. Subsequently a creditor of the deceased obtained a decree against the legal representative and in execution of that money decree, he attached certain property said to belong to the deceased including the property which had been usufructuarily mortgaged. The mortgagee knew that the debt of the deceased had not been completely paid off and that the consideration or part of it was not utilized for the discharge of such debts :

Held that these facts alone did not entitle the creditor to attach the property. It was necessary for the creditor to prove that his debt was a debt of the deceased and that the legal representative had not already paid off debts of an amount equivalent to the value of the property inherited. It was also necessary to raise this issue clearly in the suit, in order that the parties might let in evidence on that point : *A I R 1936 Mad 205 (F B), Rel. on.* [P 685 C 2]

Held further that the right of the creditor to proceed against the property which was in the mortgagee's possession was an equitable right; and before permitting the creditor to proceed against that property, the Court would have to be satisfied that equitable reasons for applying the remedy existed. Clearly, it would not be competent for an executing Court to attach the property of a stranger on purely equitable consideration. Section 52 (1), Civil P. C., did not give the creditor a right to proceed against property which was no longer in the hands of the judgment-debtor. To proceed against a transferee, he must therefore establish his equitable right to do so in a separate suit : *4 Cal 897, Expl.* [P 686 C 1]

Held also that the land in question had not been sold but only usufructuarily mortgaged. A right in that property still inured therefore in the legal representative and that right could be attached by the creditor. Hence the property could be attached subject to the mortgagee's rights. [P 686 C 1]

K. Bhashyam Ayyangar and R. Viswanathan — *for Appellant.*

M. S. Venkatarama Ayyar — *for Respondents.*

Judgment. — Defendant 3 obtained the property of the late Govinda Pillai by way of surrender from his daughter; but he gave an undertaking that he would pay off certain debts. He mortgaged usufructuarily a substantial item of property in favour of the plaintiff; and the consideration for it was partly to discharge a debt of the late Govinda Pillai and partly to discharge the private debt of defendant 3. Defendant 1 claimed to be a creditor of the late Govinda Pillai; and he obtained a decree against the daughter of Govinda Pillai, i. e. defendant 2, and against defendant 3. In execution of that money decree, he attached certain property said to belong to the late Govinda Pillai including the property which had been usufructuarily mortgaged to the plaintiff. He alleged that this mort-

gage was nominal and false. The plaintiff resisted the attachment of this property, but was unsuccessful. He therefore filed this suit under O. 21, R. 63, Civil P. C., to set aside the summary order ; and it has been held by the lower Appellate Court that this was not a nominal transaction and therefore passed a decree as prayed for. It has been argued that Exs. G and H are false documents, fabricated for the purposes of this litigation—and this contention seems to have found favour with the trial Court; but the learned Subordinate Judge in appeal came to the conclusion that the principal documents filed by the plaintiff were genuine, true and supported by consideration. It has been argued that the lower Appellate Court overlooked certain evidence; but I find no reason to think that it was unaware of the evidence to which reference has been made. I am not therefore prepared to disturb this finding of fact of the lower Appellate Court.

The next contention is that as defendant 3 had obtained possession of the property as the legal representative of Govinda Pillai and made an alienation to the plaintiff and that as the plaintiff knew that the debt of the deceased Govinda Pillai had not been completely paid off and that the consideration or part of it was not utilized for the discharge of such debts, defendant 1 is entitled to ignore the alienation to the plaintiff and to attach the property in the same way as if the alienation had not been made. Reliance is placed on 4 Cal 897,[1] in which it was held that the law in India was the same as in England and that the creditors of the testator or ancestor can follow the land into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied and also (2) that the heir or devisee to whom he paid his purchase money intended to apply it otherwise than in the payment of such debts. I think it has rightly been argued that the plaintiff had a constructive knowledge—if not actual knowledge—of the terms of the surrender, in which mention is made of the debt of defendant 1 and that he should therefore have enquired whether the debts had been paid off. It is also clear that the consideration for this alienation was not applied entirely for the discharge of Govinda Pillai's debts, but I do not think that these facts alone entitle the defendant to attach the property.

In the first place, it is clear that the scope of the enquiry in the execution proceedings and in the suit was confined to the genuineness of this transaction; and it was not argued either during the execution proceedings or during the present suit that because of the equitable principle to which reference has just been made, defendant 1 is entitled to proceed against the suit property, and to ignore the mortgage. It has been pointed out by Varadachariar J. in a Full Bench case of this Court, 70 M L J 162[2] at p. 172, that the liability of a legal representative is a personal one up to the amount of the property he received from the testator or last male-holder. If, for example, he pays off the debts otherwise than from the property inherited, then the property of the deceased in his hands cannot be proceeded against, i. e. there was nothing of the nature of a charge on the property. It would therefore have been necessary for defendant 1 to prove in a more satisfactory way than he has done that his debt was a debt of the deceased Govinda Pillai and that defendant 3 had not already paid off debts of an amount equivalent to the value of the property inherited. It would also have been necessary to raise this issue clearly in the suit, in order that the parties might let in what evidence on that point. The issues actually framed were :

(1) Whether the usufructuary mortgage bond relied on by plaintiff is true and supported by consideration ?

(2) Whether plaintiff is entitled to the declaration prayed for ? and,

(3) To what relief is the plaintiff entitled ?

When the parties went to suit, it seems clear that they did not intend to raise the point which has been argued so fully in this Court; nor does this contention seem to have been argued in the lower Appellate Court.

Even apart from the failure to raise this point and to discuss it in the pleadings, I do not think defendant 1 can succeed in this suit. It seems clear that Pontifex J. in his judgment reported in 4 Cal 897,[1] did not think that the question of the liability of property transferred to a stranger could be decided in execution. He says :

1. Greender Chunder Ghose v. Mackin Tosh, (1879) 4 Cal 897=4 C L R 193.

2. Kanchamalai Pathar v. Shahaji Rajah Saib, (1936) 23 A I R Mad 205=162 I C 156=59 Mad 461=70 M L J 162 (F B).

Presumably these words (the language of Ss. 252 and 203 of the then Procedure Code), were intended to confine the procedure under the sections in question to property remaining in the possession of the legal representative, leaving the creditors to follow property improperly alienated by the legal representative by a separate suit. It could not be intended that property alienated should be subject to execution in a suit to which the alienee was not a party.

It is contended that the plaintiff has intermeddled with the property and he is therefore a legal representative; but I cannot agree that a mere alienee from a legal representative is a legal representative. It has been held by this Court that a transfer that is not binding on a particular person can be held to be so in execution proceedings. For example, a transaction that can be set aside under S. 53, T. P. Act can be declared to be not binding on a person in the course of execution proceedings; but in the present instance, it cannot be said that this alienation in favour of the plaintiff is a void transaction or is in any way voidable. The right of defendant 1 to proceed against the property which is in the plaintiff's possession is an equitable right; and before permitting defendant 1 to proceed against that property, the Court would have to be satisfied that equitable reasons for applying the remedy existed. Clearly, it would not be competent for an executing Court to attach the property of a stranger on purely equitable consideration. S. 52(1), Civil P. C. gives a creditor a right to proceed against the property of the deceased in the hands of the legal representative and S. 52 (2) gives the creditor the right to proceed personally against the legal representative if he cannot satisfy the Court that he has properly accounted for the property in his hands. It does not give the creditor a right to proceed against property which is no longer in the hands of the judgment-debtor. To proceed against a transferee, he must therefore establish his equitable right to do so in a separate suit.

The land in question has not been sold to the plaintiff, but only usufructuarily mortgaged. A right in that property still inured therefore in defendant 3; and that right can be attached by the defendant. That part of the decree of the lower Appellate Court which declares that the property was not liable for attachment by defendant 1 is not therefore correct and will have to be modified by saying that it can be attached subject to the plaintiff's rights. It is also pointed out that the decree restrains defendant 1 by a permanent injunction from interfering with the plaintiff's possession, although the plaintiff was not then in possession. This part of the decree will have to be modified by deleting the injunction and adding a declaration that the plaintiff is entitled to possession. This possession he can obtain by restitution proceedings. In other respects the appeal fails and is dismissed with costs.

C.R.K./D.S. *Decree modified.*

A. I. R. 1938 Madras 686

BURN AND STODART JJ.

In re Bojji Reddi and others — Accused.

Reference No. 9 of 1937, Decided on 15th March 1938, made by Sess. Judge, Bellary Division, in S. C. No. 23 of 1937.

Criminal P. C. (1898), S. 307—Case having some offences triable by aid of jury and others by aid of assessors — Before reference under S. 307 Sessions Judge must dispose of case with regard to latter offences.

Where in a case there are some offences triable with the aid of jury and others triable with the aid of assessors, the Sessions Judge is bound to dispose of the case in so far as the offences triable with the aid of assessors are concerned. He is not competent to refer under S. 307 the case of those offences to High Court, nor can his reference give High Court jurisdiction to dispose of them. Moreover he cannot refer to High Court under S. 307 the case of anybody in regard to whom he is in agreement with the verdict of the jury : *A I R 1932 Mad 512, Rel. on.* [P 686 C 2; P 687 C 1]

K. S. Jayarama Iyer for G. Gopalaswami and P. Lakshmayya — *for Accused.*

Public Prosecutor — *for the Crown.*

Burn J.—As Waller J. observed in 55 Mad 715[1] we must decline to accept the reference which is premature. The learned Sessions Judge is bound to dispose of the case in so far as the offences triable with the aid of assessors are concerned. He is not competent to refer the case of those offences to this Court, nor can his reference give this Court jurisdiction to dispose of them. Moreover from his letter of reference it would appear that the learned Sessions Judge is not prepared to express disagreement with the verdict of the jury so far as accused 1 and 2 are concerned. If that be so, the learned Sessions Judge must dispose of the case as against them. He cannot refer to this Court under S. 307, Criminal P. C. the case of anybody in regard to

1. Pachaimuthu v. Emperor, (1932) 19 A I R Mad 512=1932 Cr C 430=137 I C 810=33 Cr L J 533=55 Mad 715=62 M L J 571.

whom he is in agreement with the verdict of the jury. The case will therefore go back to the learned Sessions Judge for disposal according to law. We may add that we have consulted the learned Public Prosecutor and he has said that if this reference had come up for disposal to-day, he would not have been able to contend that the verdict of the jury is in any way perverse or unreasonable or against the weight of the evidence.

C.R.K./D.S. *Case sent back.*

---

* A. I. R. 1938 Madras 687

VARADACHARIAR AND
PANDRANG ROW JJ.

Subramania Chettiar and others — Appellants.

v.

Srinivasaraghava Ayyangar and others — Respondents.

Appeal No. 396 of 1933 and Civil Misc. Petn. No. 5330 of 1934, Decided on 1st March 1938, against decree of Sub-Judge, Tanjore, in O. S. No. 47 of 1931.

*** Limitation Act (1908), S. 22—Suit against benamidar within limitation — Real owner impleaded after limitation merely as matter of caution—Suit as against real owner will not be barred by operation of S. 22.**

A benamidar is competent to represent the real owner, because as a benamidar he will be in a position of a trustee and the real owner will be bound by any adjudication in a suit to which the benamidar is a party : *A I R 1918 P C 140, Rel. on.* [P 688 C 1]

Where therefore a suit is filed against the benamidar within limitation and the real owner is, after limitation, impleaded merely as a matter of caution, that will not by itself let in the operation of S. 22, because the real owner will not be a new party. The suit as against the real owner will therefore not be time-barred : *7 C W N 817 and 28 Bom 11, Rel. on.* [P 688 C 1]

M. S. Venkatarama Ayyar — *for Appellants.*

T. M. Krishnaswamy Iyer and A. Balasubramania Iyer — *for Respondents.*

Varadachariar J.—This appeal arises out of a mortgagee's suit for sale; and the only question for decision at this stage is the point of limitation arising out of the fact that when defendant 18 was added as a party to this suit, more than 12 years had elapsed from the time when the mortgage money was payable. This question of limitation affects the plaintiffs' right to bring to sale a fourth share in Sch. A properties. The learned Subordinate Judge held that the claim was, to that extent, barred and directed the sale only of the remainder of Sch. A properties. Hence this appeal by the plaintiffs. The mortgaged properties belonged in equal shares to defendants 1 and 8. They sold one half of Sch. A properties to one set of defendants with whom we are not concerned in the appeal and the other half of Sch. A properties to defendant 11 on 21st September 1920 (Ex. 4). On 30th May 1931, i.e. two months before this suit was filed, one Sheik Mohammad Rowther (D. W. 1), professing to act under the authority of defendant 11 executed Ex. 5, which purported to acknowledge that the purchase by defendant 11 under Ex. 4 had been made with the moneys of defendant 18's husband and with the stridhanam amounts of defendant 18, that the properties accordingly belonged to defendant 18's husband and defendant 18 from the date of the said sale deed and that as the husband was dead, they now belonged to defendant 18 and that defendant 18's husband and defendant 18 had all along been in exclusive possession and enjoyment of the properties. The document wound up with the following sentence :

> I have executed this release deed in proof of the fact that the said Sheik Mohammad Rowther has no right to, concern in, or enjoyment of the undermentioned properties.

By I. A. No. 210 of 1932, the plaintiffs applied to add defendant 18 as a party and this was ordered on 12th October 1932, i.e. after the expiry of more than 12 years from the due date. In the affidavit filed in support of the application to add defendant 18 as a party, the plaintiffs alleged that the story that the purchase by defendant 11 was benami for defendant 18 and her husband was not true, that Ex. 5 itself was a sham document executed by the alleged agent only with a view to enable defendant 18 to put forward a claim to the properties which, in the meanwhile, had been attached in another suit and that the allegation that defendant 18 and her husband had been in possession was also not true. The plaintiffs however prayed that to avoid complication at the execution stage, defendant 18 might be impleaded as a party to the suit. When she was impleaded, defendant 18 set up her title and pleaded that as against her and the properties in which she was interested the suit was barred by limitation.

This question of limitation was raised by Issue 5 in the case. The lower Court

has held that as to one-half of the properties conveyed under Ex. 4 the suit was not barred but as to the other half it was barred. We are not satisfied with the way in which the question has been dealt with in para. 15 of the lower Court's judgment. It is true that no issue was framed as to the alleged benami character of the purchase by defendant 11 nor as to the nature and effect of Ex. 5. But we do not see how in the absence of such issues and findings thereon, the Court below could hold that the impleading of defendant 11 in time was not sufficient to entitle the plaintiffs to bring this fourth share also in the properties to sale. If defendant 11 was the real owner and the story of the benami was not true, the addition of defendant 18 would have been a mere surplusage. The fact that the plaintiffs, as a matter of precaution, impleaded defendant 18, would not amount to an admission by them that defendant 11 was not the real owner and that the story of benami set out in Ex. 5 and adopted by defendant 18 was true. Even assuming however that defendant 11 was only a benamidar for defendant 18, defendant 11 will be competent to represent defendant 18, because as a benamidar he will be in the position of a trustee and defendant 18 will be bound by any adjudication in a suit to which defendant 11 is a party: *see* 46 Cal 566.[1] If in those circumstances, defendant 18 who will be a beneficiary on this assumption is subsequently impleaded merely as a matter of caution, that will not by itself let in the operation of S. 22, Limitation Act, because defendant 18 will not, in this view, be a new party: *see* 7 C W N 817[2] and 28 Bom 11.[3] It is only on the assumption that on the execution of Ex. 5, defendant 11 ceased to be entitled to represent defendant 18 and that therefore the interests of defendant 18 were not represented at the time the suit was instituted, that defendant 18 can invoke S. 22, Lim. Act. To enable defendant 18 to do so, she must satisfy the Court that Ex. 5 represents a real and operative transaction. If, for instance, the executant of Ex. 5 had no power or authority to execute it on behalf of defendant 11, or if Ex. 5 was merely a nominal document brought into existence to enable defendant 18 to take some claim proceedings and was not intended to be operative, defendant 11 would continue to be entitled to represent defendant 18 even if the original purchase was for the benefit of defendant 18.

A decree of the lower Court straightway exonerating a fourth share of Sch. A properties without raising and determining the questions above adverted to is obviously untenable. The decree will, to that extent, be set aside and the case remanded to the lower Court for framing necessary issues in the light of the above observations and disposing of the case after giving the parties an opportunity to lead evidence bearing upon the issues to be framed as above directed. The costs of this appeal will be provided for in the revised decree of the lower Court. Court-fee paid on the memorandum of appeal will be refunded.

C. M. P. No. 5330 of 1934. — As we are remanding the main appeal for further trial in the lower Court, it is unnecessary to admit the document here. It may be tendered in the lower Court in the course of the fresh inquiry.

C.R.K./D.S. *Case remanded.*

1. Gur Narayan v. Sheolal Singh, (1918) 5 A I R P C 140 = 49 I C 1=46 Cal 566 = 46 I A 1 (P C).
2. Janhabi Chowdhurani v. Brojo Mohini Chowdhurani, (1903) 7 C W N 817.
3. Guruvayya v. Dattatraya, (1904) 28 Bom 11= 5 Bom L R 618.

*** * A. I. R. 1938 Madras 688**

VARADACHARIAR J.

On difference between

PANDRANG ROW AND

VENKATARAMANA RAO JJ.

S. Girdharilal Son and Co. —
Plaintiffs — Appellants.

v.

B. Kappini Gowder and others —
Defendants — Respondents.

Appeal No. 250 of 1936, Decided on 3rd February 1938, against decree of Sub-Judge, Nilgiris at Ootacamund, D/- 17th December 1935.

*** * (a) Partnership Act (1932), S. 69 (2)— Retrospective nature — Section cannot be treated retrospectively — Retrospective nature particularly saved by S. 74 (b)** (Per *Pandrang Row and Varadachariar JJ., Venkataramana Rao J. contra*).

Per *Pandrang Row J.* — Sec. 69 (2) cannot be said to relate to mere matter of procedure, for, it requires something to be done, viz. registration dehors the Court. S. 69, Cl. (2) should not be given retrospective effect particularly in view of S. 74 (b). [P 699 C 1; P 700 C 2]

Per *Varadachariar J.*—Because of the fact that the Legislature gave an interval of one year before S. 69 was brought into operation, it cannot be said that that interval can be explained only on the ground that the provision must have been intended to be retrospective. There are other considerations which required such an interval, particularly the necessity for bringing into existence the necessary machinery, and for the framing of rules contemplated by S. 71 : *Case law discussed.* [P 704 C 2]

Per *Venkataramana Rao J. contra.*— The language of S. 69 (2) is very general and will apply to all suits arising from contracts whether entered into before the passing of the Act or not. S. 1 provides that S. 69 shall come into force on 1st October 1933, though the entire Act would come into force on 1st October 1932. This postponement of the operation of the section may fairly be taken as an indication of the intention of the Legislature to give retrospective operation to the section. S. 74 (b) does not go to save this retrospective operation : *A I R 1916 Mad 607, Rel. on.* [P 695 C 2 ; P 696 C 1]

*** (b) Limitation Act (1908), Preamble — Retrospective effect -- It is retrospective not because it is matter of procedure but because of its express intention to extinguish existing rights.**

Per *Pandrang Row J.* — The intention of the law of limitation being practically to put an end to existing rights after a certain lapse of time, the reason why a new rule of limitation is applied retrospectively is not because the law of limitation is a law of procedure but because the express intention of the law of limitation is to destroy or extinguish existing rights of action after a certain lapse of time. It is retrospective if it is clearly intended to be retrospective and not because it is merely a matter of procedure. [P 699 C 2]

Per *Venkataramana Rao J.*—It is well settled that limitation is a branch of the law of procedure and is only a condition annexed to the enforcement of a right and does not affect the right itself. Therefore it has been held that a statute shortening or extending time within which proceedings can be taken is retrospective. [P 693 C 1, 2]

*** (c) Interpretation of Statutes—Retrospective operation — Test is whether existing rights are affected.**

Per *Pandrang Row J.* — The real test when deciding whether a particular provision of law is to be given retrospective effect or not, is not whether the law is a law of procedure or substantive law, but whether the law in question affects or impairs existing rights including rights of action which are substantive rights. Where existing rights would be adversely affected, Courts decline to give retrospective effect unless compelled thereto by the words of the statute. [P 700 C 1]

(d) Partnership Act (1932), S. 69 (2) — Registration — Subsequent registration will not validate original institution.

Per *Venkataramana Rao J.* — The subsequent registration of the firm will not validate the original institution of the suit and enable the plaintiff to sustain action : *A I R 1927 P C 176 and A I R 1937 Mad 667, Applied.* [P 691 C 1]

(e) Interpretation of Statutes — Procedure— Meaning of 'procedure' explained —Step to be taken even prior to commencing action in Court is procedure.

Per *Venkataramana Rao J.* — Under 'procedure' are comprised all steps which a party must take in order to get the aid of the Court for enforcement of his rights. It therefore includes not only the steps which a party has to take after an action is launched in Court but also steps which he has to take before commencing it. The issue of a citation or a summons, the procuring of necessary evidence and such other steps in the further progress of the suit are all comprised in procedure which a party has to observe after a suit is launched, but there may be certain steps which he has to take outside Court in order to enable him to initiate proceedings in Court. The familiar instance is the service of notice by the plaintiff on the defendant as enacted by S. 80, Civil P. C. The rule of limitation which enjoins a party to bring his action within a particular period is another instance. [P 692 C 1]

(f) Interpretation of Statutes—Law of procedure — Meaning of — What is remedial law — Retrospective operation of law of procedure.

Per *Venkataramana Rao J.* — The law of procedure deals with the process by which a remedy for the enforcement of a right is made available. A right of suit, a right of appeal and a right of distraint are all remedies for the enforcement of a right and they are equally substantive rights though remedial in nature. The law makes a distinction between rules of law which in any way impair or destroy those rights and those which a litigant has to comply with for availing himself of those remedial rights. The latter belong to the law of procedure. An enactment altering the procedure is always held to be retrospective even where the alteration tends to the disadvantage of one of the parties save in cases where it tends to destroy the right or the remedy : *Case law discussed.* [P 694 C 2 ; P 695 C 1]

(g) Partnership Act (1932), S. 74 (b)—Cause of action accruing before 1st October 1932 is saved from the bar of S. 69 (2).

Per *Varadachariar J.* — Sec. 74 (b) saves the "remedy" in respect of any right acquired or accrued prior to 1st October 1932 from the bar of S. 69 (2). [P 703 C 2]

B. Sitarama Rao, E. Antony Lobo and A. Nagarajan — *for Appellants.*

S. Panchapakesa Sastriar, K. Nanjundiah, T. K. Rajagopalan, M. L. Nayak and M. R. Venkataraman — *for Respondents.*

Venkataramana Rao J. — This is an appeal from the decree of the learned Subordinate Judge of Nilgiris dismissing the suit of the plaintiffs which was instituted for recovery of a sum of money borrowed from them on 12th March 1931. The plaintiffs were non-suited on the ground that S. 69 (2), Partnership Act was a bar to the maintenance of the action as the plaintiffs' firm was not registered before the date of the institution of the suit, namely 23rd August 1934. In appeal it is contended by Mr. Sitarama Rao for the plaintiffs that Section 69 (2) of the Act does not affect

contracts entered into before the said Act came into force, that they are saved by S. 74 (b) of the Act, that even assuming registration of the firm was necessary, the firm was registered a month after the institution of the suit and the subsequent registration of the firm was enough to validate the original institution of the suit. I shall first deal with the contention based on the subsequent registration of the firm. It seems to me that this contention is not tenable having regard to the plain language of the section which says : "No suit to enforce a right arising from a contract shall be instituted" unless the condition mentioned therein, i. e. the registration of the firm, is fulfilled. Therefore the condition is a condition precedent to the institution of a suit. The word used is 'shall'. The Privy Council in dealing with an analogous section (S. 80, Civil P. C.), where the language was almost similar, namely " no suit shall be instituted against the Secretary of State .... until the expiration of the two months next after the notice in writing has been delivered" remarked thus :

> The Act, albeit a procedure code, must be read in accordance with the natural meaning of its words. S. 80 is express, explicit and mandatory : *vide* 51 Bom 725[1] at page 747.

This is the view which has been taken in construing an analogous section [S. 28 (2), Prov. Insol. Act] according to which leave of the Insolvency Court is made a condition precedent to the institution of a suit and our High Court has held that leave subsequently obtained would not cure the initial defect and validate the institution of the suit : *vide* 1937 M W N 654.[2] In 21 Bom 351,[3] a question arose under S. 433, Civil P. C., 1882, corresponding to S. 86 Civil P. C., 1908, as to whether a suit against a ruling Chief without obtaining the consent of the Governor-General can be validated by a subsequent consent and it was held that it could not be. In 58 All 495[4] it was held that subsequent registration would not validate the original institution. A similar view was taken in 17 Lah 275.[5] But in some cases the view has also been taken that if the suit was not barred by limitation on the date of the subsequent registration, the suit must be deemed to have been instituted on the date when registration was effected. But it is unnecessary to consider whether this view is correct, as even the application of this rule would not help the plaintiffs because by the date of registration the plaintiffs' suit became barred. Mr. Sitarama Rao strongly relied on the decision in 1930 M W N 456,[6] which was a case under S. 92, Civil P. C., and it was held therein that where a suit was instituted without the leave of the Advocate-General, it could be validated by subsequent consent. From a perusal of the case it will be seen that the learned Judges in that case made it clear that their observations must be confined only to cases arising under S. 92, Civil P. C. : vide pages 468 and 469. It may be noticed that even this view was not shared by other High Courts : *vide* for example 26 All 162.[7]

Mr. Sitarama Rao also relied upon two English cases, namely (1921) 3 K B 226[8] and (1927) 1 Ch 355[9] decided under S. 8, English Registration of Business Names Act. Under that section, it is no doubt true that no action can be maintained in respect of a contract unless the firm is registered ; but the section itself contained a provision that it is open to the Court to dispense with the said condition and relieve the disability. Therefore, once relief is granted by the Court, the effect will be as stated by Lord Hanworth, M. R. in (1927) 1 Ch 355[9] at p. 357, "to rehabilitate the proceedings from the beginning." But no such provision is contained in S. 69 (2) of the Act and it may be a matter for the Legislature and not for the Court to grant a similar relief. Mr. Sitarama Rao again laid some stress on the Privy Council decision in 8 Cal 422[10] decided under Pensions Act ; but that case was decided on the language of S. 6 of the Act which provides

1. Bhageband Dagadusa v. Secretary of State, (1927) 14 A I R P C 176=104 I C 257 = 54 I A 338=51 Bom 725 (P C).
2. Dawood Mohideen Rowther v. Sahabdeen Sahib (1937) 24 A I R Mad 667=173 I C 285 =I L R 1937 Mad 841 = (1937) 2 M L J 223 =1937 M W N 654.
3. Chandulal v. Awad, (1897) 21 Bom 351.
4. Danmal Parshotamdas v. Baburam Chhotelal. (1936) 23 A I R All 3=160 I C 227 = 58 All 495=1935 A L J 1245.
5. Kishenlal Ramlal v. Abdul Gafur Khan, (1935) 22 A I R Lah 893 = 160 I C 513 = 17 Lah 275=38 P L R 633.
6. Rathnasamy Pillai v. Adipurnam Pillai, 1930 M W N 456.
7. Gopal Dei v. Kanno Dei, (1904) 26 All 162 = 1903 A W N 227.
8. Hawkins v. Duche & Sons, (1921) 3 K B 226= 90 L J K B 913=125 L T 671=37 T L R 748.
9. In re Shaer, (1927) 1 Ch 355=136 L T 695= 96 L J Ch 282.
10. Mahammad Azamat Ali Khan v. Lalli Begum, (1882) 8 Cal 422=9 I A 8=4 Sar 310 (P C).

that a Civil Court shall take cognizance of the claim relating to a pension upon receiving a certificate from the Collector. Their Lordships held that when the Court received the certificate, it was bound to take cognizance of the claim and finding an existing suit when it received the certificate, it might take cognizance of the claim in that suit. It therefore seems to me that emphasis was laid by their Lordships on the word "claim" and there is a distinction between the claim in the suit and the suit itself. Here the bar is to the institution of the suit and not to the cognizance of the claim. The subsequent registration of the firm will not validate the original institution of the suit and enable the plaintiffs to sustain this action.

I shall now consider the contention relating to S. 69 (2) of the Act. At the outset, it may be mentioned that almost all the High Courts have taken the view that S. 69 (2) is a bar to the maintenance of an action by an unregistered firm in respect of a contract or a cause of action which accrued before the commencement of the Act if it is instituted after 1st October 1933, the date when the S. 69 (2) came into force : *vide* A I R 1935 Lah 893=17 Lah 275,[5] 58 All 495,[4] 62 Cal 213,[11] 40 C W N 1180,[12] 15 Pat 810,[13] A I R 1937 Mad 419,[14] (1937) 2 M L J 273,[15] (1937) 1 M L J 610[16] and (1937) 2 M L J 717.[17] The view taken in all these cases is that S. 69 (2) enacts a rule of procedure and it is not controlled by S. 74 (b) of the Act. In A I R 1937 Mad 419,[14] at p. 420, I stated the effect of S. 69 (2) thus :

> There is no doubt that this section enacts a rule of procedure. It imposes a condition for the enforcement of a right and does not affect the right itself. Being an enactment relating to procedure, it will apply to pending actions as well as to future actions. The Legislature, to avoid hardship, provided that S. 69, Cl. (2) shall come into force on 1st October 1933. This provision is also a clear indication that the enactment is intended to be retrospective.

It was also pointed out therein that all actions brought after October 1933 should be governed by the said provision and that S. 74 (b) was only intended to save pending legal proceedings from the bar of S. 69 (2) and not future proceedings. This view is canvassed by Mr. Sitarama Rao on the ground that the right of a suit is a substantive right and therefore a right vested in the plaintiffs on the date of the Act, that any restriction placed thereon would affect that right and that S. 69 (2) must be deemed to be a provision affecting a substantive right, that in accordance with the general rule of law governing the construction of statutes an enactment affecting a substantive right cannot be held to be retrospective and that this provision is made clear by the Legislature by enacting S. 74 (b). In support of this position he relied on (1905) A C 369,[18] 52 Mad 361,[19] 56 Cal 512[20] and 39 Mad 645.[21] Before examining the soundness of the contention, it is necessary perhaps to explain what is meant by procedure and to determine whether S. 69 (2) enacts a rule of procedure or enunciates a condition which affects a substantive right. Though it is not possible as Salmond points out to state with precision the exact nature of the distinction between substantive law and the law of procedure, still the distinction is marked. As stated by him,

> the law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—all the residue is substantive law and relates not to the process of litigation, but to its purposes and subject-matter: Salmond on Jurisprudence, pages 495 and 496.

He further amplifies by observing that :

> The substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other : page 497.

Holland in his book on Jurisprudence explains the scope of adjective law thus :

---

11. Surendranath De v. Manohar De, (1934) 21 A I R Cal 754=153 I C 671=62 Cal 213=39 C W N 67.
12. Ramsundar v. Madhusudhan, (1936) 40 C W N 1180=64 C L J 554.
13. Shazid Khan v. Darbar Babu Kuthi, (1937) 24 A I R Pat 16=166 I C 32=15 Pat 810=17 P L T 713.
14. Catholic Sangham v. Ravivarma, (1937) 24 A I R Mad 419=171 I C 821=45 M L W 276.
15. Varadarajulu Naidu v. Rajamanickam Mudaliar, (1937) 24 A I R Mad 767=(1937) 2 M L J 273.
16. Sundararaja Iyengar v. Mannarsami, (1937) 24 A I R Mad 528=169 I C 688=(1937) 1 M L J 610.
17. Firm of Syed Ibrahim Sahib v. Gurulinga Iyer, (1938) 25 A I R Mad 185=(1937) 2 M L J 717.
18. Colonial Sugar Refining Co. Ltd. v. Irving, (1905) A C 369=74 L J P C 77=92 L T 738 =21 T L R 513.
19. In re Vasudevasamiar, (1929) 16 A I R Mad 381=115 I C 811=52 Mad 361=56 M L J 369 (S B).
20. Sadar Ali v. Doliluddin Oshagar, (1928) 15 A I R Cal 640=113 I C 49=56 Cal 512=48 C L J 150=32 C W N 1130 (F B).
21. Raja of Pithapur v. Venkatasubba Rao, (1916) 3 A I R Mad 912=30 I C 94=39 Mad 645=29 M L J 1.

A remedial right is in itself a mere potentiality deriving all its value from the support which it can obtain from the power of the State. The mode in which that support may be secured, in order to the realization of a remedial right, is prescribed by that department of law which has been called 'adjective' because it exists only for the sake of 'substantive law' but is probably better known as 'procedure.' In the exceptional cases in which an injured party is allowed to redress his own wrong, adjective law points out the limits within which such self-help is permissible. In all other cases it announces what steps must be taken in order duly to set in motion the machinery of the law-courts for the benefit either of a plaintiff or of a defendant : Pages 358 and 359, Edition 13, 1924.

Wharton in his Law Lexicon explains it thus: "The mode in which successive steps in litigation are taken." Thus it will be seen that under 'procedure' are comprised all steps which a party must take in order to get the aid of the Court for the enforcement of his rights. It therefore includes not only the steps which a party has to take after an action is launched in Court but also steps which he has to take before commencing it. The issue of a citation or a summons, the procuring of necessary evidence and such other steps in the further progress of the suit are all comprised in procedure which a party has to observe after a suit is launched, but there may be certain steps which he has to take outside Court in order to enable him to initiate proceedings in Court. The familiar instance is the service of notice by the plaintiff on the defendant as enacted by S. 80, Civil P. C., or by S. 350, District Municipalities Act. The rule of limitation which enjoins a party to bring his action within a particular period is another instance. As observed in (1848) 2 Ex 22[22]:

> There is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away, and when it is dealing with mere procedure to recover those rights which it may be quite reasonable to regulate and alter.

The right of action does not constitute a title to keep all the consequences of the right as they were before. S. 69 (2) does not affect the right of action; it only prescribes that a condition is to be performed before a party seeks the aid of the Court for giving him relief in respect thereof. Under S. 80, Civil P. C., no suit can be instituted unless notice has been served on the Secretary of State. This section has been held to enact a rule of 'procedure (*vide* Mulla's Commentary, p. 274). The Privy Council in 51 Bom 725[1] at p. 747 refers to it as "a statutory provision as to procedure." In (1846) 9 Q B 847[23] the facts were these : Before 6 & 7 Victoria, Chapter 73, a solicitor was entitled to bring an action for work done outside Court immediately the work was done but S. 37 of the Act provided that no solicitor shall commence or maintain any action or suit until the expiration of one month after he shall have delivered a bill in the manner provided for therein. The Act was passed in 1843 but the work in respect of which the action was brought was completed before 1840. It was also evident that the bill was delivered before that date but no bill was delivered after the date when the Act came into force and before the section was brought. Lord Denman C. J. observed that according to the Act a bill delivered before 1840 would not be sufficient because such a bill was not taxable before the Act, whereas on the other hand after the Act the bill was taxable and a defendant might insist upon such taxation that the Act distinctly provides that no attorney shall commence or maintain any action until he has delivered the bill after the Act and waited for a month and that the Act was retrospective and as there was no delivery within the meaning of the Act the action failed. Thus though the cause of action to institute a suit accrued before the Act, yet the condition prescribed for instituting the suit was held to apply on the principle that the condition related only to procedure. The observations of Lord Esher in (1897) 1 Q B 702[24] at pp. 705 and 706 on this section (S. 37) bring out clearly what is meant by a rule of procedure and they are to this effect :

> Before any enactment existed with regard to actions by solicitors for their costs, a solicitor stood in the same position as any other person who has done work for another at his request and could sue as soon as the work which he was retained to do was finished without having delivered any signed bill of costs or waiting for any time after the delivery of such a bill. Then to what extent does the statute alter the right of the solicitor in such a case and does the alteration made by it affect or alter the cause of action ? It takes away no doubt the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of action. The statute of limitations itself does not affect the right to payment but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly I think S. 37 of the Solicitors Act, 1843 deals not with the right

22. Moon v. Durden, (1848) 2 Ex 22=12 Jur 138.

23. Brooks v. Bockett, (1846) 9 Q B 847.

24. Coburn v. Colledge, (1897) 1 Q B 702=66 L J Q B 462=76 L T 608=45 W R 488.

of the solicitor but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges or disbursements until then. It assumes that he has a right to be paid the fees, charges and disbursements, but provides that he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied.

The principle of this decision was applied and followed by our High Court in a case reported in 25 M L J 205.[25] In that case the facts were these. Under S. 7, Rent Recovery Act,

> no suit brought and no legal proceedings taken to enforce the terms of a tenancy shall be sustainable unless pattas and muchilikas have been exchanged ....

But this condition was done away with by S. 77, Madras Estates Land Act which enacts that :

> At any time after an arrear of rent has become due the landlord may institute a suit before the Collector for the recovery of the arrear.

A suit was instituted for arrears for faslis 1315, 1316 and 1317 which accrued due before the Estates Land Act came into force. The plea was taken that under S. 7, Rent Recovery Act the action was not sustainable. It was overruled by Sundara Aiyar and Sadasiva Ayyar JJ. on the ground that S. 7 only enacted a rule of procedure and at the time the suit was brought, it was no longer in force. Both the learned Judges dissented from 6 M H C R 122[26] and in the course of the judgment, Sundara Ayyar J. observed thus:

> Did Sec. 7 of Act 8 of 1865 affect the landlord's right to the rent? In my opinion, it did not. It merely imposed a condition which the landlord was bound to fulfil if he wished to institute a suit for its recovery or to take legal proceedings to compel its payment..... In so far as it related to the recovery of it through Court, it undoubtedly belonged to the region of processual law.

A similar view was taken by Subramania Ayyar and Benson JJ. in an unreported case (S. A. No. 1091 of 1897) referred in 22 Mad 248[27] at p. 250. The learned Judges therein pointed out that the exchange of patta and muchilika or tender of patta was a condition imposed by law as a necessary preliminary to the filing of a suit. It is well settled that "limitation is a branch of the law of procedure and is only a condition annexed to the enforcement of a right and does not affect the right itself." Therefore it has been held that a statute shortening or extending time within which proceedings can be taken is retrospective. As an instance of a statute shortening the time may be mentioned the case in (1899) L R P D 236.[28] In respect of a cause of action which accrued before the Public Authorities Protection Act came into force, the question arose whether the period of limitation prescribed by the said Act, is applicable. The said Act came into force on 1st January 1894. The default in respect of which the suit was instituted occurred in September 1893 and the suit was instituted in 1898; but under the Act, the action must be commenced six months after the default complained of. So on the date of the Act there was only a period of one month or so, that was available if the period of limitation of six months were held to apply. But it was contended that the cause of action accrued before the Act and the period of limitation provided by the Act should not be made applicable. This contention was overruled and the action was held to be barred on the ground that it was not brought within six months after the matter complained of. Sir F. H. Jeune observed as follows:

> It is clear that what must be taken to be an improvement in procedure is not considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition.

This view was endorsed by the Court of Appeal. As an instance of a statute extending the time may be mentioned the case in (1905) 2 K B 335.[29] In that case, a prosecution was launched under S. 5, sub-s. 1, Criminal Law Amendment Act, 1885, for an offence committed on 15th July 1904. Under that Act the prosecution should have been launched within three months after the commission of the offence, but by the Prevention of Cruelty to Children Act, 1904, which came into force on 1st October 1904, the period of limitation was extended from three months to six months. It was held that though the prosecution was commenced on 27th December 1904, more than three months after the date of the commission of the offence, by virtue of the later Act

25. Muthiah Chettiar v. Ramaswamy Chettiar, (1913) 25 M L J 205=20 I C 689=1913 M W N 618.
26. G. Lee Morris v. Sambamurthi Rayar, (1872-73) 6 M H C R 122.
27. Kumarasami Pillai v. President, District Board of Tanjore, (1899) 22 Mad 248.
28. 'The Ydun', (1899) L R P D 236=81 L T 10 =8 Asp M C 551=68 L J P 101.
29. Rex v. Chandra Dharma, (1905) 2 K B 335= 74 L J K B 450.

the prosecution was sustainable. Channel J. there observed :

> An alteration of the time within which they might be prosecuted, whether by extension or diminution, was a matter of procedure only.

But an exception has been made in cases where the alteration in procedure would have the effect of destroying a right of action, that is, if before the new Act came into operation the time fixed by it had already expired and would have prevented the plaintiff from enforcing his right, the new Act would not be considered as retrospective. It is this principle that was applied in 38 Mad 101[30] and 39 Mad 645.[21] In those cases the suits were for arrears of rent and on the date they were brought more than three years had elapsed after the rent became due and they were dismissed on the ground that they must have been brought within three years as prescribed by Ss. 210 and 211 and Art. 8 of the Schedule to the Estates Land Act. But for this Act, they would have had six years from the date when the rents accrued due and the suits would have been in time. It was held that as by the time the Estates Land Act came into force the three years' period had run out, the rule of limitation prescribed by this Act should not be held to be retrospective. This position is well set out in 41 Cal 1125[31] at page 1141 thus :

> The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot govern suits where such compliance was from the first impossible. The effect of is to regulate, not to confiscate. There are thus two positions: where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply. but where it could not, then the amendment would have no application.

In the Full Bench decision in 6 All 262[32] the distinction between the right and the relief and the process to be adopted for getting relief is well brought out. In that case a question arose as to the maintainability of a suit for foreclosure of a mortgage by conditional sale executed on 3rd July 1877 when Regn. 17 of 1806 was in full force, instituted after the Transfer of Property Act came into force which repealed the said Regulation. Under S. 8 of the said Regulation, no mortgage can be foreclosed without the service of one year's notice upon the mortgagor in the manner provided therein. Objection was taken that the conditions mentioned in the Regulation not having been complied with, the suit was not maintainable. This contention was repelled on the ground, that the provisions of Ss. 7 and 8 of Regn. 17 of 1806 prescribed only a procedure and no person can have a vested right in procedure. An argument was advanced based upon S. 2, T. P. Act, which provided that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability and therefore it must be taken that the previous provision must be deemed to have been unaffected by the Act. In dealing with this contention Oldfield J. observed thus :

> There is no vested right to have recourse to a particular procedure for enforcing a contract; such a right cannot be claimed by the parties to a mortgage as being in any sense a right to which arises out of the legal relation of a mortgagor and mortgagee. To alter the procedure involves no breach of their contract.
>
> Their rights and liabilities under their contract and the relief they are entitled to in respect of such rights and liabilities, are different things from the procedure necessary to enforce such rights, liabilities and relief. And although the procedure for redemption and foreclosure of mortgage by conditional sale has been altered, it can scarcely be said that the mortgagor has been injuriously affected by the change. The regulation prescribed certain ministerial proceedings to be taken, under which a year was allowed to the mortgagor to pay the debt, before a suit could be brought for possession, or to obtain a declaration of absolute title, whereas the present Act has done away with the preliminary proceedings, and allows the mortgagee to bring a suit for foreclosure.

Dealing with a similar set of facts, Trevelyan J. in a Full Bench case in 12 Cal 583[33] at page 589 remarked thus :

> There is, I think, a clear distinction between relief and the mode of procedure for obtaining such relief. The relief remains unaffected by the change of the procedure. The rights and liabilities of the mortgagor and mortgagee, and the relief in respect of such rights and liabilities, are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has however been adopted. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it.

On an examination of the above cases and other decisions on this branch of the law, it is fairly clear that the law of procedure

30. Ramakrishna Chetty v. Subraya Iyer, (1916) 3 A I R Mad 607=18 I C 64=38 Mad 101 = 24 M L J 54=1913 M W N 303.

31. Gopeshwar Pal v. Jiban Chandra, (1914) 1 A I R Cal 806=24 I C 37=41 Cal 1125 = 19 C L J 549=18 C W N 804 (F B).

32. Ganga Sahai v. Krishan Sahai, (1884) 6 All 262=1884 A W N 79 (F B).

33. Bhobo Sundari Debi v. Rakkal Chander Bose, (1886) 12 Cal 583 (F B).

deals with the process by which a remedy for the enforcement of a right is made available. A right of suit, a right of appeal and a right of distraint are all remedies for the enforcement of a right and they are equally substantive rights though remedial in nature. The law makes a distinction between rules of law which in any way impair or destroy those rights and those which a litigant has to comply with for availing himself of those remedial rights. The latter belong to the law of procedure and an enactment altering the procedure is always held to be retrospective even where the alteration tends to the disadvantage of one of the parties save in cases where it tends to destroy the right or the remedy. The cases relied on by Mr. Sitarama Rao do not enunciate any principle which is in conflict with the principles above indicated. There are two cases on which Mr. Sitarama Rao laid considerable emphasis. The first is the case in (1905) A C 369,[18] where with reference to a pending action a right of appeal to the Privy Council which was available on the date when the Act was instituted was taken away and a right of appeal was given to the Chief Court of the Common Wealth of Australia. Lord Macnaghten observed thus:

> To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal ....

Here, the right of appeal to the Privy Council as a superior tribunal is taken away and there is thus a deprivation or destruction of a vested right. The other case relied on by Mr. Sitarama Rao is a Full Bench decision in 52 Mad 361.[19] There the question was whether the amendment of Cl. 15 of the Letters Patent which came into force on 31st January 1928 by which no second appeal can be filed without the leave of the Judge who gave the decision against which appeal is sought to be preferred will apply to a pending appeal. The learned Judges who delivered the judgment in that case were of the opinion that the principle laid down in (1905) A C 369[18] would apply to the case on the ground that the institution of the suit would carry with it the implication that all appeals then in force were preserved to it through the rest of its career. The decision can probably be supported on the ground that the condition of leave is one which a litigant cannot comply with but is dependent upon the will of a foreign agency in whom is the power vested either to give leave or refuse leave, that is, the power to preserve the right or to destroy it. It can therefore be said that an existing right of appeal is turned into a mere chance, put in peril and the right is thus affected. As Rankin C. J. observed, "an intention to interfere with a substantive right to impair or imperil it, cannot be presumed": *vide* 56 Cal 512[20] at p. 517. It is thus clear that S. 69 (2) enacts only a rule of procedure; the rights under the contract are not taken away; the remedy by way of a suit is also not taken away; the relief obtainable has not been interfered with; the condition imposed is the one which a party can comply with and the remedy by way of a suit is thus not imperilled in any way.

The very cases relied on by Mr. Sitarama Rao also lay down the proposition that the provision of a statute dealing with a matter of procedure will have retrospective effect unless that construction is textually inadmissible: 9 Lah 284[34]. They also lay down a further proposition that the provisions which touch a right in existence at the passing of the Act are not to be applied retrospectively in the absence of express enactment or necessary intendment. Therefore if the necessary intendment of the statute is that it ought to be applied retrospectively, the Court is bound to give retrospective effect to it. The language of S. 69 (2) is very general and will apply to all suits arising from contracts whether entered into before the passing of the Act or not. S. 1 provides that S. 69 shall come into force on 1st October 1933, though the entire Act would come into force on 1st October 1932. This postponement of the operation of the section may fairly be taken as an indication of the intention of the Legislature to give retrospective operation to the section: *vide* 38 Mad 101[30] at pages 104 to 107 and the English cases referred to therein. But Mr. Sitarama Rao contends that by virtue of S. 74 (b) of the Act it must be taken that the Legislature did not intend to give a retrospective operation to the section. S. 74, Cls. (a) and (b) are to this effect:

> (a) Any right, title, interest, obligation, or liability already acquired accrued, or incurred before

34. Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi, (1927) 14 A I R P C 242=106 I C 156=9 Lah 284=54 I A 421 (P C).

the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act.

Clause (a) deals with what are called strictly substantive rights, that is rights arising out of certain legal relationship between the parties; and Cl. (b) deals with what are known as remedial rights which law gives for the enforcement of or redress for the infringement of such rights. Therefore what S. 74 lays down is that "nothing in this Act shall affect or be deemed to affect" those rights; that is a right to sue or institute a legal proceeding or a right to any remedy will not be affected by the Act. The section does not deal with the process or the procedure for the enforcement of the said right or remedy. The process by which the remedy is made available is not the same as the remedy. What is contemplated is that the right to institute a suit or to enforce any other remedy in respect of a contract available to a party at the date when the Act came into force will not be affected. But if a legal proceeding has already been commenced, it would not be affected by S. 69, Cl. 2. It appears to be the intention of the Legislature that the retrospective operation which is given to a rule of procedure should not be extended to legal proceedings pending on the date of the Act. As explained by me in A I R 1937 Mad 419,[14] the word 'remedy' may be taken to be a comprehensive term as including a right to sue or any other remedy without resorting to Court, for instance, a right to sell pledged goods, a seller's lien and a right of re-sale of goods. But for this enactment, it may be that even pending legal proceedings would have been affected: *vide* (1868) L R 3 Q B 160.[35] If the intention was not to affect even legal proceedings not begun in respect of such contracts, the Legislature would have provided in S. 74 a provision similar to the one they did in respect of the repeal of an enactment, viz. any legal proceeding or remedy may be instituted or continued as if the Act had not been passed : [cf. S. 6, Cl. (e), General Clauses Act]. I am therefore of the opinion that the action is barred by S. 69 (2) of the Act and it is not saved by S. 74 (b) of the Act. The suit has therefore been rightly dismissed by the Courts below. I would therefore dismiss the appeal with costs.

35. Kimbray v. Draper, (1868) L R 3 Q B 160=9 B & S 80=37 L J Q B 80 = 17 L T 540=16 W R 539.

Pandrang Row J.—This appeal is from the decree of the Subordinate Judge of the Nilgiris at Ootacamund, dismissing a suit for the recovery of Rs. 9000 due on a promissory note executed on 12th August 1931. A payment had been made on 23rd August 1931 and the suit was filed on 23rd August 1934. The claim was in respect of money due to the plaintiff firm, and that firm was actually registered about a month after the suit was instituted, namely on 22nd September 1934. In the original written statement, the defendants did not take any objection to the maintainability of the suit. But about a year later, namely in November 1935, they raised the objection that the suit was not maintainable by reason of the provisions of S. 69, Cl. (2), Partnership Act of 1932. This preliminary objection alone was decided by the Court below, and the suit was dismissed on the ground that the preliminary objection was good, the lower Court holding that the registering of the firm about a month after the institution of the suit could not date back to the institution of the suit, and would not overcome the bar imposed by S. 69 (2), Partnership Act. It seems to me that it is not necessary to decide whether the effect of the subsequent registration will relate back to the institution of the suit, unless it is found that S. 69 (2) applies to the present suit. This does not mean that I differ on this point from my learned brother, but I prefer not to decide it because I am of opinion that S. 69 (2) does not apply to the present suit and that the present suit is expressly saved by the saving clause in the Partnership Act, namely S. 74. It is on these points that I have to differ from my learned brother.

No doubt, there are several decisions of several High Courts which support the view which has commended itself to my learned brother. It is enough to refer to the earliest of these, as the others merely follow it more or less, viz. 62 Cal 213.[11] The decision therein appears to be based mainly on two English cases, namely (1852) 18 Q B 343[36] and (1868) L R 3 Q B 160.[35] I do not think these two decisions have remained unquestioned. (1852) 18 Q B 343[36] followed the earlier decision in (1829) 6 Bing 258.[37] In Craises' Statute Law, Edn. 4 at p. 341 the result of the

36. Reg v. Leeds and Bradford Railway Co., (1852) 18 Q B 343.

37. Towler v. Chatterton, (1829) 6 Bing 258=31 R R 411.

cases dealing with this question is stated as follows :

> The result of these decisions seems to be that the suggested exception is rarely if ever applicable, and cannot be enunciated as an undoubted rule of construction,

the 'suggested exception' being that where the Legislature provides in the statute a certain period of time within which proceedings respecting antecedent injuries might be taken before the proper tribunal, the statute must thereafter be given a retrospective operation. It was this consideration that prevailed in 62 Cal 213,[11] and in fact the very words used in (1852) 18 Q B 343[36] were quoted therein; it was held that the suspension of operation for a year so far as S. 69, Partnership Act, was concerned is to be taken

> as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries must be taken before the proper tribunal.

I may add that (1868) L R 3 Q B 160[35] was a case concerned with a new provision made in an Act for security for costs. It purported to follow the earlier decision in (1860) 30 L J Ex. 40,[38] though doubts were expressed about it both by Cockburn C. J. and Balckburn J. The latter case appears to be the first case in which the exception to the general rule of not giving retrospective effect to statutes so as to affect or impair existing rights was laid down, namely that the rule need not be applied where the statutory provision is a mere matter of procedure. This case, (1860) 30 L J Ex 40,[38] is the first case in which the rule was enunciated that where an enactment merely affects procedure and does not extend to rights of action, the general rule of not giving retrospective effect to statutes so as to affect or impair existing rights does not apply. It must be remembered that that was a case in which the question that arose was one relating to costs. The words used by Pollock C. B. in that case show what exactly he had in mind when he referred to the matter before him as a matter of procedure. He said :

> I have always understood that there is a considerable difference between laws which affect vested rights and those laws which merely affect the proceedings of Courts; as for instance, declaring what shall be deemed good service, what shall be the criterion to the right of costs, how much costs shall be paid, the manner in which witnesses shall be paid, or what witnesses the parties shall be entitled to and so on . . . . I do not think a matter of that sort can be called a right in any sense in which Lord Coke in his Institutes has spoken of rights.

If by mere matter of procedure is meant only matters of this kind, no difficulty can possibly arise. The difficulty arises when an elastic word of indefinite and uncertain import such as 'procedure' is used in an extended sense and a separate rule of law is laid down that where a statute relates to procedure it can be given retrospective operation, as distinct from the general rule that retrospective effect should not be unnecessarily given to a statute so as to affect existing rights. It is really incorrect in my opinion to say that these two rules are distinct, or that the former constitutes an exception to the latter. There is only one rule, the rule based on the foundation that the Legislature shall not be presumed to take away or impair existing rights; and when in matters of strictly so-called procedure retrospective operation is given, it is because there is no right in a matter of procedure which any person can have and which he can enforce as against any one else. This aspect of the matter has been dealt with in 1913 M W N 303[30] at p. 304 as follows :

> It is well-established principle that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation will not be given to a statute so as to affect, alter or destroy any vested right: See S. 6 Cl. (c), General Clauses Act and S. 8, Cl. (c), Madras Act 1 of 1891. For, to do so would result in great injustice and it would be presumed that the Legislature did not intend to deprive any person of a right previously vested in him. The general rule that statutes relating to processual law have retrospective operation is as much subject to this important qualification as statutes dealing with substantive rights. The question whether a person is entitled to maintain a particular action or to do so in a particular form and what defences are open to the defendant cannot be affected by any statute passed after its institution.

Then the learned Judges go on to quote from the decision of the Privy Council in (1905) A C 369,[18] a case which requires full consideration for the purpose of the present question. The facts of that case were that a certain suit was pending when the Judicature Act of 1903 became law, the Act having received the Royal Assent on 25th October 1903; the writ in the action had been issued in the previous year but judgment was not delivered till 4th September 1903, that is to say, a few days after the Judicature Act had come into force. The Judicature Act by Ss. 38 and 39 practically substituted the previous right

---

38. Wright v. Hale, (1860) 6 H & N 227=30 L J Ex 40=6 Jur (N S) 1212=8 L T 444=9 W R 157.

which a litigant had of appealing to the Privy Council by a right of appeal to the High Court of Australia. It was held that though the judgment had not been delivered in the case before the new Act came into force, the new Act did not apply and that the litigant's right of appeal to the Privy Council continued to exist in spite of the new Act. The judgment in the case was delivered by Lord Macnaghten and the principal portion of the judgment at p. 372 is as follows :

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judicature Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

The words used by Lord Macnaghten, namely "touches a right in existence at the passing of the Act" and "interference with existing rights" clearly indicate the broad scope of the rule which protects existing rights not only from destruction but also from any diminution or injury. It was not seriously disputed before us that if a statute destroyed an existing right or even placed an onerous condition upon it, it would not be given retrospective effect unless the statute was clear on the point and no other interpretation of the statute was possible. Though questions of limitation and questions relating to the law of evidence are treated in some respects as branches of the law of procedure, nevertheless, it has been found necessary by Courts not to apply the so-called rule that laws of procedure are retrospective to cases where existing rights are altogether taken away or burdened with an onerous condition. It is not necessary for me to refer to all the cases on the point some of which have been referred to by my learned brother in his judgment. It is enough to refer to the cases dealing with the new condition of obtaining leave of Court for the filing of a second appeal, namely 52 Mad 361[19] and 56 Cal 512.[20] It was however argued that where the condition imposed newly by statute on the right of suit is one that can be easily performed by the intending plaintiff, there is no justification or reason for not giving effect to the new statute even as regards existing rights of action. In the first place, it is difficult in principle to draw a clear line between onerous conditions and light conditions. Secondly, the general rule of law is not only that existing rights should not be taken away or seriously affected, but should not be affected or impaired. Questions of degree do not arise in a matter like this and, in my opinion, it would be indefensible in principle to introduce an element of uncertainty in a rule of law which is of general application.

It seems to me that the real foundation of the fundamental rule of law common to all civilized nations against giving retrospective operation to statutes so as to affect existing rights is the rule of justice which regards all deprivation or impairment of existing rights as prima facie wrong, and the consequent presumption that the Legislature which aims to promote the ends of justice should not be presumed to bring about an injustice of this kind unless the intention to do so is clearly expressed or unless such an inference is inescapable by reason of the words used by the Legislature. I do not think the injustice done in a case would become necessarily less when the injury to existing rights is the result of the operation of a new rule which may be said merely to relate to procedure. "Procedure", as I have already said, is a word of uncertain and indefinite import. Writers of text books on jurisprudence have hardly succeeded in defining exactly what "procedure" is, or where procedure ends and substantive law begins. Some jurists prefer to call "procedure" as "adjectival law" because its object is to aid and protect the rights given by substantive law, and it exists only for the sake of substantive law. Holland in his book on Jurisprudence, Edn. 11, at page 355, attempts the following definition:

> It comprises the rules for (i) selecting the jurisdiction which has cognizance of the matter in question ; (ii) ascertaining the Court which is appropriate for the decision of the matter ;

(iii) setting in motion the machinery of the Court so as to procure the decision ; and (iv) setting in motion the physical force by which the judgment of the Court is, in the last resort, to be rendered effectual.

Judged by this definition, Section 69 (2), Partnership Act, cannot be said to relate to mere matter of procedure, for it requires something to be done, viz. registration dehors the Court. My learned brother has referred to some passages from Salmond on Jurisprudence dealing with the same point and I would quote some more passages from the same work which have a bearing on those quoted by him. The learned author dismisses the plausible view of procedure which regards it as concerned not with rights but with remedies, by saying that this is to confound the remedy with the process by which it is made available. At page 497, Edn. 7, the learned author observes as follows:

Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure, which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issues. In legal history such transitions are frequent, and in legal theory they are not without interest and importance.

He goes on to refer to 'three important classes', in which procedure and substantive law appear to merge into one another and are practically indistinguishable, namely:

(1) An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing ; (2) a conclusive evidential fact is equivalent to, and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law.... for instance, a bond (that is to say, an admission of indebtedness under seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged ; but it is now itself creative of a debt ; for it has passed from the domain of procedure into that of substantive law; and (3) the limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy ; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting ; the latter leaves no right at all. But save in this respect their practical effect is the same, although their form is different.

It may be said that even in form so far as the right to possession is concerned, the form as well as substance is the same, for, S. 28, Lim. Act provides that in such cases the right will be deemed to be extinguished. As observed by the Privy Council in 21 Cal 8[39] and affirmed in 33 All 356,[40] the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right.

The intention of the law of limitation being practically to put an end to existing rights after a certain lapse of time, the reason why a new rule of limitation is applied retrospectively is not because the law of limitation is a law of procedure but because the express intention of the law of limitation is to destroy or extinguish existing rights of action after a certain lapse of time. It is retrospective if it is clearly intended to be retrospective, and not because it is merely a matter of procedure. So far as rules relating to questions of evidence are concerned, when a new law of evidence takes away an existing right and gives new rights to parties who had no rights before, the Courts are unwilling to give retrospective effect to it, though ordinarily the law of evidence is regarded as a matter of procedure. It is enough in this connexion to refer to (1878) 3 A C 582.[41] That was a case where when an existing disability created by an Act of 1672 in respect of deeds not signed by a particular man was removed by an Act of 1874, the new Act was held not to apply to deeds executed when the Act of 1672 was in force, because the new Act could not be said to create new rights in parties who had none and in effect destroy existing rights by giving validity to deeds which otherwise were of no effect divesting heirs or next of kin in favour of the party in whose interest the improbative instrument had been made. Lord Blackburn laid down the rule in the following words :

Now the general rule, not merely of England and Scotland, but, I believe, of every civilized nation, is expressed in the maxim '*nova constitutio futuris formam imponere debet non præteritis*'—prima facie, any new law that is made affects future transactions, not past ones.

A similar provision is found in the Roman law: "*Leges et constitutiones futuris dare fornem negoti is, non ad fætu præte-*

39. Hari Nath Chatterjee v. Mothu Mohan Goswami, (1894) 21 Cal 8 = 20 I A 183 = 6 Sar 334 (P C).
40. Khunni Lal v. Gobind Krishna, (1911) 33 All 356=10 I C 477=38 I A 87 (P C).
41. James Gardner v. Edward A Lucas, (1878) 3 A C 582.

rit arevocari" (Code 1.4.7); to the same effect is the positive provision in Art. 2 of the Code of Civil — "*La loi ne dispose que pour l'avenir, elle n'a point d'effect retroactif*". The real test is, when deciding whether a particular provision of law is to be given retrospective effect or not, not whether the law is a law of procedure or substantive law, but whether the law in question affects or impairs existing rights including rights of action which are substantive rights. Where existing rights would be adversely affected, Courts decline to give retrospective effect unless compelled thereto by the words of the statute. That a right of action is a substantive right is not disputed; there is considerable authority in support of that position and it is not necessary to refer to the large number of cases which bear on the point. It is enough to mention (1876) 1 Ch D 48[42] and (1898) 2 Q B 547.[43] The latter case deals also with the question whether in cases where the commencement of the operation of a statute is suspended for a time, it is an indication that no further restriction upon retrospective operation is intended. Wright J. observed as regards this point as follows :

> But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as statutes of limitation and even in relation to them it is questioned in (1848) 2 Ex 22.[22]

He proceeded to state that in the case before him the enactment did not merely affect procedure, though the effect of the enactment was not to destroy the right which the creditor had to dividend beyond 5 per cent. but merely postponed that right. He continued as follows :

> If the section is construed retrospectively, it will postpone the creditor's right to dividend beyond 5 per cent. and will pro tanto deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred.

His decision was that retrospective effect should not be given in the case before him. In (1876) 1 Ch D 48,[42] Jessel M. R. observed that

> the right to prove for a debt is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt from a company in liquidation,

and he held that the provisions of S. 10, Judicature Act which direct that

> in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable .... as may be in force,

were not retrospective, though it was argued before him that the rules to be applied under that section, being rules relating to procedure, should be given retrospective effect, and (1868) L R 3 Q B 160[35] was quoted in support of that contention. One other English case may be referred to, viz. (1923) 2 K B 193[44] in which McCardie J. held that in accordance with well established rules of construction, as well as by virtue of S. 38(2), Interpretation Act, 1889, the Gaming Act of 1922, which repealed S. 2, Gaming Act, 1835 and enacted that "no action for recovery of money under the said section shall be entertained by any Court," did not prevent the bringing of an action under the repealed section of the Act of 1835 after the date when the repealing Act came into force in respect of a cause of action which had arisen before that date. So far I have dealt with the question whether S. 69, Cl. (2), Partnership Act should be given retrospective effect, and I have said enough to indicate my view that it should not be given retrospective effect. But the matter does not rest there because the Legislature has expressly enacted a saving clause in S. 74. In other words, the presumption that the Legislature does not intend to affect or impair existing rights including rights of action is reinforced in the present case by an express saving clause in the shape of S. 74 the relevant portions of which run as follows :

> Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—
>
> (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
>
> (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act or ....
>
> (f) any rule of law not inconsistent with this Act.

Presumably Cl. (f) would include the rule of law which denies retrospective operation to statutes so as to affect existing rights and is embodied by the Legislature

42. In re Joseph Suche & Co., Ltd., (1876) 1 Ch D 48=45 L J Ch 12.

43. In re Athlumney, (1898) 2 Q B 547=67 L J Q B 935=79 L T 303=47 W R 144=5 Manson 322.

44. Henshall v. Porter, (1923) 2 K B 193=92 L J K B 866=129 L T 443=39 T L R 409=67 S J 537.

in the General Clauses Act. So far as Cls. (a) and (b) are concerned, it is clear that the right with which we are now concerned, namely the right of suit with respect to the debt due on the promissory note, is a right which had accrued before the commencement of the Act, and that the present suit is a remedy, and indeed the only remedy, in respect of such a right. Cl. (b) of S. 74 has been interpreted both by Sulaiman C. J. in 58 All 495[4] and by my learned brother in 45 L W 276[14] in the same way, namely that it would include any suit for the enforcement of a right already accrued, and that the words "before the commencement of this Act" would not qualify "legal proceeding or remedy," found earlier in that clause. My learned brother however thought that the word 'affect' cannot be interpreted to mean 'apply to' as appears to have been understood or interpreted by Sulaiman C. J. Now the word 'affect' is an ordinary word which must be given its dictionary meaning. It means "to act upon, to produce or effect a change upon, to influence, to touch." It does not therefore follow that a right is not affected unless it is taken away wholly or in greater part: any diminution or deterioration or impairment of the right would affect it. The word 'impair' which has been used in this connexion also has a wide meaning. "Impair" means "to diminish in quantity, value or strength, to weaken," and an absolute right of suit is impaired or affected when a condition is imposed upon it. It may be the condition is light, or it may be the condition is onerous, but it is not always easy to say which burden is onerous and which is not. The onerous nature of the burden depends not only on the burden itself but also on the individual who has to bear the burden and the law cannot have respect of persons in order to determine whether a particular condition is onerous or not. It is not possible to have any general principle based on such a shifting foundation. In my opinion whenever a burden is imposed, the previously existing right is affected or impaired, if not imperilled. It seems to me that it is hardly right to say in a case of this kind where we have got the actual facts before us, where a suit to recover a sum of Rs. 9000 would otherwise be dismissed, that the right to recover that amount is not imperilled by reason of the condition imposed by S. 69 (2), Partnership Act. I am unable to shut my eyes to such an extent to the facts of the case as to say to the plaintiffs that whatever they might think their rights have not been affected by S. 69 (2), Partnership Act, though in effect they would lose their entire right to recover the money due to them by reason of that statutory provision. I do not think the law requires me to say that such deprivation of rights was intended by the Legislature and should take place and that this consequence cannot be avoided because S. 69 (2) of the Act relates to a matter of procedure.

Since the case was argued before us, I have come across a decision of a Full Bench of the Rangoon High Court in which this question of what is procedure and what is not procedure has been considered and decided and I think it is but right that I should refer to it. The case is A I R 1937 Rang 419.[45] The High Court of Rangoon had made an amendment to O. 21, R. 90, Civil P. C., which made the right to have a sale set aside subject to the proviso that before such an application is made a certain deposit was to be made. The Full Bench of the same High Court held that such an amendment by the High Court was ultra vires as the proviso did not relate to procedure. Roberts C. J. approved the following definition of procedure given by Lush J. in (1881) 7 Q B D 329[46]:

> Procedure denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or 'defines that right.'

Roberts C. J. observed that the right of applying to set aside a sale referred to in O. 21, R. 90, Civil P. C. was only declaratory of the common law and as such right of application was taken away unless the person is able and willing to make the deposit, the new rule could not be regarded as mere procedure. He relied on (1832) 2 C & J 558[47] and on the observation in Broom's Legal Maxims, that no one is to be deprived of his property in any judicial proceeding unless he has an opportunity of being heard. Leach J. observed as follows:

> Proviso (b) in the rule under discussion clearly offends against this principle, because in effect it says that a person shall not enter the Court and ask for redress until he has deposited a sum of money, not by way of court-fee, but as a warranty

---

45. Chettiyar Firm v. Central Bank of India Ltd., (1937) 24 A I R Rang 419=172 I C 102=1937 R L R 268 (F B).
46. Poyser v. Minors, (1881) 7 Q B D 329=50 L J Q B 555=45 L T 33=29 W R 773 = 46 J P 84.
47. Capel v. Child, (1832) 2 C & J 558=2 Tyr 689 =1 L J Ex 205.

of good faith. It is said that the proviso was inserted in the rule in order to prevent applications of a frivolous character being filed; but unfortunately its effect does not stop there. It can operate to prevent a person who has suffered a wrong coming into Court for redress because he has not the means to make the deposit.

Braund J. observed that the proviso was "a mandatory rule by which, when read with S. 47 (1) of the Code, the Court purports not merely to regulate the mode of its exercise of jurisdiction but to divest itself altogether of jurisdiction in all cases in which the applicant cannot, or will not, make a substantial deposit," and that the proviso so far as it imposed an onerous condition upon an applicant applying to set aside a sale appeared to go further than a mere matter of procedure. Here again, no doubt there is a reference to the onerous character of the condition precedent, but I do not think that it was meant to be an essential qualification. It appears to me that the fundamental and universal rule that no existing rights should be deemed to be impaired or affected unless the Legislature's intention so to do is clearly expressed or such a result is unavoidable by reason of the words used in the statute, is not subject to any real exception. Otherwise the result would be what the Legislature is presumed not to intend, and work an obvious injustice, which the Legislature must be deemed to be at least as anxious to avoid as anyone else. In my opinion, difficulties have arisen on this point only because the question has been complicated by the importation into the rule of elastic and general words of uncertain and indefinite import like "matter of procedure" or "processual law", words which are very good illustrations of the fallacies that lie hidden in words which of all the idols imposed by words on the understanding are, according to Bacon, the most troublesome of all, and make human thought the bond slave of words. As I have said already, there is no real exception to the general rule so far as so-called matters of procedure are concerned, and if, even otherwise, there is such an exception so far as procedural law is concerned, the term 'procedural law' must be very strictly construed, and the exception should not be allowed to be extended so widely as to eat up the rule. The exception, no less than the rule, is, in my opinion, subject to the fundamental principle that existing rights are not taken away except by express enactment or by necessary intendment.

Bearing this fundamental principle in mind in construing the saving clause in the Act, namely S. 74 (b), I find it is impossible to accept the contention that the Legislature intended that, in spite of S. 74 (b), the bar imposed by S. 69 (2) should prevail even in respect of rights of suit which were in existence when that section came into force. I am therefore of opinion that the present suit is maintainable and should not have been dismissed on the preliminary ground by the Subordinate Judge and that his decree should accordingly be set aside and the suit remanded for fresh disposal. As however my learned brother is of a different opinion, the question whether the suit is maintainable or not must be referred to a third Judge.

(Accordingly the case was placed before a third Judge who delivered the following judgment.)

Varadachariar J.—I agree with Pandrang Row J., that the present suit is maintainable and that the objection based on S. 69 (2), Partnership Act must be overruled. The arguments that can be urged in favour of one view or the other have been fully set out in the judgments delivered by my learned brothers; it is therefore not necessary for me to deal with every one of them in detail or with the several decisions referred to in their judgments. The relevant facts and dates are : The promissory note sued on was executed on 12th March 1931, the Partnership Act except S. 69 came into force on 1st October 1932, S. 69 came into force on 1st October 1933, and this suit was filed in August 1934. On these facts, the question arises, whether the plaintiffs who admittedly constitute a firm but had not got themselves registered before the date of the institution of the suit are entitled to maintain the suit. If the matter were wholly res integra, it may be open to argument whether the language of S. 69, Partnership Act, clearly and necessarily applies to contracts entered into before the date of the coming into force of the Act. In (1862) 1 B & S 758,[48] where the question arose with reference to S. 32, English Medical Act of 1858, Blackburn J. thought that it was clear from the language of that section that the prohibition referred to a charge incurred after 1st January 1859. The language of that section was that :

48. Wright v. Greenroyd, (1862) 1 B & S 758=31 L J Q B 4=8 Jur (N S) 98=5 L T 347.

After 1st January 1859 no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied. unless he shall prove upon the trial that he is registered under this Act.

As a matter of language, it is not easy to see any marked difference between the above words and the language of S. 69, Partnership Act. In view however of the way in which the general words of this section of the Partnership Act have been understood in many of the reported decisions, I prefer to deal with the case on the footing that, but for other considerations, the language employed is capable of being applied even to contracts entered into before the Act came into force and to causes of action that accrued before that date. On the above assumption two questions arise for decision : (1) Whether the saving words found in S. 74 have the effect of exempting a suit like the present from the operation of S. 69, and (2) if S. 74 has no such operation, whether on general principles the Court ought to hold that S. 69 does not apply to a suit to enforce a cause of action which had accrued prior to the date of the coming into force of the Act. In dealing with S. 74, I may note one ambiguity which however is not very material to this case. In Cls. (a), (b) and (c) reference may be made to "the commencement of this Act" and the learned counsel for the respondents rightly pointed out that it may not be easy to say when dealing with an objection under S. 69, whether the above words should be held to refer to 1st October 1932 when the Act except S. 69 came into force or to 1st October 1933 when that section came into force. I do not however express any opinion upon this question because the right of action in the present case accrued even before 1st October 1932 when the Act came into force.

The material clause of S. 74 is sub-cl. (b) which, omitting the unnecessary words and importing what is necessary from sub-cl. (a), will read as follows : "Nothing in this Act shall affect any remedy in respect of any right acquired or accrued before the commencement of this Act." In view of the words 'legal proceeding' found in sub-cl. (b), it has been held in some of the reported decisions that all that the exemption was intended to secure was the continuance of proceedings pending at the commencement of the Act. With great respect I am unable to hold that the language of the section is capable of being so read. The difficulty in the way of so reading it is adverted to by Sulaiman C. J. in 58 All 495[1] and by Stodart J. in 1937 M W N 654.[2] By way of contrast I may refer to the language employed by the Legislature in S. 63 of Act 20 of 1929 where the difference between the provision saving remedy in respect of a right already accrued and the special provision made in respect of proceedings pending on the date of the commencement of the Act is clearly brought out. Even if it is possible to read the expression 'legal proceeding' in sub-cl. (b) of S. 74 as in some way relating only to 'pending' proceedings, it is difficult to read the word 'remedy' with the same qualification because it is not appropriate to speak of a 'pending remedy'. If S. 74 (b) could be read and I am inclined so to read it as saving the 'remedy' in respect of any right acquired or accrued prior to 1st October 1932 the preliminary objection raised in the present suit must be overruled.

Learned counsel for the respondents however adopted another line of argument in dealing with sub-cl. (b) of S. 74. He emphasized the distinction between remedy in the sense of action or right of action and rules of procedure incidental to the working out of that remedy. I agree with him that this distinction is recognized in some of the cases referred to by him. The question still remains under which of these categories will the provision in S. 69 fall. He asks me to hold that it is a mere rule of procedure and does not affect any remedy that the plaintiffs were entitled to before the commencement of the Act. At one stage, he went to the length of contending that the remedy can be said to be "affected" only if it is "extinguished;" but he did not persist in that contention in view of decisions like (1905) A C 369,[18] 56 Cal 512[20] and 52 Mad 361.[19] These cases show that an alteration or restriction or even the imposition of a condition preliminary to the enforcement of the remedy must be held to affect the remedy within the meaning of the rule presuming against the retrospective operation of statutes. He argued that it is not the imposition of every condition that can be said to affect the remedy even in this sense. He strongly relied upon two English decisions relating to the condition that a solicitor should deliver a bill of costs before he could sue for the recovery of the amount thereof. The judgments in (1897) 1 Q B 702[24] do

not throw much light upon the question in the form in which it now arises for decision ; but the earlier decision in (1846) 9 Q B 847[23] does suggest that the Court regarded a condition of the above kind as a matter of procedure. The discussion in the case turned so much on the form of the pleading that there is hardly much light derivable from the judgment as to the reasons why this view was taken. Learned counsel also relied upon the cases which have held that requirements like those relating to the delivery of a patta before a landlord could sue for rent or the delivery of a notice under S. 80, Civil P. C., are in the nature of a provision of processual law. These decisions undoubtedly support his contention that "processual provisions" are not for the purposes of the present discussion necessarily limited to steps to be taken after the institution of a suit or in the Court itself. While I agree with that contention, I must point out that it is not every condition that may be imposed upon a plaintiff in respect of his right of suit that can be regarded as a mere provision of processual law. In the English Medical Act case that I already referred to, it was certainly not regarded as a mere matter of procedure though the restriction was framed in very similar language : *see also* (1862) 31 L J Ex 230.[49]

In this connexion it is necessary to consider the purpose and effect of the provision in S. 69. If it had such unintegral connexion with the subject-matter of the proposed suit as in some way to make the step required by it a step in the litigation, I should have been inclined to accept the argument that it related to a matter of procedure. But it is obvious that that was not its purpose. In the case for instance of a patta being delivered or a notice being given or a bill being tendered by a solicitor, it is clear that the condition intimately bears upon the subject-matter of the suit to follow. The object however of S. 69 was to make sure that the general policy of the Legislature that all partnerships should be registered will be carried out. It is true that occasionally questions may arise in a suit as to who are the partners of a particular firm ; but that cannot justify my ignoring the real purpose of the provision in S. 69. As pointed out by Sir Dinshaw Mulla, the object of this provision was to bring pressure to bear on partners to have the firm and themselves registered. This policy has been attempted to be enforced in various ways in different systems. In the English Legislation, S. 7 of Registration of Business Names Act of 1916 imposes a penalty upon partners making default in the matter of registration. Such a provision certainly cannot be described as a processual provision.

The Indian Legislature did not wish to go so far and for the present thought that it would be sufficient pressure to deprive unregistered partners of the right of suit. Though I do not wish to base any conclusion upon the language of a marginal note, it is noteworthy that in S. 8 of the English Act corresponding to S. 69 of the Indian Partnership Act, the marginal note is "Disability of persons in default." In the Indian Companies Act, the Legislature has provided that unregistered associations of the kind contemplated by the Act will be illegal on default of registration. These are, in my opinion, different ways adopted by the Legislature to enforce this policy of compelling registration, and I do not think it right to hold that the provision contained in S. 69 is really in the nature of "processual" law in the sense in which that term is used in the cases discussing principle of retrospective operation of Statutes. In an early case, e. g., 6 M H C R 122,[26] Holloway J. drew attention to the danger of confounding what are merely processual provisions with those which under that fictitious appearance are really provisions of material or substantive law. The particular application which the learned Judge made of that distinction in the case before him has no doubt been dissented from in later cases : *see* 25 M L J 205[25] at p. 213. But the distinction is undoubtedly true.

In the above view, it does not seem to me to be necessary to deal with the second question stated at the outset, viz. whether even independently of S. 74, S. 69 can be given retrospective operation. Nor is it necessary to consider the argument based on the fact that the Legislature gave an interval of one year before S. 69 was brought into operation. It cannot be said that that interval can be explained only on the ground that the provision must have been intended to be retrospective. There are other considerations which required such an interval, particularly the necessity for bringing into existence the necessary machinery and for the framing of rules

49. Thishleton v. Frewer, (1862) 31 L J Ex 230.

contemplated by S. 71. The result is that the decree of the lower Court will be set aside and the case remanded for disposal on the merits. The appellants will be entitled to a refund of the court-fee paid on the memorandum of appeal and they will also be entitled to the costs of this appeal.

C.R.K./B.D. *Case remanded.*

A. I. R. 1938 Madras 705

HORWILL J.

In re K. M. T. T. Kulandaivelu Chettiar and others — Petitioners.

Criminal Revn. No. 636 and Petn. No. 599 of 1937, Decided on 10th February 1938, from judgment of Sub-Divisional Magistrate, Devakottai, in Criminal Appeal No. 36 of 1937.

(a) Madras Gaming Act (3 of 1930), S. 3—Accepting rent for building used for gaming.

Accepting rent for the use of a building, which the rentor knows is being used for gambling, is making a profit from gaming within the meaning of Section 3. [P 706 C 1]

(b) Madras Gaming Act (3 of 1930), S. 6—Mere finding of instrument of gaming in house searched on warrant under S. 5 is evidence that building is used for gambling—That evidence alone is sufficient for conviction.

The mere finding of cards and instruments of gambling in a house searched on a warrant issued under S. 5 is evidence that the room was used for gambling and that some person was deriving a profit from it, although there may not be any independent proof that any person makes a profit from this gambling or from the use of the room for gambling. Further even though there is no presumption of guilt, there is nothing in the Act which prevents a Magistrate convicting upon that evidence alone. [P 706 C 1]

(c) Madras Gaming Act (3 of 1930), Ss. 5, 6—Presumption under S. 6—No need of evidence for prosecution that warrant under S. 5 was issued on proper information — Presumption may be raised under S. 114 (e), Evidence Act.

It would be against public policy in most cases if the prosecution were compelled to let in evidence in regard to the material on which a Magistrate acted. If the nature and the source of such information were not concealed, the police might be unable in future to obtain information at all. Before the presumption under S. 6 can be availed of, there need not be some evidence for the prosecution that the warrant was issued under S. 5 upon proper information, sufficient to lead a Magistrate to believe that the room in question was used as a common gaming house. Such a presumption can be raised under S. 114 (e), Evidence Act : *A I R 1926 Cal 966; A I R 1924 Bom 184 and A I R 1938 Mad 29, Dissent.* [P 706 C 2]

(d) Madras Gaming Act (3 of 1930), S. 3—Gaming house restricted to particular section of public is still common gaming house.

The definition of a common gaming house in S. 3 warrants no limitation as for example excluding those which have restriction on their use by any section of the public. [P 706 C 2]

V. T. Rangaswami Ayyangar and G. N. Chari — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—The petitioners were found in a small room of a building in Devakottai described as the 'Jubilee Club' with all the paraphernalia of gambling such as cards, coloured chips, beans and cash and it has been found by both the Courts below that these persons were engaged in gaming in a 'common gaming house' within the meaning of Sec. 3, Madras Gaming Act, 1930. Accused 1 to 12 were convicted under S. 9 of the Act of gaming in a 'common gaming house' and accused 13 was convicted under S. 8, which punishes the opening, keeping, using, or permitting to be used, any common gaming house or conducting or assisting in conducting such, etc. Accused 13 contends that the building in which the gaming took place was not a common gaming house and that in any event accused 13 was not the keeper of that gaming house. Most of the arguments have turned on the legal effect of S. 6, Gaming Act, which is that :

> Any cards, dice, gaming table or cloth, board or other instruments of gaming found in any place entered or searched under the provisions of the last preceding section, or on any person found therein shall be evidence that such place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming.

Section 5 empowers a salaried Magistrate, not below the rank of a Second Class Magistrate, and certain police officers to issue a warrant to a police officer upon the belief that a certain place was used as a common gaming house, to search such a place and seize any property therein which are instruments of gaming, moneys, securities connected therewith and to arrest all persons found there. The expression "common gaming house" is defined in S. 3 as any room etc. in which cards, dice, tables, or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using etc. that room. It is said that the prosecution have not been able to prove that any person has received any money or profit for the keeping of this room for the purpose of gaming ; but I cannot altogether agree that this is so. The club appears to have been a bogus one; accused 13's partici-

pation in the gaming is proof that he knew the purpose for which he was letting the building. In accepting rent for the use of a building for gambling, he was making a profit from the gaming. Apart from this common sense deduction from the facts, I should still be of opinion that the room in which the gambling took place was a "common gaming house." Sec. 6 clearly makes the finding of cards or instruments of gaming not merely evidence that cards or instruments of gaming were found; but that the building in which they were found was a "common gaming house," provided that these articles were found there in a search conducted upon a warrant issued under Sec. 5. That means that although there may not be any independent proof that any person makes a profit from this gambling or from the use of the room for gambling, yet the mere finding of cards and instruments of gambling in a house searched on such a warrant, is evidence that the room was used for gambling and that some person was deriving a profit from it.

It is however contended that the section does not raise a presumption that a room in which these articles were found was a common gaming house. That contention may be right, although in the majority of cases quoted before me by the learned advocates for the petitioner as well as from the Crown, the effect of finding the articles mentioned in S. 6 is referred to as raising a presumption. Even though there is no such presumption of guilt, there is nothing in the Act which prevents a Magistrate convicting upon that evidence alone. I do not propose to decide the abstract question whether such evidence alone would be sufficient or not to sustain a conviction; for, in almost every case, there must be some other evidence lessening the effect of the evidence operated on by S. 6 or increasing it. In the present case, there is evidence to this effect that this room in which the gambling took place was not part of a club at all; and it would appear that the name "Jubilee Club" was intended merely to screen from the public the nature of the building and the purpose for which the building was used. The Circle Inspector deposes that when the police party entered, the petitioner signalled to the other accused and they tried to extinguish the petromax light which was burning and to conceal the articles of gambling by standing round them. This is further evidence upon which the Magistrate was entitled to act; and I cannot say that on the evidence before the Magistrate he was not justified in convicting the accused of gambling in a common gaming house.

It is further argued that before the presumption under S. 6 can be availed of, there must be some evidence for the prosecution that the warrant was issued under S. 5 upon proper information, sufficient to lead a Magistrate to believe that the room in question was used as a common gaming house. This contention has some support from some observations found in 53 Cal 718,[1] 25 Cr L J 531[2] and 1937 M W N Cr 220,[3] but I see no reason why the presumption raised under S. 114, Illus. (e), Evidence Act that judicial and official acts have been regularly performed should not be here applied. It would be against public policy in most cases if the prosecution were compelled to let in evidence in regard to the material on which a Magistrate acted. If the nature and the source of such information were not concealed, the police might be unable in future to obtain information at all. Another contention is that a common gaming house cannot include any gaming house in which there was any restriction on its use by any section of the public. The definition of a common gaming house in S. 3 warrants no such limitations. Any room is a common gaming house if instruments of gaming are kept or used there for the profit of a person owning, occuping etc. that house. If a common gaming house had the limited meaning ascribed to it, it would be possible for any person to avoid the application of the Gaming Act by introducing some petty restrictions on certain classes of persons. Members of a particular caste might be excluded or even more fanciful restrictions might be applied, such as by excluding persons above or below a certain height or weight. I cannot accept this contention.

Clearly, accused 13, who was gambling in that house, could have been convicted under Section 9, Gaming Act as the other accused were. He has however been

1. Walvekar v. Emperor, (1926) 13 A I R Cal 966 =96 I C 264=27 Cr L J 920=53 Cal 718=30 C W N 713.
2. Emperor v. Dattatraya Shankar, (1924) 11 A I R Bom 184=77 I C 995=25 Cr L J 531= 47 Bom 960=25 Bom L R 1089.
3. Kesanna Chetty v. Emperor, (1938) 25 A I R Mad 29=172 I C 909=39 Cr L J 236=1937 M W N Cr 220.

convicted under S. 8 simply because the Magistrate thought that S. 8 was a more serious offence and that the greater offence included the lesser. It has been argued that it has not been satisfactorily proved that he derived any benefit from this gaming house. If, by the application of S. 6, the Court is satisfied that the room in question was a common gaming house, then it would follow that gaming was conducted there for some person's profit. The person mentioned in the warrant as using the gaming house is the Secretary of the Club; but as the police were given to understand that he had not been present in the room for 10 or 15 days, he was not charged. The petitioner, who was found participating in the gaming, was charged as the owner of the room and one who had derived a profit from the gaming that was going on there. The petitioner has produced a document under which the house in question purports to have been sold to his daughter; but whether the sale is a genuine one or not matters little; for it is clear that it was the petitioner who was acting as the owner of the place—whether on behalf of himself or his daughter—and as presumably rent was being paid for that building, the owner of the house was receiving profit from it. Even otherwise, the petitioner had the control of the house and knew that gaming was going on there. He would therefore be guilty under S. 8 because he was permitting his property to be used as a common gaming house. He was therefore rightly convicted under S. 8.

The punishments awarded are not excessive. S. 8 prescribes a maximum fine not exceeding Rs. 500 or imprisonment not exceeding three months; and accused 13 has been sentenced only to a fine of Rupees 75. This cannot be said to be heavy. The other petitioners were sentenced only to a fine of Rs. 50. The petition is therefore dismissed.

C.R.K./V.B.B. *Petition dismissed.*

A. I. R. 1938 Madras 707

ABDUR RAHMAN J.

Ramachandra Madhavadoss Co. by partner K. Raghunatha Mallaya — Petitioners.

v.

Moovakat Moidunkutti Birankutti and Brothers, Firm, Cannanore — Respondents.

Civil Revision Petn. No. 1127 of 1937, Decided on 11th March 1938.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 31—Suit by agent against principal for specific sum alleged to be due from principal is not suit for accounts.

A suit for accounts is a special form of suit. It does not mean that whenever accounts have to be looked into in order to ascertain the amount due by one party to the other that the suit should be technically called a suit for accounts. A suit by agent against a principal for a specific sum of money alleged to be due to the plaintiff by the defendant in regard to certain dealings is not a suit for accounts within the meaning of Art. 31 of Sch. 2. It is only in exceptional cases where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into that a suit by an agent for accounts against his principal might be competent. But where the exact sum of money which the agent claims from his principal is known to him, the due form in which a suit can be filed is the one for specific amount. [P 707 C 2; P 708 C 1]

K. P. Sarvothama Rao — *for Petitioners.*

O. T. G. Nambiar — *for Respondents.*

Order.—The only question which I have been called upon to decide in this revision relates to the correctness of the order passed by the District Munsif of Mangalore who, in view of an objection raised on behalf of the defendant, refused to entertain the suit on the ground that being one for accounts it was barred under Art. 31, Sch. 2, Provincial Small Cause Courts Act. The suit was, as the plaint would show, for a specific sum of money which was alleged to be due to the plaintiff by the defendant in regard to certain dealings mentioned in para. 3 of the plaint. The District Munsif examined the plaintiff and finding that four heads of accounts were clubbed together in a single katha, maintained by the plaintiff firm in its books, out of which two only could be properly recovered on the Small Cause Side, returned the whole plaint for presentation to the proper Court. Having heard the counsel for the parties at some length, I am clearly of the opinion that this is not a suit for accounts within the meaning of Art. 31 of Sch. 2, Provincial Small Cause Courts Act, and is, as framed, maintainable by the Court of Small Causes. 'A suit for accounts', as observed by Sankaran Nair J. in 28 Mad 394,[1]

is a special form of suit. It does not mean that whenever accounts have to be looked into in order to ascertain the amount due by one party to the other that the suit should be technically called a suit for accounts.

---

1. Ranga Reddi v. Subbiah Setty, (1905) 28 Mad 394.

The plaintiff has nowhere in his plaint asked for any accounts to be rendered to him and the allegations in the plaint would ordinarily determine the nature of the suit. If the plaintiff fails to substantiate his allegations, his suit will have to be dismissed and not returned for presentation to the proper Court, as ordered by the District Munsif. Had the District Munsif, bestowed any attention to the relationship of the parties, he could not have possibly arrived at the conclusion to which he did. Even according to the allegations of the defendant, he was the principal and the plaintiff a mere agent. How could the agent sue his principal for accounts? It is only in exceptional cases where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into that a suit by an agent for accounts against his principal might be competent. But where the exact sum of money which the agent claims from his principal is known to him, the only form in which a suit can be filed is the one adopted by the plaintiff here.

It is rather surprising that although the District Munsif was of the opinion that a suit in regard to two of the items was entertainable by the Court of Small Causes, he returned the whole of the suit for reasons which have neither logic nor good sense behind them. If he were of the opinion, the two out of the four items could not be heard by him as a Judge of the Court of Small Causes; he should have simply refused to go into them but should have proceeded to decide the remaining items which could otherwise be determined. In view of my finding, however, that the entire suit is cognizable by the Court of Small Causes, this contingency does not arise. I must therefore reverse the order of the District Munsif and remand the suit for disposal on the merits. The respondent will pay the costs of the petitioner in this Court. The costs in the lower Court will abide the result. I understand that the plaint was returned to the petitioner. He may file it in this Court now and it will be sent to the District Munsif for disposal as ordered.

C.R.K./D.S. *Suit remanded.*

A. I. R. 1938 Madras 708

LEACH C. J. AND MADHAVAN NAIR J.

Jureddy Kannayya and others — Petitioners.

v.

Yandamuri Lakshmidevi and another —Respondents.

Civil Misc. Petition No. 4057 of 1937, Decided on 15th March 1938, to revise order of the Government Agent of East Godawari, D/. 13th April 1937.

(a) Agency Rules, R. 55 — Order refusing amendment of plaint can be revised.

Under R. 55 of the Agency Rules, the Agent has power to revise interlocutory orders and hence an order of the Assistant Agent refusing to allow amendment of plaint is revisable. [P 709 C 1]

(b) Practice — Amendment — Suit by mortgagee to enforce his half share in mortgage— Sub-mortgagees made defendants but subsequently transposed as co-plaintiffs — Application by them for amendment of plaint by including other half share held should be allowed.

A mortgagee sued to enforce his share in a mortgage, the share being a moiety. In addition to the mortgagors he made his co-mortgagees as defendants. The co-mortgagees applied to the Court for an order transposing them as co-plaintiffs and this application was granted. The order was followed by an application by them, in which they asked to be allowed to amend the plaint by including in it a prayer for their half share of the mortgage. The original plaintiff had paid the court-fee on the full amount due by the mortgagor :

Held that the amendment should be allowed. [P 709 C 1]

M. S. Ramachandra Rao—*for Petitioners.*

V. Govindarajachari—*for Respondents.*

Leach C. J. — In O. S. No. 12 of 1934 of the Court of the Assistant Agent, Bhadhrachalam Division, an Agency tract, one Bhimavarapu Ramaswamy sued to enforce his share in a mortgage, the share being a moiety. In addition to the mortgagors he made as defendants the present petitioners who are his co-mortgagees. Some time prior to 7th October 1936 the petitioners applied to the Court for an order transposing them as co-plaintiffs and this application was granted. The order was followed by an application by them, in which they asked to be allowed to amend the plaint by including in it a prayer for their half share of the mortgage. The original plaintiff had paid the court-fee on the full amount due by the mortgagors. This application came before the Assistant Agent on 4th November 1936. He refused to allow the amendment on the remarkable ground that if it was allowed it would change the entire nature of the suit, his view being that

"only clerical mistakes, etc.," are usually allowed to be amended. It is not surprising that the petitioners applied for revision of this order to the Agent. Rule 55 of the Agency Rules states that the Agent to the Governor or the Government Agent, as the case may be, for the purpose of satisfying himself that a decree or order made in any case decided by a Court subordinate to him was according to law, may call for the case and pass such order with respect thereto as he thinks fit. The Government Agent dealt with this application on 13th April 1937 and rejected it on the ground that R. 55 provides only for the revision of orders passed in cases finally decided by the subordinate Courts. R. 59 states that all petitions against the proceedings of the Agent to the Governor or the Government Agent in respect of matters, not otherwise provided for in the rules must in the first instance be submitted to the Government who may, if necessary, refer them to the High Court. An application was made to the Government for revision of the Agent's order and the Government has referred the matter to this Court.

This Court has always held that it has powers under the Code of Civil Procedure to revise even interlocutory orders. The Agency Rules do not incorporate the provisions of S. 115 of the Code and R. 55 is widely drawn. In view of the decisions of this Court, the Agent should have held that he had the power to revise the Assistant Agent's order and in passing the order which he did he wrongly refused to exercise a jurisdiction which he possessed. In these circumstances, we consider that the orders of the Agent and the Assistant Agent should be set aside. The application for leave to amend the plaint will be granted but in directing the Court of the Assistant Agent to accept the amendment proposed we are not expressing any opinion on the merits of the case. The petitioners are entitled to their costs throughout.

C.R.K./D.S. *Orders set aside.*

A. I. R. 1938 Madras 709

LAKSHMANA RAO J.

M. C. Krishnan Nambiar — Petitioner.

v.

Municipal Prosecutor, Calicut Municipality — Respondent.

Criminal Revn. No. 565 and Petition No. 533 of 1937, Decided on 14th December 1937, from order of First Class Bench Magistrate, Calicut, D/- 26th April 1937.

(a) Madras District Municipalities Act (5 of 1920), S. 93—Profession tax — Test for liability of person holding appointment is not personal presence within Municipality.

The test for liability in the case of a person holding an appointment is not personal presence within the Municipality. Hence where a person was the Subordinate Judge of Calicut from 1st April 1934 to 18th June 1934, his absence from Calicut during the summer recess from 29th March 1934 to 4th June 1934 cannot make any difference : *A I R 1925 Mad 607, Rel. on; A I R 1937 Mad 894, Disting.* [P 709 C 2]

(b) Madras Elementary Education Act (8 of 1920), Ss. 34 and 36 — Education tax levied under head of profession tax — Assessee is liable to pay education tax even if he has paid profession tax to another Municipality not levying education tax.

When the education tax has been levied under the head of profession tax, after assessment by the Municipal Council, the assessee cannot escape liability by paying the profession tax to another Municipality in which education tax is not levied. He is entitled only to credit for the amount paid to the other Municipal Council. [P 709 C 2; P 710 C 1]

P. Govinda Menon — *for Petitioner.*

K. Kuttikrishna Menon—*for Municipal Prosecutor.*

Public Prosecutor — *for the Crown.*

Order. — The petitioner was the Subordinate Judge of Calicut from 1st April 1934 to 18th June 1934 and his absence from Calicut during the summer recess from 29th March 1934 to 4th June 1934 cannot make any difference. He was holding that appointment till 18th June 1934 and as pointed out in 48 Mad 476[1] the test for liability in the case of a person holding an appointment is not personal presence within the Municipality. There is therefore no force in the contention that the petitioner was not holding that appointment within the Municipality of Calicut for 60 days, and the decision in (1937) 2 M L J 569[2] is clearly distinguishable. The levy of profession tax was therefore legal and S. 34, Elementary Education Act, empowers Municipal Councils to levy an education tax under the head of profession tax. S. 36 enacts that the education tax shall be deemed to be an addition to the profession tax, when it is levied under that head, and it further provides that all the provisions of the Municipalities Act relating to the realization of such tax shall be applicable. In this case the education tax was levied under the head of profession

1. Veerappa Chettiar v. Municipal Council, Palni, (1925) 12 A I R Mad 607=88 I C 662=48 Mad 476=48 M L J 428.
2. Mahadeva Aiyar v. Municipal Council, Masulipatam, (1937) 24 A I R Mad 894=I L R 1938 Mad 203=(1937) 2 M L J 569.

tax, and after assessment by one Municipal Council the assessee cannot escape liability by paying the profession tax to another Municipality in which education tax is not levied. He is entitled only to credit for the amount paid to the other Municipal Council and in spite of several reminders the petitioner declined to pay the difference. The default to pay the amount due was thus wilful, and prosecutions in respect of sums due to Municipal Councils under the District Municipalities Act are governed by S. 345 and not S. 347 of the Act. The prosecution was commenced within three years and there is no ground for interference. The petition is therefore dismissed.

C.R.K./D.S. *Petition dismissed.*

---

* A. I. R. 1938 Madras 710

HORWILL J.

Nedungadi Bank Ltd., Ottapalam — Petitioner.

v.

Collector of Malabar — Respondent.

Criminal Revn. Nos. 932 and 1010 and Revn. Petns. Nos. 874 and 945 of 1937, Decided on 25th March 1938, from order of Sess. Judge, South Malabar Division, in Cri. Misc. Petn. No. 6 of 1937.

*** Treasure Trove Act (1878), S. 20—Finding of bangle—Finder selling it and depositing money so obtained in bank — Crown cannot claim refund.**

Where a finder of a bangle sells it, the produce of the sale of the bangle is Government money; but if he deposits the money in a bank or even if he uses that money for purchasing articles, the money ceases to be Government money when it changes hands, for, not only is the money into which the bangle was converted not capable of being traced; but when it is deposited in the bank it becomes a part of the assets of the bank, the banker becoming a debtor for that amount to the accused. The Crown cannot therefore claim in criminal proceedings the refund of the money deposited in the bank out of the proceeds of the sale of the bangle : *7 M H C R 233, A I R 1915 Bom 265 and A I R 1927 Mad 797, Rel. on.* [P 710 C 2]

S. Venkatachala Sastri for P. S. Ramaswamy Iyer and K. Kuttikrishna Menon — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Order.—Kunnath Sankaran Ezhuthassam found a bangle, sold it for Rs. 1000 and deposited portions of that sum in three banks. The Courts below have held that the Crown is entitled to recover the sums of money deposited in the banks; and the question raised in these petitions is whether those findings are correct. The argument of the learned Sessions Judge is that under S. 4, Treasure Trove Act, a person who finds property valued at more than ten rupees is bound to give notice to the Collector, that under S. 20 of the Act such property vests in the Government, that as the same rule would apply to any property into which the treasure trove had been converted, it would follow that the money realized by the sale of the bangle also belonged to the Government, and that therefore the money that was deposited with the three banks is Government money which the Government is entitled to recover.

I think the learned Sessions Judge was right in saying that the produce of the sale of the bangle was Government money; but if any person takes Government money and deposits it in a bank or even if he uses that money for purchasing articles, the money ceases to be Government money when it changes hands. For example if a person steals a note from a Government treasury and purchases articles in the bazar with it, then even though the note can be traced and is recovered from the person who sold goods to the accused, the Government would not be entitled to recover that note; for title in currency notes passes as it changes hands. The moment the stolen currency note comes into the hands of any person who takes it without knowledge of the theft, the holder becomes the owner of that note. The claim of the Government to the value of the note is naturally weaker still if the actual note cannot be identified. The Government's case with regard to a deposit in the bank is even worse; for not only is the money into which the bangle was converted not capable of being traced, but when it is deposited in the bank it becomes a part of the assets of the bank, the banker becoming a debtor for that amount to the accused.

The Crown cannot therefore claim in criminal proceedings the refund of the money deposited in the banks out of the proceeds of the sale of the bangle. 7 M H C R 233[1] is a very old case which deals with the claim of the original owner to a stolen currency note which was traced to a person into whose hands it came without notice that it was stolen; and it was held that the property in the note passed by mere

1. In re Collector of Salem, (1874) 7 M H C R 233=2 Weir 664.

delivery. This case was followed in 50 Mad 916[2] in which Curgenven J. says :

> The petitioner received the note in all good faith and the title is not so much doubtful as pretty evidently with him, as property to a currency note passes by mere delivery.

He refers to 7 M H C R 233[1] and 40 Bom 186.[3] The petitions are therefore allowed and the moneys taken from the banks will be returned.

C.R.K./D.S. *Petitions allowed.*

2. Srinivasmurti v. Narasimhalu Naidu, (1927) 14 A I R Mad 797=104 I C 719=28 Cr L J 879=50 Mad 916=53 M L J 309.
3. In re Pandharinath Pundlik, (1915) 2 A I R Bom 265=31 I C 383=16 Cr L J 783=40 Bom 186=17 Bom L R 922.

A. I. R. 1938 Madras 711

PANDRANG ROW J.

S. A. Ramanathan Chettiar — Petitioner.

v.

S. N. Alagappa Chettiar — Respondent.

Civil Revn. Petn. No. 686 of 1937, Decided on 3rd February 1938, from order of Sub-Judge, Devakottah, D/. 29th March 1937.

Civil P. C. (1908), O. 17, R. 1 —Costs occasioned by adjournment should be ordered to be paid and not costs of suit generally.

Rule 1 of O. 17 does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for, because the power given to the Court to make such order as it thinks fit is only with respect to the costs occasioned by the adjournment and not the costs of the suit generally : *36 Cal 566, Expl.; A I R 1930 Oudh 171, Ref.* [P 711 C 1, 2]

A. Swaminatha Iyer — *for Petitioner.*

E. Vinayaka Rao — *for Respondent.*

Order. —This is a petition to revise the order of the Principal Subordinate Judge of Devakottai dated 29th March 1937 directing that the adjournment prayed for by the plaintiff in O. S. No. 183 of 1928 before him should be granted only on condition of the plaintiff paying as costs the sum of Rs. 8979.5.4 to defendant 1. The claim in the suit was no doubt valued at about Rs. 6 lakhs but it is argued on behalf of the plaintiff-petitioner that even in spite of the fact that the plaintiff valued the claim at Rs. 6 lakhs, the amount of costs ordered to be paid as a condition of the adjournment is excessive if not illegal. He relies on the words of O. 17, R. 1, Civil P. C., which give the Court power to make such order as it thinks fit with respect to the costs occasioned by the adjournment. According to him this Rule does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for as was done in the present case. His contention appears to be right because the power given to the Court to make such order as it thinks fit is only with respect to the costs occasioned by the adjournment and not the costs of the suit generally. He relies also on R. 27 of the Rules of Practice made under the Civil Procedure Code where it is stated that the party desiring an adjournment shall in certain cases be ordered to pay the costs thereof including the expenses of resummoning the witnesses if any and the fee of the pleader of the other party. There is another rule in the Rules of Practice, viz. R. 49, framed under the Legal Practitioners Act which provides that except in certain cases adjournment should not be granted save on the condition that the party applying pays all the costs of the day including a reasonable fee to the legal practitioner engaged by his adversary. The rule goes on to say that a sum not exceeding Rs. 20 in a Subordinate Judge's Court shall be deemed to be a reasonable fee within the meaning of the rule. It therefore appears as if according to the rules only the costs occasioned by the adjournment should have been ordered to be paid, the pleader's fee not ordinarily exceeding Rs. 20.

Mr. Swaminatha Aiyar brings to my notice the decision in 4 Luck 529[1] and in particular the observation at page 533 to the effect that the sum to be awarded as costs as a condition of the grant of an adjournment should not be one of the nature of penalty or of punishment. It cannot, in my opinion, be seriously argued that anything like Rs. 8000 or Rs. 9000 was properly ordered to be paid as a condition of granting the adjournment in a case of this kind in the mofussal. The case reported in 36 Cal 566[2] which was relied upon by the respondent's advocate does not really support his contention. In that case it was only the costs of the day that were ordered to be paid as a condition and not

1. Gajendra Shah v. Ram Charan, (1930) 17 A I R Oudh 171=121 I C 894=4 Luck 529=7 O W N 197.
2. Dhani Ram Mahto v. Murli Mahto, (1909) 36 Cal 566=1 I C 366=13 C W N 525=11 C L J 150.

the costs incurred up to date, as in the present case including the full vakil's fee on the claim in the plaint. The order sought to be revised is in my opinion indefensible in law in the sense that it goes beyond the power of the Court which made it. Even otherwise I am of opinion that even if the Court had power to require the payment of full costs up to date as a condition it was neither reasonable nor just to require such payment in the circumstances of this case, having regard to the very large amount involved.

The order of the Subordinate Judge will therefore be modified as follows : Instead of the words "that the plaintiff should pay the defendants the costs incurred by him till now in this Court", the words "that the plaintiff should pay the defendants the costs of the day, viz. of 29th March 1937, including vakil's fee Rs. 20", be substituted. The petitioner is entitled to get his costs of this petition from the respondent. 15 days time will be given to pay the costs after the same are taxed by the Court below. In view of the fact that the amount of costs now ordered to be paid is comparatively small, there is no need to retain the condition that if the amount of costs are not paid by the due date the plaintiff will be nonsuited. That condition is set aside. The defendant will be at liberty to execute the order relating to the costs of the adjournment if the amount is not deposited within the time allowed.

C.R.K./D.S. *Order modified.*

A. I. R. 1938 Madras 712

BURN J.

Public Prosecutor — Appellant.

v.

M. S. Krishnamurthi Ayyar and another — Respondents.

Criminal Appeal No. 377 of 1937, Decided on 4th March 1938, against acquittal of accused by First Class Sub-Divisional Magistrate, Mayavaram, in Criminal Appeal No. 17 of 1937.

Land Customs Act (1924), S. 7 (2) — Sub-Inspector of Customs is competent to file complaint.

A Sub-Inspector of Customs is a Land Customs Officer and under S. 7 (2) is competent to make a complaint to a Magistrate. [P 712 C 2; P 713 C 1]

V. G. Row — *for Appellant.*

K. S. Jayarama Ayyar for G. Jagadesa Ayyar — *for Respondents.*

A. S. Sivakaminathan — *for Respondent 2.*

Judgment.—The respondents were tried in C. C. No. 823 of 1936 on the file of the Stationary Sub-Magistrate, Mayavaram, for offences under S. 7 (1) (a) and (c), Land Customs Act. The facts found against them by the learned Sub-Magistrate were that on 16th November 1936 they were caught at Mayavaram Railway Station. They were both travelling in the train which arrived at Mayavaram at 11.5 P.M. from Tiruvalur. Respondent 1 alighted from a carriage which runs through from Karaikal to Pondicherry carrying what is described as a "rattan box." Respondent 2 alighted from the next carriage. They met upon the platform and respondent 1 handed the rattan box to the second and both were going together along the platform when they were detained by a Land Customs Sub-Inspector (P. W. 1). On examination the box was found to contain 25 yards of silk shirting and 96 watches of Swiss manufacture. These had been smuggled in from Karaikal by respondent 1. On these facts the learned Sub-Magistrate found respondent 1 guilty of an offence under S. 7 (1) (a) and respondent 2 guilty under S. 7 (1) (c), Land Customs Act. On appeal to the Sub-Divisional Magistrate of Mayavaram, the learned Sub-Divisional Magistrate confirmed the findings of fact recorded by the learned Sub-Magistrate, but held that the complaint was invalid and therefore reversed the convictions and the sentences, observing that the authorities might, if they thought fit, file a fresh complaint satisfying the requirements. The learned Sub-Divisional Magistrate thought that the Sub-Inspector of Land Customs was not competent to prefer a complaint under S. 7 (2) because the Sub-Inspector was not competent to adjudicate upon the value of goods exceeding Rs. 50. For this purpose, he referred to certain sections of the Sea Customs Act. This appeal has been preferred by the Local Government from the acquittal by the learned Sub-Divisional Magistrate.

The learned Public Prosecutor points out that the Governor-General in Council in exercise of the powers conferred by S. 3 (1), Land Customs Act, has appointed "all .... Sub-Inspectors of Customs .... to be land customs officers ....." (*vide* Notification of the Government of India, No. 5942 dated 13th December 1924). The Sub-Inspector of Customs (P. W. 1) was therefore a Land Customs Officer and under Section 7 (2), Land Customs Act, a Land

Customs Officer is competent to make a complaint to a Magistrate. Learned counsel appearing for the respondents agrees that the learned Sub-Divisional Magistrate was wrong in holding that the Sub-Inspector was not competent to prefer a complaint. He has discussed only the question of punishment. The watches were confiscated and it is suggested that a penalty might be imposed instead of imprisonment. It is however to be observed that this is not a trivial case of smuggling but is apparently a case in which a deliberate attempt has been made to violate the tariff law for the purposes of business. That being so, I am not prepared to say that the sentences of three months' rigorous imprisonment passed upon respondent 1 by the Sub-Magistrate and of two months' rigorous imprisonment passed upon respondent 2 are excessive. Setting aside the order of acquittal passed by the learned Sub-Divisional Magistrate I restore the convictions passed by the learned Sub-Magistrate and the sentences imposed by him.

C.R.K./D.S. *Acquittal set aside.*

A. I. R. 1938 Madras 713

PANDRANG ROW AND KING JJ.

A. L. S. P. L. Subramaniam Chettiar — Appellant.

v.

S. Natesa Gurukkal and others — Respondents.

Appeal No. 195 of 1932, Decided on 3rd February 1938, against decree of Dist. Judge, West Tanjore, in O. S. No. 8 of 1929.

Religious Endowments—Transfer of office of trustee in return for present payment of certain amount and annual contribution of certain sum is opposed to public policy.

The transfer of office of trustee by the Board and Committee in return for a present payment of certain amount in cash and a promise to make an annual payment of certain sum amounts to a transfer of the office of trustee for a monetary consideration which is opposed to public policy and cannot be recognized as being in accordance with law. It is not as if appointments of this kind are permitted by custom ; and even if there is such a custom, such a custom could not be recognized by law : *1 Mad 285, Rel. on.* [P 714 C 1]

V. V. Srinivasa Ayyangar and P. S. Sarangapani Ayyangar — *for Appellant.*

K. Rajah Ayyar, V. Ramaswami Ayyar and P. V. Rajamannar — *for Respondents.*

Pandrang Row J. — This is an appeal from the decree of the District Judge of West Tanjore dated 11th February 1932 in O. S. No. 8 of 1929, in a suit under S. 57, Hindu Religious Endowments Act to cancel or modify a scheme framed by the Board for Sri Vridhapureswarar Temple at Thirupunavasal. The suit was decreed and the scheme framed by the Board was set aside. The main ground on which the scheme was cancelled was that the provision in the scheme for the appointment of defendant 3 as trustee contained in para. 3 of the scheme was illegal. That provision runs as follows :

> The said temple shall be under the control and management of a single trustee; and the present trustee Mr. L. S. P. P. L. Subramaniam Chettiar shall be first trustee under the scheme and the trusteeship shall continue in him and the other heirs of his father late Chidambaram Chettiar so long as they pay an annual contribution of Rs. 3000 which will be set apart for the thirupani work of the temple and for the upkeep and maintenance of the temple walls and its premises. When a vacancy in the trusteeship arises, the Committee, subject to the approval of the Board, shall appoint one from among the family of the said A. L. S. P. P. L. Chidambaram Chettiar, preference being given to the most senior in point of age if he is otherwise competent. If for any sufficient reason the Board or the Committee finds him incompetent, the claims of the heirs indicated shall be considered in the order of their seniority in age.

As a matter of fact it is found that apart from the appointment being made on condition of the payment of an annual contribution of Rs. 3000, defendant 3 had actually offered to endow a sum of Rs. 25,000 for establishing a thevaram pathasala as an adjunct to the temple and that this offer, which was accepted by the Committee and the Board, was also one of the reasons for the appointment of defendant 3 as trustee for life under certain conditions, and also for restricting the appointment of future trustees to the members of his family. It is not necessary in our opinion to decide whether the appointment foreshadowed by the scheme is the appointment of a hereditary trustee within the meaning of that expression as defined in the Hindu Religious Endowments Act and the further question which will then arise whether the Board has the power to make an appointment of a hereditary trustee in a non-excepted temple. Assuming that the appointment is not objectionable on the ground of want of authority in the Board, the question still remains, whether the appointment of the kind set forth in the scheme was proper and justifiable in the circumstances. There can

be no doubt that the office of trustee was really transferred by the Board and the Committee to defendant 3 in return for a present payment of Rs. 25,000 in cash and a promise to make an annual payment of Rs. 3000. Para. 3 of the scheme in terms makes the appointment of defendant 3 conditional on his paying an annual contribution of Rs. 3000 for the benefit of the temple. In our opinion, this amounts to a transfer of the office of trustee for a monetary consideration which is opposed to public policy and cannot be recognized as being in accordance with law. It is enough in this connexion to refer to the observations of their Lordships of the Judicial Committee in 1 Mad 235.[1] It is not as if appointments of this kind are permitted by custom; and even if there is such a custom, such a custom could not be recognized by law. It may be that in one sense the temple benefited by the appointment but the benefit comes in such a "questionable shape" that the consideration of benefit cannot prevail. It is not as if the temple was so badly off that in the interests of the temple it was necessary to resort to this method of getting money, that is to say, by selling the office of trustee of the temple. It may be that there were other considerations also which led the Committee and the Board to decide upon the appointment of defendant 3 as trustee, but it is fairly clear that the governing consideration was the payment of Rs. 25,000 in cash for the pathasala and a promise of an annual contribution of Rupees 3000 for the benefit of the temple. We think therefore that the learned District Judge's decree cannot be interfered with in appeal. The appeal is therefore dismissed with the costs of the plaintiffs (respondents 1 to 3).

C.R.K./D.S. *Appeal dismissed.*

1. Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty, (1876-78) 1 Mad 295= 4 I A 76=3 Sar 687 (P C).

A. I. R. 1938 Madras 714

HORWILL J.

Shanmuga Pandaram — Petitioner.

v.

K. Ponnuswami Iyer and others — Respondents.

Criminal Revn. No. 844 and Petn. No. 792 of 1937, Decided on 28th March 1938, from order of Addl. Dist. Magistrate, Tanjore, D/- 25th September 1937.

Criminal P. C. (1898), S. 144—Adi-Dravidas taking procession through locality of caste residents—Order under S. 144 when can be made stated.

Ordinarily those responsible for law and order should see that persons exercising their rights have the support of the police and the magistracy; but cases do of course arise where in the interest of public peace, persons should be prevented from exercising their rights. If the Adi-Dravidas, who have right to take procession along all public streets, for example are anxious to conduct this procession not to honour Sri Thiruvalluvar, but in order to irritate and annoy the caste residents of those streets, then the Magistrate would be justified in placing some restraint upon their processions; but unless the Magistrate is satisfied that the Adi-Dravidas had no bona fide desire to do honour to the saint he should not pass an order under S. 144, unless he is quite satisfied that there is no other means within his power of preventing a breach of the peace. The fact that the Adi-Dravidas have been exercising restricted rights in the past can be rightly taken into account; but it is not in itself a sufficient ground for refusing them protection in the exercise of their full rights. [P 714 C 2; P 715 C 1]

A. S. Sivakaminathan — *for Petitioner.*

V. T. Rangaswami Iyengar and K. Ramaswami Iyengar — *for Respondents.*

N. Somasundaram for Public Prosecutor — *for the Crown.*

Order. — In 1936 the Adi-Dravidas of Peralam began to conduct processions in honour of Sri Thiruvalluvar, to the annoyance of the caste residents of the village. On the occasion to which this criminal revision case relates they wished to take a procession through the four streets along which the car is taken at the annual car festival and through which the caste Hindus conduct their procession. The Stationary Sub-Magistrate, Nannilam, and the Additional District Magistrate of Tanjore were of opinion that the Adi-Dravidas were putting forth fresh claims and thereby causing annoyance to the residents of Peralam who have houses on the processional route; and an order under S. 144 was therefore passed. Although the order under Sec. 144 has long ago worked itself out, yet it is urged for the petitioner that this petition should be considered on its merits, as otherwise the same situation will arise in subsequent years. There can be no doubt that the Adi-Dravidas have a civil right to take a procession along all public streets, just as any other persons may have; whereas the caste residents have no right at all to object. Ordinarily those responsible for law and order should see that persons exercising their rights have the support of the police and the magistracy; but cases do of course arise where in the interests of public

peace, persons should be prevented from exercising their rights. If the Adi-Dravidas for example are anxious to conduct this procession, not to honour Sri Thiruvalluvar but in order to irritate and annoy the caste residents of those streets, then the Magistrate would be justified in placing some restraint upon their processions; but unless the Magistrate is satisfied that the Adi-Dravidas had no bona fide desire to do honour to the saint he should not pass an order under S. 144 unless he is quite satisfied that there is no other means within his power of preventing a breach of the peace. The fact that the Adi-Dravidas have been exercising restricted rights in the past was rightly taken into account; but it is not in itself a sufficient ground for refusing them protection in the exercise of their full rights. With these remarks this petition is dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1938 Madras 715

HORWILL J.

Public Prosecutor — Appellant.

v.

Soosai Pillai and others—Respondents.

Criminal Appeal No. 313 of 1937, Decided on 1st March 1938, against acquittal by Taluk Magistrate, Shivaganga, D/- 5th March 1937.

Penal Code (1860), S. 294-A — Government issuing order declaring chit funds illegal but adding that prosecution would be withheld provided chit funds were wound up within certain time and subscriptions were repaid — Accused not repaying subscription within time and therefore prosecuted under S. 294-A — Withholding of prosecution held not tantamount to authorization of chit fund and accused if proved to have conducted chit fund held liable under S. 294-A.

The Government issued an order declaring that conducting chit funds was illegal but added that prosecutions of persons who were running chit funds in ignorance of the law would be withheld provided that they did their best to wind up the lottery and to pay everybody who had subscribed to the lottery. The District Magistrate published the order and granted the accused time to repay the subscriptions. On accused's failure to do so within time, he was prosecuted under S. 294-A for conducting chit fund :

Held that if the accused was proved to have conducted a lottery that was illegal, he was liable to be punished under S. 294-A whatever the action of the Crown might subsequently have been. The withholding of prosecution during certain time in which the subscriptions were directed to be repaid was not tantamount to authorization of the lottery during that time. [P 716 C 1]

T. V. Ramiah, G. Gopalaswami for S. Nagaraja Aiyar and K. Desikachari—*for Respondents.*

Judgment. — The prosecution case was that the three counter-petitioners had been conducting a chit fund and had thus committed an offence punishable under Sec. 294-A, I. P. C. As however chit funds had been very common in Southern India and there had been some misapprehension as to the law governing them, Courts having held at one time that chit funds were not illegal, the Government thought it would be unduly hard on persons conducting chit funds if prosecution were forthwith launched against them. Cr. O. No. 2621 dated 14th September 1934 was thereupon passed ordering the District Magistrate of Malabar to give wide publicity to the fact that such chit funds were illegal and to order those who were conducting them to wind them up as soon as possible, adding that prosecutions need not be launched unless there were indications of fraud. The counter-petitioners were ordered to wind up this chit fund and it appears that no drawing took place after the order was communicated to them. They were given to understand however that they should, in winding the fund up repay the subscriptions ; and the counter-petitioners addressed the Government by a petition asking for time until the end of December 1935 to pay up the amounts due to the subscribers. This petition seems to have been referred to the District Magistrate, who granted time to do so. As this too was not done and the money was not repaid to the subscribers, this prosecution was launched. The Taluk Magistrate of Sivaganga acquitted the accused on the ground that the accused did not raise any subscriptions after receiving the order from the District Magistrate, that there was thereafter no drawing of any lot, that the shed in which the office had been located was dismantled, that the fund did not continue to exist as a lottery, and that no proposals were published, and concluded his judgment by saying that there was no evidence that there was any fraud on the part of the organizers of the fund, that they had obeyed the District Magistrate's order and wound up the lottery, and that if dues were still to be paid to the subscribers, it was open to them to recover their dues through Civil Courts.

It is not denied that a transaction of this kind contravenes the provisions of

S. 294-A, I. P. C., but the learned advocate for the accused has put forward the same argument that seems to have found acceptance with the learned Taluk Magistrate. The accused have not been punished for contravening the order of the District Magistrate that they should wind up the lottery, for such an order would have had no binding and legal force if the lottery itself had been valid; but they have been convicted for conducting the lottery and thereby contravening the provisions of S. 294-A. The various points considered by the learned Taluk Magistrate have therefore no bearing on the question whether the accused committed an offence. If they conducted a lottery that was illegal, they were liable to be punished under S. 294-A whatever the action of the Crown might subsequently have been. It is argued that the order of the Government that they would wind up the lottery within a certain time and that they should repay the subscriptions within a certain time amounted to an authorization of the lottery prior to that date. I am unable to agree that the withholding of prosecution is tantamount to authorization. It seems to me that the authorising of a lottery by private persons would be the last thing the Government would be prepared to do. Clearly, the object of the Government in issuing their order in the form they did was to withhold the prosecutions of persons who were running lotteries in ignorance of the law, provided that they did their best to wind up the lottery and to pay everybody who had subscribed to the lottery. It is clear therefore that the accused were guilty of the offences with which they were charged if it has been satisfactorily proved that the three accused conducted the lottery. It is further contended that both the complaint and the charge led the accused to believe that they were charged not for an offence under S. 294-A, but for disobeying the orders of the District Magistrate; for we find in the complaint that

it is alleged that the accused organized a prize chit and that as this was an unauthorized lottery, the accused had to wind up the same, that the first accused sent a petition to the Local Government praying for time, that time was granted till 31st December 1935, the accused being informed that prosecution would be launched if the concern was not closed by that date, and that as the concern was not closed as directed, they were liable for the offence under S. 294-A.

The charge is to the effect that a complaint had been received to the effect that the three persons (accused) had opened a chit fund, that they had kept a lottery office, and that they had also published proposals relating to the lottery. So far it is clear that they are charged with having committed offences punishable under S. 294-A, but the charge does not end there but contains the further words:

And that in spite of the order directing you to wind up the said company within 31st December 1935, you did not close it accordingly. Show cause why you should not be punished.

The judgment of the learned Taluk Magistrate shows that he conducted this inquiry with a view to ascertain whether any fraud had been played by any of the accused. I have been asked that in case I think that the order of the Taluk Magistrate was not right, he should be ordered to retry the accused. It is ordered accordingly. This order of retrial will give an opportunity to the accused to repay to the subscribers whatever may be due to them and so put themselves in a position to plead for mercy in case they are found guilty.

C.R.K./D.S. *Retrial ordered.*

A. I. R. 1938 Madras 716

LEACH C. J. AND MADHAVAN NAIR J.

Sree Muthangi Seetharamayya Garu and others — Appellants.

v.

Panthan Sathiah and others—Respondents.

Appeal No. 273 of 1933, Decided on 1st March 1938.

Hindu Law — Debts — Promissory note by mother on behalf of minor in renewal of promissory note of her deceased husband—In body of note mother described as guardian but note signed by her without any description as guardian—She is not personally liable on such pronote — Minor is liable to extent of assets in his hands.

In a proper case it is within the competence of a Hindu guardian by executing a promissory note to make a minor liable to the extent of the joint family property in his hands. [P 717 C 2]

A promissory note had been executed by the mother of a Hindu minor on his behalf as guardian and in the body of the note it was stated that he was represented by his mother, but she signed the note without any description following the signature. She had executed an earlier promissory note which itself was in renewal of a promissory note executed by her deceased husband:

Held that the minor was liable to the extent of assets in his hands and the mother was not personally liable as she excluded her personal liability: *A I R 1935 Mad 447 (F B), Expl. and Foll.; A I R 1919 Mad 641 (F B), Rel. on.* [P 718 C 1]

Ch. Raghava Rao and S. Kothanda Raman Nayanar — *for Appellants.*

K. Someswara Rao and K. Ramamurthy — *for Respondents.*

Leach C. J. — The appellants are the legal representatives of one Sree Mathangi Sitharamayya, who has died since the institution of the appeal. Sitharamayya instituted a suit in the Court of the Subordinate Judge, Rajahmundry, to recover a sum of Rs. 7306-2-9 claimed to be due to him on a promissory note dated 30th December 1928, executed by Pantham Venkataratnamma, the mother of the respondents as their guardian. The respondents' father was one Panthan Chinna Venkanna, who on 21st February 1923 borrowed from Sitharamayya Rs. 4000 on a promissory note. This debt had not been discharged at the time of his death in 1925. On 29th January 1926, the widow executed a promissory note in substitution of the note given by her husband, the renewal being for a sum of Rs. 5410, representing the Rs. 4000 and interest. In the body of the promissory note, it was stated that it was executed by her as the mother and guardian of the respondents, and she signed the instrument in that capacity. The promissory note in suit was executed by her in renewal of the last mentioned promissory note for a sum of Rs. 7306-2-9, the difference between Rs. 5410 and Rs. 7306-2-9 representing the interest which had accrued due since 29th January 1926. The promissory note is in the following terms :

Promissory note executed on 30th December 1928, in favour of Sri Muthangi Sitharamayya Garu, resident of Rajahmundry, by Venkataratnamma, as the mother and guardian of the minors (1) Satteyya, (2) Perayya Naidu and Venkatarao, sons of the late Pantham China Venkanna, residents of Vengalpudi. The principal and interest due on the promissory note executed and delivered on 29th January 1926, is Rs. 7306-2-9 (rupees seven thousand three hundred and six, annas two and pies nine). On demand I shall pay the same to you or order together with interest thereon from now till payment of the amount at Re. 1 (one rupee) per cent. per mensem, get the payment endorsed on the note and take it back. The consideration of this is received as aforesaid. This promissory note is executed with consent.

The signature of Venkataratnamma was appended, but in this case she did not add the words describing herself as the mother and guardian of the minors.

The suit was defended on the following grounds : (1) the promissory note executed by the respondents' father represented moneys obtained by him for his own immoral purposes ; (2) the signatures on the promissory note in suit and on the promissory note dated 29th January 1926 were not genuine, and (3) the suit could not be maintained against the respondents inasmuch as in signing the promissory note in suit their mother had not described herself as their guardian. The learned trial Judge decided in favour of the plaintiff on the first two points, but held against him on the third point. The questions relating to the father's immorality and the genuineness of the mother's signatures have not been raised before us, and we are merely called upon to decide whether the respondents are bound by their mother's signature on the promissory note in suit. This appeal is governed by the decision of a Full Bench of this Court consisting of Beasley C. J., Ramesam and King JJ. in 58 Mad 735[1] which is in the appellant's favour. In passing, I may mention that the judgment in the present case was delivered after the Full Bench had given its decision. The facts are almost identical. In the Full Bench case[1] a promissory note had been executed by the mother of Hindu minors on their behalf and in the body of the note it was stated that they were represented by their mother, but she signed the note without any description following the signature. She had executed an earlier promissory note which itself was in renewal of a promissory note executed by her deceased husband. It was held that the surrounding circumstances should be looked into in order to find out whether the maker of the note intended to exclude her personal liability as guardian but to make the wards liable. Seeing that the promissory note was in renewal of earlier promissory notes, ultimately leading up to the father's liability, it was held that it was a proper inference to draw that she did intend to exclude her personal liability. It was also held that in a proper case it was within the competence of a guardian by executing a promissory note to make a minor liable to the extent of the joint family property in his hands.

The learned advocate for the respondents has not asked us to hold that the mother did not sign the instrument sued upon on behalf of the minors. He could not contend to the contrary because the note itself shows this, as does the earlier promissory note executed by the mother, and

1. Satyanarayana v. Mallayya, (1935) 22 A I R Mad 447=155 I C 581=58 Mad 735=68 M L J 540 (F B).

we know that the two instruments executed by her were renewals of the father's promissory note. The learned advocate however wishes us to regard 58 Mad 735[1] as being wrongly decided, his reason being that a Hindu minor cannot be made liable on a promissory note executed by his mother as his guardian. He does not ask us to disregard the decision, but suggests that we should refer the question to another Full Bench. To justify this course, we must be convinced that there are grounds for doubting the correctness of the judgment. The learned advocate has advanced no reasons why we should doubt its correctness. In holding that a Hindu guardian can bind a minor in respect of a promissory note in proper circumstances the learned Judges followed 42 Mad 185,[2] which was decided by a Full Bench consisting of Wallis C. J., and Ayling and Seshagiri Ayyar JJ., who held that the judgment of the Privy Council in 11 Bom 551,[3] did not throw doubts on the correctness of the opinion that a Hindu guardian can make a minor liable on a promissory note. A similar opinion has also been expressed by other High Courts and this Court has regarded it as being settled law. Consequently we see no reason to refer the present appeal to a Full Bench. The appeal being governed by 58 Mad 735,[1] it must be allowed with costs here and in the Court below. The liability of the respondents will, of course, be limited to the assets of the estate in their hands. There is a memorandum of cross objections, but these cross-objections have not been pressed and will be dismissed without costs.

C.R.K./D.S. *Appeal allowed.*

2. Ramajogayya v. Jagannadham, (1919) 6 A I R Mad 641=49 I C 872=42 Mad 185=36 M L J 29 (F B).

3. Waghala Rajsanji v. Sheik Masludin, (1887) 11 Bom 551 (P C).

A. I. R. 1938 Madras 718

PANDRANG ROW J.

Cheedalla Polamma — Appellant.

v.

Official Receiver, Nellore and others — Respondents.

Appeal No. 123 of 1936, Decided on 19th November 1937.

Insolvency—Fraudulent purchase — Decree-holder suppressing knowledge of debtor's insolvency proceedings from Court and purchasing property to detriment of other creditors—Purchaser cannot get benefit of S. 51 (3), Insolvency Act — Such fraudulent sale can be set aside under S. 4, Insolvency Act.

Where a decree-holder deliberately kept back from the executing Court the knowledge of the pending insolvency proceedings by the judgment-debtor and the object of such suppression of fact from the Court was to get on with the execution sale and purchase the properties himself to the loss of the other creditors who otherwise would have shared equally with him, it amounts to fraudulent conduct on the part of the decree-holder purchaser and he cannot get the benefit of S. 51 (3). Such sale can be set aside under S. 4: *A I R 1936 Mad 819, Ref.* [P 719 C 2; P 720 C 1]

N. S. Srinivasa Ayyar — *for Appellant.*

K. Kuppuswami — *for Respondents.*

Judgment. — This is an appeal from the order of the District Judge of Nellore dated 18th February 1936 allowing an application by the Official Receiver to set aside a sale held in execution of a decree by the Additional District Munsif of Nellore, on 23rd January 1933. The relevant facts are as follows: The properties that were sold in court auction belonged to the insolvents against whom a creditor's petition to adjudicate them as insolvents was admitted in October 1932. Notice of the petition was published in the Gazette on 14th January 1933. The sale was actually held, as observed already, on 23rd January 1933, that is to say, after the publication in the Gazette of the petition. The properties were brought to sale by another creditor of the insolvents, the appellant Polamma, who was represented throughout by her agent Chidambaram Chetti. There is evidence in the case which has been accepted by the Court below to show that before the sale there was an attempt to bring about a composition, that Chidambaram Chetti, the agent, was also one of those present when the matter of composition was talked about and that he left the place after promising to take the instructions of his employer. Instead of doing so, he got the properties purchased in the name of the decree-holder, his employer, on 23rd January. The facts therefore clearly show that the decree-holder purchaser as well as her agent were perfectly aware that there had been an insolvency petition filed and that it was pending and it was with this knowledge which they kept back from the executing Court which held the sale that they had the properties brought to sale actually on 23rd January and purchased them in the name of the decree-holder. It is further alleged that the amount for which the properties were purchased by the decree-holder was very low but this matter need not be pursued because there has been no finding on that point. The

decree-holder was permitted to set off the purchase money against the amount due under the decree to herself. This is therefore a case in which one creditor has been able to get hold of some of the properties of the insolvents for herself to the exclusion of the other creditors. Prima facie, in my opinion, this is inconsistent with good faith. The question that arises in this case is whether the decree-holder purchaser is entitled to claim the benefit of S. 51 (3), Provincial Insolvency Act which provides that a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

Considerable reliance has been placed by the appellant's learned advocate on the observations contained in 59 Mad 928,[1] more particularly on the observations dealing with the effect of S. 51 (3), Provincial Insolvency Act. It has been laid down in that case by Venkatasubba Rao J. that, in spite of the vesting of the properties in the receiver from the date of the presentation of the petition for insolvency, if a sale is held in execution a purchaser in good faith acquires a good title to the property. It is not necessary for the purpose of this appeal to deal with the contention that this observation is not in accordance with what was decided by the Privy Council in 42 Cal 72[2] and by a Bench of this Court in 30 M L J 611.[3] For the purpose of this appeal, that point may be assumed in the appellant's favour, namely that in spite of the vesting of the insolvent's properties in the Official Receiver much earlier than the sale in question, the sale would be valid if the purchaser is found to have purchased the property in good faith. The only question therefore that has to be decided is whether the purchaser acted in good faith. The finding on this point by the learned District Judge is in the negative, and after going through his judgment I see no reason to differ from his finding.

It may be that where the fact of the pending insolvency is brought to the notice of the Court and the Court nevertheless proceeds with the sale as happened in 59 Mad 928,[1] the mere knowledge of the insolvency possessed by the purchaser may not be sufficient to show that the purchaser acted in bad faith or did not act in good faith. But that is not the case here. The Court which held the sale was not informed by anyone of the pending insolvency and the District Judge observes that this happened on account of "some hanky panky" in his office and that it was also due to some manœuvre on the part of the decree-holder. Whatever the reason may be, the fact remains that in the present case the Court which held the sale did not know at the time that there was a pending insolvency which affected the properties that were to be sold. Neither the decree-holder nor her agent who knew of the insolvency informed the Court that there was a pending insolvency. They deliberately kept back from the Court this knowledge which they had, and the object of such suppression of fact from the Court was obviously to get on with the sale and purchase the properties themselves to the loss of the other creditors who otherwise would have shared equally with them. This amounts to fraudulent conduct on the part of the decree-holder purchaser who by wilfully suppressing a most material fact induced the Court to go on with the sale and thereby obtained an unlawful benefit herself. This again is very strong evidence of bad faith and is certainly inconsistent with good faith. In fact what the decree-holder or her agent did was obviously dishonest, and they made a dishonest gain at the expense of the other creditors by the course which they adopted.

In these circumstances it is impossible to say that the finding of the learned District Judge is not supported by the evidence in the case and by the undisputed facts. It would therefore follow that the appellant was not a bona fide purchaser, or, in other words, did not act in good faith when she purchased the properties of the insolvents. She is therefore not protected by S. 51 (3), Provincial Insolvency Act. It follows therefore that the sale in Court auction was utterly invalid as the sale was held at a time when the Official Receiver was, in law, vested with the properties and he had no notice of the sale, and there was no good faith on the part of the purchaser. It is a part of the general law that a sale of a person's property without notice to him is not valid and the Official Receiver in whom the insol-

1. Muthan Chettiar v. Venkituswami Naicken, (1936) 23 A I R Mad 819=170 I C 510=59 Mad 928=71 M L J 170.
2. Raghunatha Das v. Sundar Das Khatri, (1914) 1 A I R P C 129=24 I C 804=42 Cal 72=41 I A 251 (P C).
3. Anantharama Iyer v. Kuttimalu Kovilamma, (1917) 4 A I R Mad 924 = 34 I C 829 = 30 M L J 611.

vents' property is vested is no exception to this rule. In effect the application of the Official Receiver was that certain properties belonging to the insolvents in the possession of the appellant should be handed over to him on the ground that the sale in the appellant's favour was not valid. I do not see how it can be said that the Insolvency Court had no jurisdiction to decide a claim of this kind under S. 4, Provincial Insolvency Act. It is a claim which it was necessary to decide for the purpose of making a complete distribution of the insolvents' property and the Insolvency Court had therefore jurisdiction to decide it. The objection on the score of the jurisdiction therefore fails. In view of my opinion that the sale itself can be set aside in these circumstances, it is unnecessary to consider the contention that the alternative relief claimed by the Official Receiver for a direction to the decree-holder to deposit the purchase money can alone be granted on the ground that this is the only relief available to the Receiver in the circumstances. No other objection has been taken to the order of the District Judge. The appeal therefore fails and is dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1938 Madras 720

VENKATARAMANA RAO AND STODART JJ.

Rangaswami Iyengar and others.

v.

K. Marudanayagam Pillai and others.

Appeal No. 328 of 1936, Decided on 14th December 1937.

Execution sale—Setting aside—Upset prices shown in sale proclamation grossly low—Price realised far below market value—Such sale can be set aside.

Where the upset prices as shown in the sale proclamation were grossly low and the prices realised were far below their actual market value, the Court is right in setting aside such sale. It is incumbent on the Court to see that all the particulars required under O. 21, R. 66, Civil P. C., are given properly, so that an intending bidder may know exactly what he is going in for. Moreover, it is the duty of the Court to group the lands, in small and convenient plots and offer them for sale so that it may be possible for men of ordinary means especially the ryots in the locality to purchase them at a fair value. [P 720 C 2]

K. Rajah Iyer and R. V. R. Thathachariar — *for Appellants.*

K. Bhashyam and T. R. Srinivasan — *for Respondents.*

Venkataramana Rao J. — This is a civil miscellaneous appeal against the order of the learned Subordinate Judge of Tiruvarur setting aside a sale of certain immovable properties in execution of a decree in O. S. No. 26 of 1931. The main ground on which the learned Judge set aside the sale was that the upset prices as shown in the sale proclamation were grossly low and the prices realised were far below their actual market value and that the judgment-debtor had suffered substantial injury by reason of this gross undervaluation. It will be seen that the upset prices fixed in the sale proclamation and the prices realised in pursuance of the same are exactly one-fourth of the prices which were given by the decree-holder himself. Any likely bidder who looks at the sale proclamation would consider that having regard to the smallness of the value fixed for the several items of property, they are really of very inferior quality and not worth going in for at high prices. The learned Judge therefore was certainly right in coming to the conclusion he did. We therefore see no reason to differ from his finding in regard thereto. We must point out that the obligation of settling a proper sale proclamation really rests on the Court. It is incumbent on the Court to see that all the particulars required under O. 21, R. 66 are given properly so that an intending bidder may know exactly what he is going in for. We find in this case that almost all the lots which are sought to be sold comprise large extents of property ranging from 27 to 34 acres and each of the lots comprises several survey fields with varying amounts of kist. It is very undesirable especially in a district like Tanjore where it is well known that considerable financial depression is prevailing, that properties should be sold in such large lots. It is the duty of the Court to group the lands in small and convenient plots and offer them for sale so that it may be possible for men of ordinary means especially the ryots in the locality to purchase them at a fair value. If large extents are sold, it may not be possible at all to find a capitalist with the money which is required to fetch a fair value for the said property. We therefore direct the learned Subordinate Judge to group the fields into small and convenient plots after giving notice to the decree-holder and judgment-debtor and settle the sale proclamation with proper upset prices and have the properties sold. In the result, the civil miscellaneous appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

*** A. I. R. 1938 Madras 721**

LEACH C. J. AND MADHAVAN NAIR J.

Mrs. M. Bulteel — Petitioner.

v.

Mr. R. C. Bulteel — Respondent.

Criminal Revn. No. 67 and Petn. No. 66 of 1938, Decided on 9th March 1938, from order of Court of Dist. Magistrate, Nilgiris, D/- 13th November 1937.

*** Criminal P. C. (1898), S. 488 (1)—Application for maintenance by wife for herself and for her child—Rs. 100 can be directed to be paid to each separately.**

Under S. 488 (1) power is given to make an order for the maintenance of the wife "or such child." Therefore an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the Section which says that if an application is made on behalf of the wife an application shall not lie on behalf of the child. [P 721 C 2]

Where therefore a woman makes an application for herself and also for her child, the husband can be directed to pay Rs. 100 per mensem for the maintenance of the wife and Rs. 100 per mensem for the maintenance of the child : *A I R 1926 Mad 59 and AIR 1933 Cal 406, Approved; A I R 1927 Bom 46, Expl.* [P 721 C 2]

C. Krishnaswamy Iyer — *for Petitioner.*

Public Prosecutor — *for the Crown.*

Leach C. J.—The petitioner was married to the respondent in the Nilgiris on 23rd April 1932 and lived with him as his wife until February 1936. A daughter was born of the marriage. In February 1936, the respondent left India for England and has not returned to India. He has neglected to provide for the maintenance of his wife and child and on 6th July 1937 the petitioner was compelled to file an application in the Court of the District Magistrate of the Nilgiris at Ootacamund for an order directing the respondent to pay a monthly sum for their maintenance. The amount asked for was Rs. 350 per mensem. The petitioner also asked that steps be taken under the Maintenance Orders Enforcements Act, 1921 with a view to the Magistrate's order being confirmed by the proper authority in England. The application was dealt with by the Magistrate on the date of filing. He held that inasmuch as the petitioner had asked for an order for a sum of Rs. 350 he had no jurisdiction to hear the application and dismissed it, notwithstanding that the prayer in the petition was for a sum of Rs. 350 per mensem, or such other sum as the Court might deem fit. It is not surprising that an application for revision of this order was filed in this Court. The revision application came before Newsam J. on 15th October 1937. The learned Judge granted it and directed the Magistrate to dispose of the application on its merits. In the course of his order the learned Judge expressed the opinion that the Magistrate had no power to pass an order for more than Rs. 100 for the maintenance of both the mother and the daughter. He refused to accept the decision of Devadoss J. in 49 Mad 891[1] and that of the Calcutta High Court in 37 C W N 655.[2] The order of Newsam J. having been transmitted to the District Magistrate, an order for the payment of Rs. 100 per mensem for the maintenance of the wife and daughter was passed against the respondent on 13th November 1937. The petitioner now asks for revision of that order. The petitioner says that Newsam J. misinterpreted the Section and should have held that the District Magistrate had power to pass an order directing the respondent to pay Rs. 100 per mensem for the maintenance of the petitioner and Rs. 100 for the maintenance of the daughter. We consider that this contention is well founded. S. 488 (1), Criminal P. C., reads as follows :

> If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such persons as the Magistrate from time to time directs.

It will be observed that the word "or" is used. Power is given to make an order for the maintenance of the wife "or such child." Therefore an application can be made for the maintenance of the wife or for the maintenance of the child. There is nothing in the Section which says that if an application is made on behalf of the wife an application shall not lie on behalf of the child. The application now before us can be treated as an application for an order in favour of the petitioner and also for an order in favour of the daughter. In 49 Mad 891,[1] Devadoss J. rightly pointed out that to contend that when a woman makes an application for herself and for her children

1. Kent v. Kent, (1926) 13 A I R Mad 59=90 I C 669=26 Cr L J 1597=49 Mad 891=49 M L J 335.

2. Tulsi Das v. Sm. Saraju Dei Devi, (1933) 20 A I R Cal 406=1933 Cr C 584=143 I C 296=34 Cr L J 590=37 C W N 655.

she could only be given Rs. 100 for the maintenance of herself and of her children, whatever be the number, is opposed to the clear wording of the Section, and added :

If the petitioner's construction of the Section is correct it would amount to this : if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child and if that person afterwards refuses to maintain his wife and the legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain.

In 37 C W N 655[2] Panckridge and Patterson JJ. quoted with approval the decision of Devadoss J. and refused to follow a previous unreported decision of Jack J. to a contrary effect. In 28 Bom L R 1299,[3] a Bench of the Bombay High Court did interpret the Section in the way it was interpreted by Newsam J. but this was an ex parte application, and it was not fully argued. We have no hesitation in accepting the decision of Devadoss J. as being correct. I may mention that the learned Public Prosecutor who appears on behalf of the Crown supports the application for revision of the District Magistrate's order. For the reasons indicated, the application will be allowed and the order of the Magistrate will be varied by directing the respondent to pay Rs. 100 per mensem for the maintenance of the petitioner and Rs. 100 per mensem for the maintenance of the child. The case will be remitted to the District Magistrate in order that he may pass all necessary orders under the Maintenance Orders Enforcements Act, 1921.

C.R.K./D.S. *Case remitted.*

3. Palmerino v. Mrs. Palmerino, (1927) 14 A I R Bom 46=99 I C 83=28 Cr L J 51=28 Bom L R 1299.

A. I. R. 1938 Madras 722

LEACH C. J. AND MADHAVAN NAIR J.

Ryots of Garabandha, Sariapalli and Ramachandrapuram and others — Petitioners.

v.

Zamindar of Parlakimidi —

Respondent.

Civil Misc. Petition No. 1119 of 1938, Decided on 4th April 1938, for leave to appeal to His Majesty in Council, against the order of the High Court, *reported in A I R 1938 Mad 381.*

Civil P. C. (1908), S. 109 (b)—Permission to appeal — High Court refusing to issue writ of certiorari to Board of Revenue against enhancement of rent under Ch. 11, Madras Estates Lands Act — High Court's order comes under S. 109 (b) and permission could be granted.

Where in proceedings under Ch. 11, Madras Estates Lands Act rent was enhanced and the High Court refused to issue a writ of certiorari to the Board of Revenue, the applicant for writ is entitled to apply for leave to appeal to His Majesty in Council because the decision of the High Court was in its exercise of original jurisdiction which means original civil jurisdiction in contrast to original criminal jurisdiction.

[P 722 C 2 ; P 723 C 1]

B. Jagannadha Das — *for Petitioners.*

N. Srinivasa Iyengar for Govt. Pleader — *for Board of Revenue.*

L. S. Veeraraghava Iyer — *for Respondent.*

Leach C. J.—The petitioners ask for a certificate permitting an appeal to His Majesty in Council. They claim to be entitled to a certificate under Cl. (b) or failing that under Cl. (c), S. 109, Civil P. C. The petitioners desire to appeal from an order of this Court refusing to issue a writ of certiorari to the Madras Board of Revenue. Proceedings were taken under Ch. 11, Madras Estates Land Act, and as the result of those proceedings, the Board of Revenue enhanced the rents of three villages by 37½ per cent. The petitioners contended that by reason of S. 168 (2) read with S. 30 (b) of the Act, the power of the Board of Revenue was limited to an enhancement of 12½ per cent. This Court refused to order a writ to issue as it considered that the argument advanced was a fallacious one and had previously been rejected by this Court in 49 Mad 499.[1] If the present application were made merely under S. 109 (c), Civil P. C., we should not be prepared to grant the certificate; but as we consider that the case does fall within Cl. (b) of the Section, the certificate will issue.

Under Cl. (b) a litigant has the right of appeal to His Majesty from any decree or final order passed by a High Court in the exercise of its original civil jurisdiction. It is conceded by the learned advocate for the respondent that the issue of a writ of certiorari means the exercise of original jurisdiction, but he says that it does not mean the exercise of "original civil jurisdiction"

1. Narasimha Rao v. Ryots of Paddamamidipalli, (1926) 13 A I R Mad 480=94 I C 164 =49 Mad 499.

within the meaning of the Clause. The distinction here is between "civil" and "criminal." The order complained of referred to a civil matter as opposed to a criminal matter, namely a decision of a Revenue Court in a revenue case. It was admittedly passed in the exercise of original jurisdiction and in the circumstances it could only have been passed in the exercise of civil jurisdiction. Therefore it was an order passed in the exercise of original civil jurisdiction. I might add that the order of the Board of Revenue which these applicants wished to have set aside directs the payment of large sums by way of increased rents. The order affects the applicants to the extent of Rs. 31,503.12.0 and it is not disputed that it is the intention of the Board of Revenue to extend the enhancement to the other villages of the zamindari which when carried out will mean an annual increase in the rents of the tenants by over Rs. 1,50,000 annually. The amount involved is therefore very considerable. The certificate will issue on the usual conditions.

C.R.K./B.D. *Leave granted.*

A. I. R. 1938 Madras 723

HORWILL J.

Emperor.

v.

Panchaksharam — Respondent.

Criminal Appeal No. 378 of 1937, Decided on 30th March 1938, against acquittal of accused by Sessions Judge, South Arcot, in S. C. No. 18 of 1937.

(a) Criminal Trial—Accused acquitted under S. 304, I. P. C. but convicted under S. 335 — Appeal against acquittal — Court satisfied that accused is not guilty even under S. 335, Penal Code — Court can suo motu acquit accused under S. 335.

In an appeal against acquittal, the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. [P 723 C 2]

Where an accused is acquitted under S. 304, I. P. C. but convicted under S. 335, and the Crown appeals against the acquittal under S. 304, the accused is entitled to argue on the facts of the case to show that he has not committed an offence under S. 304, I. P. C.; and although the acceptance of those arguments may not automatically set aside the conviction under Sec. 335, I. P. C., yet if the Court were satisfied that no offence was committed, it would undoubtedly exercise suo motu its powers under S. 439 (1), Criminal P. C. and set aside the conviction.

[P 723 C 2; P 724 C 1]

(b) Penal Code (1860), Ss. 302 and 304 — Murder — Injury necessarily resulting in death —Intention or knowledge determines nature of offence.

In very few cases of murder can it be said that the injury caused necessarily resulted in death; but if it is caused with the necessary intention or knowledge and death results from the injury caused, then the offence committed is murder or culpable homicide as the case may be. [P 724 C 2]

N. Somasundaram — *for the Crown.*

J. Subbuswami — *for Respondent.*

Judgment. — The accused Panchaksharam was charged by the Sessions Judge of South Arcot under S. 304, I. P. C. with cutting the deceased Munuswami with a toddy drawer's knife on the head, back and abdomen. The learned Sessions Judge found on the evidence that the accused did strike the deceased Munuswami on the head, back and abdomen and caused the injuries alleged; but he held that the accused had neither the intention nor the knowledge which would bring the offence within the mischief of S. 304, I. P. C. He found however that the accused voluntarily caused grievous hurt under grave and sudden provocation; and so convicted him under S. 335, I. P. C., and sentenced him to two years' rigorous imprisonment. The Crown has appealed against the acquittal under S. 304, I. P. C.

It was contended on behalf of the Crown that the findings of fact of the learned Sessions Judge must be accepted and that the arguments of the learned counsel for the accused must be confined to combating the arguments with regard to the nature of the offence committed. The learned counsel for the accused relied on S. 439 (6), Criminal P. C., which is to the effect that any convicted person to whom an opportunity has been given of showing cause why his sentence should not be enhanced shall be entitled to show cause against his conviction. That sub-section does not apply because this is an appeal, not against the sentence but against the acquittal. It is however clear that in an appeal against acquittal, the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. If therefore the learned counsel for the accused is entitled to argue on the facts of the case to show that the accused has not committed an offence under S. 304, I. P. C., then although the acceptance of those arguments may not automatically set aside the conviction under S. 335, I. P. C., yet if this

Court were satisfied that no offence was committed, it would undoubtedly exercise suo motu its powers under S. 439 (1), Criminal P. C., and set aside the conviction.

However, after hearing the learned counsel for the accused, I am satisfied that the facts found by the learned Sessions Judge are correct. P. W. 5 is equally related to both parties and her evidence therefore is very valuable. Moreover, the accused himself has made several statements which to a great extent meet the prosecution case. The learned Sessions Judge has accepted the accused's case to the extent that while in the tope he heard that his mother had been attacked by the deceased and was lying senseless, that he came to where the deceased and his mother were, that the deceased asked him what he was doing there with the knife and struck him on the hand with his stick, that the accused then stabbed him, that the deceased then gave further blows with his stick and that the accused delivered several more blows with his knife on the person of the deceased. I agree with the learned Sessions Judge that the accused cannot be said to have acted in self-defence. His mother was in no further danger from the deceased. He came there with the intention of attacking the deceased, and the deceased, when he saw that the accused had a knife and was prepared to use it, was justified in striking his hand to prevent him from using it. A free fight between the accused and the deceased followed; and the accused must accept responsibility for the acts done by him.

That the accused acted under grave provocation there can be no doubt; but whether it was also sudden provocation is open to doubt; but I am prepared to accept the finding of the learned Sessions Judge that there was grave and sudden provocation. I cannot however agree with him that the offence committed did not amount to one punishable under S. 304, I. P. C. The accused certainly knew that a blow with a knife on any vital part of the body was likely to cause death; and there are few parts of the body where a severe blow with a knife would not cause death unless expert medical attention was immediately available. In a sense, the learned Sessions Judge concedes that, for he says "it was an injury which endangered human life, and so it amounts to grievous hurt as defined in S. 320, I. P. C." The learned Sessions Judge has found the accused guilty of causing grievous hurt under grave and sudden provocation and he has said that it was grievous hurt because it was hurt that endangered human life. The finding of the learned Sessions Judge therefore amounts to this, viz. that the accused voluntarily caused an injury which endangered human life and the deceased died as the immediate result of that injury. If the accused voluntarily caused an injury that endangered life and the deceased died as the result of that injury, the offence committed is certainly culpable homicide.

Moreover, the injury caused was a very grievous one; and I have never known of an injury of that kind from which a wounded man has survived. It was not merely a cut across the abdominal wall; but the intestine itself was severely injured. Although theoretically death was not the necessary result, yet in the ordinary course of nature one would expect that death would result. In very few cases of murder can it be said that the injury caused necessarily resulted in death; but, if it is caused with the necessary intention or knowledge and death results from the injury caused, then the offence committed is murder or culpable homicide as the case may be. Had there not in this case been grave and sudden provocation the accused would have been guilty of murder. The conviction under S. 335, I. P. C., is therefore set aside and the accused convicted under S. 304, I.P.C. In view of the fact that the accused acted under grave provocation and that the deceased was a bully, I do not think any very great enhancement of sentence is necessary. I sentence the accused to 3 years' rigorous imprisonment.

C.R.K./B.D. *Sentence enhanced.*

A. I. R. 1938 Madras 724

LAKSHMANA RAO J.

In re Pedda Ramamuni Reddi and others — Petitioners.

Criminal Revn. No. 516 and Petn. No. 484 of 1937, Decided on 17th March 1938, to revise judgment of Court of Session, Kurnool Division, in C. A. No. 13 of 1937.

Criminal P. C. (1898), Ss. 350 and 530— Demand for resummoning witnesses — Non-compliance does not vitiate trial.

Non-compliance with the demand that the witnesses should be resummoned and reheard is not an irregularity which vitiates the trial and where all the witnesses were further cross-examined

before the Magistrate who decided the case, the accused cannot be said to have been prejudiced by the refusal to resummon and rehear the witnesses, and the conviction cannot be set aside on this ground. [P 725 C 1]

P. Basireddi — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — The Joint Magistrate reports that the petitioners demanded that the witnesses should be resummoned and reheard, but non-compliance with the demand is not an irregularity which vitiates the trial: vide S. 530, Criminal P. C., and all the witnesses were further cross-examined before the Magistrate who decided the case. The petitioners cannot therefore be said to have been prejudiced by the refusal of the Joint Magistrate to resummon and rehear the witnesses, and the conviction cannot be set aside on this ground: vide Proviso (b) to S. 350, Criminal P. C. No other ground was urged against the conviction nor is there any ground for interference with it in revision. But the occurrence took place in 1935 and the trial was protracted. The hurt caused was trivial and it is unnecessary to send the petitioners back to jail. The substantive sentence of imprisonment is therefore reduced to the period already undergone and otherwise this petition is dismissed.

C.R.K./D.S. *Sentence reduced.*

A. I. R. 1938 Madras 725

KING AND LAKSHMANA RAO JJ.

K. P. S. Karuthan Chettiar and another — Appellants.

v.

P. Ct. Chidambaram Chettiar and another — Respondents.

Appeal No. 411 of 1933, Decided on 4th March 1938, against decree of Sub-Judge, Devakottai, in O. S. No. 181 of 1931.

(a) Principal and Agent — Independently of any agreement to that effect agent is not entitled to commission for collecting old outstandings of firm.

An agent is bound to collect old outstandings of a firm if required by the principal and hence independently of any agreement or custom, the agent is not entitled to any commission for collecting old outstandings : *A I R 1915 Mad 859, Explained.* [P 725 C 2]

(b) Principal and Agent — Custom among Nattukottai Chettis.

It is customary among Nattukottai Chettis to pay ten per cent. of the net profits to the foreign agent as samans : *Appeal No. 412 of 1925 and S. A. No. 467 of 1937, Rel. on.* [P 725 C 2; P 726 C 1]

K. Rajah Iyer and V. Ramaswamy Iyer — *for Appellants.*

Judgment. — *Appeal No. 411 of 1933 with memorandum of objections :* The appeal and memorandum of objections arise out of a suit by the appellant against his agent for an account of his agency and recovery of the amount found due on the taking of the accounts. The agent died after filing the memorandum of objections and the legal representative has not chosen to appear. The memorandum of objections fails for that reason and the questions raised by the appeal are whether as held by the trial Court the agent is entitled to : (1) a commission of four per cent. for collecting old outstandings; (2) ten per cent. of the net profits earned during the agency towards what is known as 'samans'. The claim was based on agreement and custom but as found by the trial Judge there is no satisfactory evidence of any agreement or custom to pay any commission for collecting old outstandings. The salary chit Ex. A fixes the remuneration of the agent and it requires him to carry on the firm business according to the directions of the principal. The collections of the outstandings is certainly a part of the firm business and in the face of the salary chit the agent cannot refuse to collect them if required. The decision in 28 M L J 199[1] deals with the liability of the agent for old outstandings and not his duty to collect them if directed and the observation of the trial Judge that it is well settled that it is not part of the duty of an agent to collect old outstandings of the firm is unwarranted. He is bound to collect them if required by the principal and the evidence of the agent shows that no commission was paid to him for collecting old outstandings during any of the previous periods of his agency. There is according to him no fixed rate either and the view of the trial Judge that independently of any agreement or custom the agent is entitled to some commission for collecting old outstandings is untenable. The claim for commission for collecting old outstandings must therefore be disallowed.

As regards the share of the profits claimed towards samans the evidence of D. W. 4 shows that it is customary among Nattukottai Chettis to pay ten per cent. of the net profits to the foreign agent as samans and the custom has been recognized

---

1. Ramasami Chetti v. Alagappa Chetti, (1915) 2 A I R Mad 859=28 I C 135=28 M L J 199.

by this Court in Appeal No. 412 of 1925 and S. A. No. 467 of 1937. It is also mentioned on p. 100 of the Madura District Gazetteer and the objection was not seriously pursued. The claim for samans is thus well founded and the appeal fails to that extent. The decree of the lower Court will therefore be modified by disallowing the claim for commission for collecting old outstandings and the parties will bear their respective costs in this appeal. The memorandum of objections is dismissed and the appellant will have his costs out of the estate of the agent in the hands of the legal representative.

C.R.K./D.S. *Decree modified.*

A. I. R. 1938 Madras 726

BURN J.

Emperor.

v.

Picha Kone and others—Respondents.

Criminal Appeal No. 614 of 1937, Decided on 9th March 1938, against acquittal of the accused by Sess. Judge, Tinnevelly, in C. A. Nos. 19 and 20 of 1937.

Penal Code (1860), Ss. 143, 120-B—Accused found in temple at middle of night with house-breaking implements, aruvals and gun—Held that they were guilty under S. 143 but not under S. 120-B.

The accused were found in a temple in the middle of night with house-breaking implements, aruvals and guns in their possession :

Held that they were guilty of an offence under S. 143 as they must have been there with a common object of an unlawful kind. The facts however did not suffice to support a conviction under Section 120-B. [P 727 C 1, 2]

Public Prosecutor — *for the Crown.*

A. S. Sivakaminathan—*for Respondents.*

Judgment.—The respondents were tried in S. C. No. 11 of 1937 by the learned Sessions Judge of Tinnevelly for offences of criminal conspiracy (S. 120.B, Penal Code) and being members of an unlawful assembly (S. 143, Penal Code) and respondent 1 alone was charged separately with having been armed with a deadly weapon (S. 144, Penal Code), with having been armed with a gun without a license [Sec. 19 (e), Arms Act 1 of 1878] and attempt to murder (S. 307, Penal Code). Accused 1 was acquitted by the learned Assistant Sessions Judge of the specific offences with which he alone was charged but the learned Assistant Sessions Judge found that he and the other three accused who are the present respondents were guilty of offences under Ss. 120-B and 143, Penal Code. The case was comparatively simple. The Sub-Inspector of Police, Shermadevi (P. W. 1) said that on 9th January 1937 he heard that these four respondents and the brother of respondent 1 named Ramiah Kone had gathered together in the Pillayar temple at Kuniyur with house-breaking implements and everything necessary to commit the offences of house-breaking and theft. Respondent 1 is what is called a "district criminal." The Sub-Inspector says that he collected police and private persons and went and surrounded the temple in the middle of the night. They found that these four respondents and the brother of respondent 1 in the temple and according to the Sub-Inspector respondent 1 fired at him with a muzzle loading gun but the charge missed the Sub-Inspector and everybody else belonging to his party. After that the Sub-Inspector discharged his revolver three times and shot Ramiah Kone who died at about 4 A. M. on 10th January. There was then a struggle between the raiding party and the remaining four suspects and eventually the four respondents surrendered at discretion.

On these facts the learned Assistant Sessions Judge convicted the respondents of criminal conspiracy to commit the offences of house-breaking by night and theft (Sec. 120-B) and being members of an unlawful assembly (S. 143, Penal Code). He found that the evidence with regard to the shooting incident was unreliable and he therefore acquitted respondent 1 of the separate charges framed against him. On appeal the learned Sessions Judge of Tinnevelly acquitted all the respondents and the Government have preferred this appeal from that acquittal. The learned Sessions Judge has in my opinion gravely misappreciated the evidence in this case. The evidence that these four respondents and Ramiah Kone were found together in the temple in the middle of the night on 9th January is overwhelming and there is no possibility of disbelieving it. Nor is it possible to reject the evidence of the witnesses who say that a crowbar, a gun and various other implements useful for house-breaking were found with them at the time. P. W. 4, the karnam of Vadaku Karkurichi, is a thoroughly disinterested witness who arrived after the shooting was over and who speaks to the recovery of the crowbar, a battery light, two aruvals, a gun, a bunch of keys and

other things mentioned in the attakshi (Ex. B), which was prepared at 1 A. M. on 10th January. Besides him there were three police witnesses (1, 6 and 7) and five other private witnesses (8, 9, 10, 11 and 12) and it is grotesque to suppose that all these witnesses agreed to give false evidence upon the suggestion of the Sub-Inspector. The learned Sessions Judge, it seems to me, goes much too far when he says that the evidence in this case proves the shooting by the Sub-Inspector to have been wholly without justification. I do not see that the evidence leads necessarily to that conclusion. The learned Sessions Judge's rejection of all the rest of the evidence is inextricably involved in his assumption that the Sub-Inspector was wholly unjustified in shooting. His theory is that, because the Sub-Inspector knew that he had no right to shoot Ramiah Kone the Sub-Inspector immediately set about preparing a case which would justify him in having used his revolver.

The learned Sessions Judge does not in so many words say so, but his conclusion involves the assumption that the karnam (P. W. 4) and all the private persons (P. Ws. 8, 9, 10, 11 and 12) as well as the Sub-Registrar (P. W. 5) readily acceded to the request of the Sub-Inspector to concoct a whole lot of false evidence against these four respondents. The Sub-Registrar was not cross-examined in any manner to indicate that he was giving false evidence. He deposed that he had recorded a dying declaration from Ramiah Kone at 2 A. M. and there is no possibility really of rejecting his evidence. It is in my opinion quite unjustifiable to reject the evidence regarding the finding of house-breaking implements merely because the evidence regarding the attempt to murder by respondent 1 is found to admit of a reasonable doubt regarding his guilt. Taking it as proved that these four respondents were found in the temple in the middle of the night with house-breaking implements and aruvals and gun in their possession, it should follow, I think, that the learned Assistant Sessions Judge was right in convicting them of an offence under S. 143, Penal Code. They must have been there with a common object of an unlawful kind. I do not however think that this by itself can suffice to support a conviction under S. 120-B, Penal Code. It is I think going a little too far to say that since they were all together they must have had a common object and since they must have had a common object therefore they must have previously come to an agreement amongst themselves to commit crimes.

Setting aside the order of acquittal passed by the learned Sessions Judge, I convict the respondents of an offence under S. 143, Penal Code, and sentence them to three months' rigorous imprisonment. The appeal with regard to the offence under S. 120-B, Penal Code is dismissed.

C.R.K./R.M. *Appeal partly allowed.*

A. I. R. 1938 Madras 727

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Vella Veeran Chetti — Plaintiff.

v.

V. Veeran Chetti and another — Defendants.

Referred Case No. 1 of 1936, Decided on 21st January 1938, made by Dist. Munsif, Melur, in E. P. No. 793 of 1935.

(a) Court-fees Act (1870), S. 11 Cl. (1) as amended by Madras Court-fees Amendment Act (5 of 1922)—It is competent to Court, without directing inquiry, to pass decree finally determining amount of profits payable subsequent to suit.

It is perfectly competent to the Court, without directing an inquiry, to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit, if it is made out that it is not necessary to make such an inquiry and it cannot be said that such a decree is not final or is incapable of execution nor would it be in contravention of the provisions of O. 20, R. 12, Civil P. C.: *A I R 1937 Mad 46 and A I R 1937 All 36 Expl.; A I R 1925 Mad 1276, Rel. on.* [P 729 C 2]

(b) Court-fees Act (1870), S. 11 Cl. (1) as amended by Madras Court-fees Amendment Act (5 of 1922)—Suit for possession of immovable property together with past and future mesne profits—Future mesne profits ascertained and decreed—S. 11 Cl. (1) applies—Court-fee on future mesne profits must be paid before decree in respect thereof can be executed.

Where a claim is for possession of immovable property and past profits or where a claim is for possession of immovable property and for past profits and future profits, and future mesne profits are ascertained and decreed, a court-fee will be leviable on such future profits under S. 11 Cl. (1), Court-fees Act, before decree in respect thereof can be executed. It is no doubt true that a claim for mesne profits subsequent to the date of suit is upon a cause of action which is not existing on the date of the suit, but nevertheless the Legislature has made an exception to the general rule by permitting a claim in respect thereof in order to avoid multiplicity of suits : *Case law referred.* [P 730 C 1]

N. Srinivasa Iyengar for Govt. Pleader—*for the Crown.*

D. Narasa Raju *amicus curiæ.*

Venkataramana Rao J.—This matter arises out of a reference made by the learned District Munsif of Melur for a decision on the question whether a plaintiff is entitled to execute a decree awarding, without directing an inquiry, mesne profits since the date of the institution of the suit without payment of court-fee. The suit was for recovery of certain immovable property and mesne profits for a period prior to the date of the institution of the suit (13th November 1926) and also subsequent thereto. The Court by its decree dated 23rd October 1929 awarded Rs. 60 for profits prior to suit and also awarded profits from the date of suit until delivery of possession at the rate of Rs. 60 per annum. It was carried in appeal both to the District Court and the High Court and ultimately confirmed. The decree of the High Court is dated 9th September 1935. The present execution application out of which this reference arises was filed on 21st November 1935 praying for delivery of possession of the property and for realization of Rs. 60 the past profits decreed and also Rs. 540, the amount of mesne profits due and payable from 13th November 1926, the date of plaint, to 21st November 1935, the date of the execution application. The question is, can the relief so far as it relates to the sum of Rs. 540 be given to the plaintiff without payment of court-fee? The relevant provision of law applicable to the case is S. 11, Court-fees Act as amended by the Madras Act 5 of 1922. It runs thus:

11. In suits for mesne profits or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained, is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court for sufficient cause extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor.

As the decree was passed at the close of the trial without directing an inquiry as indicated by O. 20, R. 12, Civil P. C., Cls. 2 and 3, S. 11, Court-fees Act do not apply. Does Cl. 1 apply? For the application of the said clause, the following conditions must be fulfilled: (a) The suit must be one for mesne profits or for immovable property and mesne profits. No distinction is drawn between mesne profits prior to and subsequent to the institution of the suit. A suit laying claim for mesne profits subsequent to suit solely or in addition to a claim for past profits or for possession of property would be a suit within the meaning of this clause. (b) There must be a decree awarding mesne profits, that is a decree determining finally the amount of mesne profits payable so far as the Court passing the decree is concerned and capable of execution. The expression used is "profits decreed." It is general and would comprise profits accruing from date of suit. (c) The profits decreed must be in excess of the profits claimed.

All these three conditions are fulfilled in the present case. The suit is for possession of immovable property and mesne profits. There is a decree finally determining the amount of profits subsequent to the date of suit. No doubt the actual amount of mesne profits is not determined, but the rate has been determined; the amount claimable at any particular point of time is only a question of calculation. That a decree of this nature is final and capable of execution has been held by Venkatasubba Rao and Madhavan Nair JJ. in 22 M L W 347.[1] The profits claimed in the suit are certainly in excess of the profits decreed. The profits claimed were Rs. 60 being the estimated amount of past profits. What was decreed was the said sum of Rs. 60 plus future profits at the rate of Rs. 60 per annum from date of suit till delivery of possession. Therefore on the plain language of S. 11 (1) the plaintiff is bound to pay the court-fee before the decree in respect of the future profits can be executed. But it is contended that it is not competent to a Court to pass a final decree for mesne profits without an enquiry and the only decree it can pass is a preliminary decree under O. 20, R. 12, Civil P. C., and S. 11 (1) contemplates cases

1. Muthu Alagappa Chettiar v. Ahmed Ibrahim Alim Saheb, (1925) 12 A I R Mad 1276 = 90 I C 789=22 M L W 347.

only where past profits were claimed as it is only in respect thereof the amount can be claimed and court-fee is payable, having regard to S. 7, Court-fees Act and O. 7, R. 2, Civil P. C. Reliance was placed on a number of cases in support of this contention, some of which we propose to deal with. Mr. Narasaraju laid emphasis on the observations of Venkatasubba Rao Offg. C. J., as he then was, in 71 M L J 677[2] at page 680 :

> As regards future mense profits, the Court has no such option but is bound in the first instance to pass a preliminary decree.

With due respect to the learned Judge, we are not able to appreciate the force of the expression " is bound." As he himself says, the Court is not bound to pass a decree for future mesne profits, the passing of the decree being in the discretion of the Court (p. 682), but if it chooses to pass a decree, should it only be a preliminary decree ? What the Section says is that in regard to future profits the Court may direct an inquiry and in case an inquiry is directed, it shall pass a decree in accordance with the result of that inquiry. One thing is plain; jurisdiction is conferred on the Court trying the suit to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit. The determination of the said profits is an essential part of the decree in the suit and must be done by the Court which passed the decree and not by the Court which executes it. If this is the principle underlying the Section, is there anything to preclude the Court from passing the decree without directing an enquiry if the parties agree or do not object? The Section does not say that no final decree should be passed unless there had been a previous inquiry and the Court must pass a preliminary decree whether an inquiry is necessary or not. In cases where an inquiry is unnecessary, it seems to us that it would be an idle formality to pass such a decree. As pointed out by Sulaiman C. J. in A I R 1937 All 36[3] at page 39 :

> A preliminary decree becomes necessary where the exact amount has to be ascertained after examination of fresh evidence.

In that case the learned Judge observed :

> When the plaintiff made it clear that she confined her relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount was definitely ascertained and there was no occasion for framing a preliminary decree so that there may be another ascertainment of the amount due to the plaintiff,

the Court was not bound to pass a preliminary decree in the first instance. It is therefore perfectly competent to the Court, without directing an enquiry to pass a decree finally determining the amount of profits payable subsequent to the institution of the suit if it is made out that it is not necessary to make such an enquiry and it cannot be said that such a decree is not final or is incapable of execution, nor would it be in contravention of the provisions of O. 20, R. 12, Civil P. C.

We shall now proceed to deal with the other aspect of the contention that S. 11 (1) deals only with a case of past profits. The case in 15 Bom 416[4] was strongly relied on in support of this contention. It was a suit for possession and for mesne profits from the date of the suit. The Court gave a decree for possession and directed that mesne profits should be determined in execution. After the mesne profits were ascertained, a question arose whether the decree-holder should pay court-fee before he could be allowed to proceed with the execution. It was held that no court-fee need be paid. We may at once state that the case would now be entirely covered by Cl. 3 of S. 11, Court-fees Act as amended, so far as this Presidency is concerned. The learned Judges after referring to 2 All 682[5] observed thus :

> There the plaint asked for past as well as future mesne profits, and an amount was claimed and fee paid in respect of the former. If the mesne profits, past and future, be regarded in such a plaint as one entire claim for mesne profits, the language of S. 11 might perhaps apply.

Therefore so far as the present case is concerned, it would directly come within the scope of the above observations. We may state that the above observations were followed with approval in two cases, namely 33 Cal 1232[6] and 34 Cal 954.[7] A Full Bench of our High Court in 54 Mad 1[8] has taken the view that a claim for possession of land and for mesne profits

2. Kantheswaram Ekanathalingaswami Koil, In re, (1937) 24 A I R Mad 46 = 165 I C 972 = I L R (1937) Mad 284=71 M L J 677.
3. A. P. Bagchi v. Mrs. F. Morgan, (1937) 24 A I R All 36=166 I C 897.
4. Ramakrishna Bhikaji v. Bhima Bai, (1891) 15 Bom 416.
5. Chedi Lal v. Kirath Chand, (1878) 2 All 682 (F B).
6. Dwarkanath Biswas v. Debendranath Tagore, (1906) 33 Cal 1232.
7. Ijjatulla Bhuyan v. Chandra Mohan, (1907) 34 Cal 954=11 C W N 1133=6 C L J 255.
8. In re Parameswara Pattar, (1930) 17 A I R Mad 833=130 I C 742=54 Mad 1=59 M L J 469 (F B).

should be taken as one entire claim for computation of the court-fee. It purported to follow the decision of the Calcutta High Court in 8 Cal 593[9] where at page 596 Garth C. J. made the following observations :

> The Court could only give him the mesne profits from the time when he was entitled to possession, and whether he was so entitled as from the date of suit, or from a time antecedent to the date of suit, the nature of his claim must be the same.

There can therefore be no question that where a claim is for possession of immovable property and past profits or where a claim is for possession of immovable property and for past profits and future profits, and future mesne profits are decreed, a court-fee will be leviable on such profits under S. 11, Court-fees Act. A case of our High Court reported in 21 Mad 371,[10] which purported to follow 15 Bom 416,[4] was also relied on. That was a suit for possession of immovable property, past profits, and future profits. There was a decree for possession and for mesne profits coupled with a direction that mesne profits should be paid from the date of suit till delivery of possession, the amount thereof to be determined in execution. There was an appeal against the said decree and a question arose whether court-fee should be paid in respect of the direction as regards the mesne profits subsequent to the institution of the suit. The learned Judges held that no court-fee was payable. The decision was based on quite an intelligible principle because no profits had yet been ascertained and no court-fee is payable in respect of the future mesne profits until they are ascertained : *vide* 71 M L J 677.[2] But it is hardly an authority for the position that when the mesne profits have been ascertained the plaintiff need not pay the court-fee before he can execute the decree in respect thereof. It seems to us that where there is a claim for mesne profits in a suit, whether past or future, the plain language of S. 11 (1) would apply to the same if a decree is passed in respect of the future mesne profits. It is no doubt true that a claim for mesne profits subsequent to the date of suit is upon a cause of action which was not existing on the date of the suit, but nevertheless the Legislature has made an exception to the general rule by permitting a claim in respect thereof in order to avoid multiplicity of suits. As the claim in respect of future mesne profits will be upon a cause of action arising subsequent to the institution of a suit, whether a plaintiff will be entitled to get a decree in respect thereof, and if so, for any and what amount are all matters which are dependent on the decision in the suit. There is no provision made in the Court-fees Act for the computation of such a claim. But from that it does not follow that no court-fee is leviable when the claim has been determined and when the mesne profits have been ascertained. The contention which seeks to negative liability for payment of the court-fee is based on the words "fee actually paid." In the case where the suit is for possession of immovable property and past profits no difficulty arises because a fee would have been actually paid. In a case where a claim is made only for future mesne profits, no fee could have been actually paid because no fee is leviable; in such cases the fee actually paid would be nil. Therefore the "difference" within the meaning of S. 11 (1) would be the entire fee payable on the amount actually decreed. However it is unnecessary to express any final opinion as in this case the claim was for past and future profits and a fee has been actually paid.

Our answer to the reference is that the plaintiff is bound to pay the court-fee on Rs. 540 claimed by him before he can execute the decree in the suit. We acknowledge our indebtedness both to Mr. Srinivasa Aiyengar, who appeared for the Government Pleader and to Mr. Narasaraju who appeared as amicus curiæ for the assistance they have rendered to us.

C.R.K./D.S. *Answer accordingly.*

9. Kishori Lal Roy v. Sharut Chunder Mozumdar, (1882) 8 Cal 593=10 C L R 359 (F B).
10. Maiden v. Janakiramayya, (1898) 21 Mad 371.

A. I. R. 1938 Madras 730

HORWILL J.

Saravana Mudaliar and others — Appellants.

v.

Singaravelu Mudaliar and others — Respondents.

Appeal No. 67 of 1938, Decided on 16th February 1938, against decree of District Court, East Tanjore, D/- 10th January 1938.

Receiver—Suit for partition—On considering facts, order appointing receiver to harvest existing crops held justified.

In a suit for partition the plaintiff was entitled to as much as a half of the property ; and the

quarrels in the family and the conduct of the defendant had made it impossible for him in the past during the pendency of the suit to get his fair share of the harvest ; and it was probable that in spite of any precautions taken by the Court, the plaintiff would not be able to secure his fair share in the income from the property so long as it remained in the hands of the defendant:

Held that under the circumstances an order appointing receiver to harvest existing crops was justified though in general a receiver will not be appointed merely because a member of the family files a suit for partition. [P 731 C 1]

K. Bhashyam Iyengar and K. Venkataraman — *for Appellants.*

K. Rajah Iyer and K. S. Desikan — *for Respondents.*

Judgment. — This is an appeal against the order of the District Judge of East Tanjore appointing a receiver. In general, a receiver will not be appointed merely because a member of a family files a suit for partition, but there are certain circumstances existing which justify the order passed by the lower Court. The plaintiff is entitled to as much as a half of the property ; and the quarrels in the family and the conduct of defendant 1 has made it impossible for him in the past during the pendency of the suit to get his fair share of the harvest; and it seems probable that in spite of any precautions taken by the Court, the plaintiff will not be able to secure his fair share in the income from the property so long as it remained in the hands of defendant 1. The plaintiff is a minor who has to depend upon his mother's relatives for the safeguarding of his interests. The lands are situated only two miles from Negapatam, and the receiver seems to have been appointed only to harvest the existing crops. A part of that duty he has already performed. It is hoped that the suit will be disposed of before further agricultural operations take place: and if not the trial Court will doubtless take account of the situation from time to time in considering what course should be adopted in future. The appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 731

VARADACHARIAR AND HORWILL JJ.

Swaminathan Chettiar — Appellant.

v.

V. E. N. K. R. M. V. R. M. Somasundaram Chettiar and another — Respondents.

Appeal No. 80 of 1936, Decided on 11th January 1938, against decree of Sub.Judge, Ramnad at Madura, in O. S. No. 43 of 1933.

(a) Jurisdiction — Non-resident foreigner — Cause of action arising in British India—British Indian Court has jurisdiction in personam.

Even as against a non-resident foreigner the Courts in British India have jurisdiction in personam in suits based upon a cause of action arising in British India : *17 Bom 662; 26 Mad 544 and 25 Bom 528, Rel. on.* [P 732 C 1]

(b) Civil P. C. (1908), S. 47—Party to suit.

Even a person who is sued as a representative is a party to the suit within the meaning of Sec. 47 when he is claiming that certain properties belonging to him in his personal right are not to be attached in execution of a decree obtained against him as legal representative. [P 733 C 1]

(c) Jurisdiction—Money under rateable distribution withdrawn in British India by father as member of firm—Suit to reopen rateable distribution—Son who was non-resident foreigner but a partner in firm impleaded as defendant —British Indian Court held had jurisdiction to deal with him.

A sum under a rateable distribution was withdrawn in British India by a member of a firm in which his son, a non-resident foreigner, was a partner. In a suit to reopen the rateable distribution the son was impleaded as a defendant :

Held that as the son was a partner his liability for refund of the money withdrawn by his father was a personal liability and not merely the liability of a son or legal representative. Hence the British Indian Court had jurisdiction to deal with him. [P 733 C 2]

(d) Civil P. C. (1908), S. 20 (b)—Scope.

There is no reason to read Clause (b) of S. 20 as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. It makes no difference whether defendants are residents of British India though outside the local limits of the Court's jurisdiction or they are persons residing outside British India : *17 Bom 662, Rel. on.* [P 733 C 2]

T. R. Venkatarama Sastry, T. V. Rajagopalan and T. R. Srinivasa Iyer — *for Appellant.*

M. Patanjali Sastry and T. K. Sundararaman — *for Respondents.*

Varadachariar J.—This appeal arises out of a suit instituted by the appellant in the Sub-Court of Ramnad, for a declaration that the decree obtained against him by the present defendants in O. S. No. 57 of 1922 on the file of that Court was void and inoperative and for an injunction restraining these defendants from executing that decree either in British India or elsewhere. The declaration was sought substantially on the ground that the plaintiff was a non-resident foreigner domiciled in the Pudukottah State and that the Ramnad Sub-Court had no jurisdiction to pass a decree against him in an action in personam. The lower Court dismissed the suit. Hence this appeal by the plaintiff. O. S. No. 57 of 1922 was a suit instituted by

the present defendants, under the provisions of S. 73 (2), Civil P. C. seeking to reopen a rateable distribution ordered by the Sub-Court, Tanjore, to the exclusion of these defendants who claimed to hold a decree against the same judgment-debtor. The present plaintiff's father Chidambara Chetti was one of the creditors who on the strength of a decree obtained by him in the Chief Court at Rangoon claimed rateable distribution in the Tanjore Court and drew a sum of Rs. 5300 odd in April 1914 from the Tanjore Court by way of rateable distribution. Against that order the present defendants had filed a civil revision petition in this Court which happened to be pending for a period of about seven years and was ultimately dismissed ; and it was after the dismissal of the revision petition that the present defendants instituted O. S. No. 57 of 1922 for recovery of their share in the assets which according to their contention had been wrongly distributed to the various creditors who were impleaded as defendants in O. S. No. 57 of 1922. The circumstances which made it possible for the present plaintiff to impeach the jurisdiction of the Ramnad Sub-Court as against him were that his father who drew the money in 1914 died in 1918 while the civil revision petition was still pending in this Court and that the plaintiff who was impleaded as a defendant in O. S. No. 57 of 1922 did not himself draw the money in question.

It has not been disputed that the plaintiff is a non-resident foreigner and has not by any act of his own submitted to the jurisdiction of the Ramnad Sub-Court. As against the plaintiff's contention, it has been urged by the defendants that the cause of action on which O. S. No. 57 of 1922 was founded, viz. the withdrawal of the money by way of rateable distribution undoubtedly arose in British India and it has been contended that it is now well settled that even as against a non-resident foreigner the Courts in British India have jurisdiction in personam in suits based upon a cause of action arising in British India: *see* 17 Bom 662[1] referred to with approval by the Privy Council in 26 Mad 544;[2] see also 25 Bom 528.[3] Whatever the validity of a decree passed in such circumstances may be, when such a decree is impugned in a foreign Court, it is admitted by the learned counsel for the appellant that in the present suit which was also instituted in a British Indian Court we can only consider whether according to the municipal law in force in British India the Ramnad Sub-Court had jurisdiction to decree O. S. No. 57 of 1922 against the present appellant.

Learned counsel for the appellant seeks to answer the defendants' argument by drawing a distinction between his client's liability as the son or legal representative of his father and his client's personal liability and he contends that the Ramnad Sub-Court had no jurisdiction to pass a personal decree against his client as it has done in O. S. No. 57 of 1922. It seems necessary in dealing with this contention to emphasize the distinction between the question of the existence of jurisdiction and that of the correctness or otherwise of the decree passed in the suit. It is admitted that if the Court had jurisdiction over the present plaintiff in O. S. No. 57 of 1922, it is not open to us in this suit to examine the correctness or otherwise of the decree passed in that suit. In this view the learned counsel for the appellant rightly refrained from pressing before us many of the issues raised in the lower Court in the present case which really bear on the merits of the decision in O. S. No. 57 of 1922 and are not strictly relevant to the question of jurisdiction. Bearing this distinction in mind, it is difficult to accede to the contention urged by the learned counsel for the appellant. The only cause of action relied on in O. S. No. 57 of 1922 was the withdrawal of money from the Court in British India under the rateable distribution order. It therefore cannot be held that the suit was not based on a cause of action arising in British India. Assuming for the moment that the proper decision for the Court to have given in O. S. No. 57 of 1922 as against the present plaintiff would only have been a decree limited to the joint family properties or the assets of the father Chidambara in the hands of the appellants, this is obviously a question relating to the correctness of the decree and not a question of jurisdiction.

Learned counsel suggested to us at one stage of his argument that the plaintiff's capacity in his character as the legal representative or son of his father is so wholly

1. Girdhar Damodar v. Kassigar Hiragar, (1893) 17 Bom 662.
2. Annamalai Chetty v. Murugasa Chetty, (1903) 26 Mad 544 = 30 I A 220 = 8 Sar 523 = 13 M L J 287 (P C).
3. Rambhat v. Shankar Baswant, (1901) 25 Bom 528 = 3 Bom L R 82.

different from his individual capacity that we should hold that though in his character as his father's son or representative he might have been properly impleaded in O. S. No. 57 of 1922, he must be dealt with as not a party at all in his individual capacity and he invoked the analogy of the position of a trustee in relation to his personal estate and to the trust estate respectively. But when we drew his attention to the line of cases in this country under S. 47, Civil P. C., holding that even a person who is sued as a representative is a party to the suit within the meaning of S. 47 when he is claiming that certain properties belonging to him in his personal right are not to be attached in execution of a decree obtained against him as legal representative, learned counsel admitted that the analogy of a trustee was not a true analogy. We are therefore unable to accept the appellant's contention that so far as he was concerned O. S. No 57 of 1922 was not founded on a cause of action which arose in British India.

There are one or two other grounds advanced in the Court below and also suggested before us in support of the defendant's contention that the Ramnad Sub-Court was competent to deal with O. S. No. 57 of 1922 against the present plaintiff. In the view we have above taken it will be sufficient to deal with these other contentions briefly. One of them is that the plaintiff was one of the partners in the T. A. firm or family business carried on by his father Chidambara and that the plaintiff's liability for refund of the money drawn by Chidambara under the rateable distribution order was therefore a personal liability and not merely the liability of a son or legal representative. There is certainly some evidence to support the contention that in relation to the T. A. firm the plaintiff was more than a mere joint family member interested in the business. Admittedly in 1916 the plaintiff was adjudicated insolvent along with his father in respect of the debts due by the T. A. firm. This could only have been on the footing that he was personally liable for those debts as a partner and his liability was not merely that of a member of a joint Hindu family. At one stage, a doubt was raised whether the plaintiff had attained majority at all in 1914 so as to impose upon him a personal liability to refund the money withdrawn by his father under the rateable distribution; but in view of the affidavit filed by him during the insolvency proceedings we are unable to accept the appellant's suggestion that he had not attained majority in 1914. If therefore the plaintiff's father should be held to have withdrawn the money under the rateable distribution order as one of the members of the firm in which the plaintiff was also a partner, the cause of action was one which accrued both against the plaintiff and his father and in that sense O. S. No. 57 of 1922 was as against the present plaintiff a suit founded on a cause of a action that arose in British India.

Alternatively, learned counsel for the respondents contended that even if that suit was not as against this plaintiff founded on a cause of action that arose in British India the Court had full jurisdiction in that suit by reason of the provisions of S. 20 (b), Civil P. C. As already stated, that suit was instituted against a number of defendants who had obtained rateable distribution under the same order and as some of the defendants in that suit (including the present plaintiff) were not resident within the limits of the territorial jurisdiction of the Ramnad Court, leave was obtained under S. 20 (b) of the Code to implead them in that suit. There can be no doubt that as against most of the defendants to that suit that suit was properly instituted in the Ramnad Court. In these circumstances, learned counsel for the respondents contends that if in a suit of that kind the Court grants leave to include defendants not resident within the limits of its jurisdiction, the suit must be deemed to have been properly instituted even as against the latter defendants and that it makes no difference for this purpose whether those defendants are residents of British India though outside the local limits of the Court's jurisdiction or they are persons residing outside British India. This contention receives some support from the reasoning of Sargent C. J. in 17 Bom 662.[1] If in respect of some parts of S. 20, the Code is to be construed as giving jurisdiction to British Indian Courts even in actions in personam as against non-resident foreigners, there is no reason to read Cl. (b) of S. 20 as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. The analogy of O. 11, Rule 1 (g) of the English Supreme Court Rules relating to service outside jurisdiction also supports the respondent's contention. It is obvious

that that clause of the English Rule refers to non-resident foreigners. The considerations justifying the recognition of jurisdiction in the English Courts even as against non-resident foreigners in cases falling under that clause are indicated in the judgment of Wills J. in (1888) 21 Q B D 330[4] at p. 334. From the decision in (1903) P 18,[5] it is clear that in cases falling under that clause it is immaterial that even the cause of action did not arise in England. The danger that by obtaining leave a plaintiff may bring before the English or British Indian Court a person against whom the domestic Court could not reasonably exercise jurisdiction is sufficiently guarded against by the provision insisting upon the leave of the Court being obtained in such cases; and, as we have already indicated, O. S. No. 57 of 1922 was instituted with the leave of the Court. Any argument as to whether the leave was or was not properly granted in the particular circumstances is not one which can be advanced in a separate suit attacking the validity of the decree passed in that suit. We accordingly agree with the decision of the learned Subordinate Judge that the contention that as against the present appellant the decree in O. S. No. 57 of 1922 is void for want of jurisdiction fails.

Learned counsel for the appellant suggested another argument based on the insolvency proceeding against the plaintiff and his father. It appears that the adjudication was annulled as the result of a scheme of composition. Relying on that circumstance, the learned counsel contended that the present claim should be regarded as not enforceable by a regular suit and must have been proved in the insolvency itself as a debt. He did not however seriously insist on that contention when it was pointed out to him that before the annulment of that insolvency the present claim could not have been regarded as a debt provable in the insolvency. As stated already, Chidambara had withdrawn the money under an order of Court which denied the present defendants' claim to rateable distribution. There was at that stage no relationship of debtor and creditor between Chidambara and the present defendants nor could it be said that any liability had come into existence till in O. S. No. 57 of 1922 the Court made a decree on the ground that the distribution made under the rateable distribution order was improper. There is accordingly no force in the contention based upon the insolvency proceedings. The appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

4. Massey v. Heynes, (1888) 21 Q B D 330=57 L J Q B 521=36 W R 834.
5. The Duc D' Aumale, (1903) P 18.

A. I. R. 1938 Madras 734

LEACH C. J. AND LAKSHMANA RAO J.

Unde Rajaha Raje Captain Sir Rajah Velugoti Sri Govinda Krishna Yachendra Bahadur and others — Appellants.

v.

Secretary of State and another — Respondents.

Appeal No. 205 of 1932, Decided on 25th January 1938, against decree of Sub-Judge, Nellore, in O. S. No. 70 of 1927.

Grant—Construction—Right to take minerals—Grant to pious Mahomedans by way of shrotriem—Jodi reserved—Grantee to enjoy income of land — Grant held did not include right to take minerals.

A grant of a village was made to pious Mahomedans by way of shrotriem. Jodi was reserved and the assessment of land revenue was leased entirely on the value as agricultural land. The grantee was to enjoy the income of the village. For over a hundred years from the date of the grant the land was used entirely for the purpose of producing crops and afterwards for some years mining was undertaken :

Held that the onus of proving that the original grant included the right to take minerals was on the grantee : *A I R 1921 P C 1 and A I R 1931 P C 89, Rel. on ; A I R 1925 Bom 12, Disting.* [P 737 C 1]

Held further that in the circumstances of the grant, original grant did not include the right to take minerals : [P 738 C 2]

Held also that the rule that in respect of ancient grant, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from earlier period and so to prove contemporaneous usage and enjoyment at the date of the deed had no application to a case where for over a hundred years from the date of the grant the land was used entirely for the purpose of producing crops and mining was undertaken in recent years: *7 H L C 650, Disting. ; A I R 1931 P C 89, Rel. on.* [P 738 C 1]

Advocate-General and P. S. Raghavarama Sastri — *for Appellants.*

Govt. Pleader — *for Respondents.*

Leach C. J. — The appellants were the plaintiffs in the Court below. They sued for a declaration of title to the mines and minerals in the lands comprising the village of Kalichedu, Nellore District, and for a decree for Rs. 22,992.6-6, the amount

which they claimed had been unlawfully collected by Government from defendant 2, their lessee, by way of royalty. The learned trial Judge found against the appellants on all the issues and dismissed the suit with costs. Plaintiff 1 acquired the lands described in the plaint in parcels from 1879 to 1884. Having become the owner of the lands he created a trust of them for the benefit of the Poor House at Venkatagiri and appointed himself and his son, appellant 2, the trustees thereof. According to the plaint the original grant of these lands was issued in 1758. This has not actually been proved, but it is common ground that the grant was issued in the 18th century and that it was a shrotriem grant. The question which arises in this appeal is whether the right to take minerals was included in the grant. The appellants maintain that the right to the minerals was conveyed to the original grantee and in the first instance rely on what they claim to be a certified copy of a true copy of the original grant, but, as the learned trial Judge found that this document (Ex. Q) had been fabricated, they also say that the admitted documents and admitted facts are sufficient to prove their case. For reasons which I shall in due course state, we are of opinion that the learned trial Judge was right in holding Ex. Q to be a false document. We also consider that the other evidence does not support the appellants' case.

In order to appreciate the position I think it will be better if I set out first the events of recent years. Respondent 2 was granted a lease of the lands in suit by the appellants on 14th May 1923. Having obtained this lease he formed the Kalichedu Mining Company in order to extract mica; until the year 1900, the lands were used merely for agricultural purposes, but mica having been discovered on the property extraction was then commenced and continued without question until the month of February 1924. The Mica Inspector of the Government of Madras then raised the question of the right of the grantee to take minerals and referred the matter to the Collector. As the result, on 19th September 1924, the Collector wrote to the Kalichedu Mining Company stating that it had been brought to his knowledge that the Company was carrying on mica mining operations and giving notice that this should not be done without previous payment of royalty to the Government. On 30th September 1924 the Company replied stating that there was no custom to pay royalty and asserting that the Company was not liable to pay. On 4th October 1924 the Collector wrote re-asserting the Government's claims to the mineral rights in the lands. This was followed by a further letter of protest from the Company dated 24th October 1924. On 1st November 1924, the Collector wrote stating that royalty must be paid and intimating that the matter could not be kept pending indefinitely. On 12th November 1924 respondent 2 filed an application in the Collector's Office for copies of certain documents. The copies asked for included copies of kyfiets submitted by the shrotriemdars of Kalichedu in 1842-43, gudicat accounts, the sanad granted by Richard Dighton, who was the Collector of the Nellore District in 1790-92 and the register containing "the grant of the said shrotriem by Mr. Travers", who was the Collector from 1802 to 1806. These documents were supposed to be on the Collector's file. On 21st November 1924, Ex. Q was received by respondent 2, apparently in response to the application which it had filed on 12th November 1924. On 29th November 1924 the Company wrote to the Collector enclosing Ex. Q and described it as being a certified copy of the original grant of the shrotriem dated 1758. It will be convenient at this stage to give the terms of this document :

Amulam Hal Istukabal (greetings to) the *Desamukhani Va Desapandyani, Pastala Karaniyani, Va, Rayani & Kulkarniyani* (karnam)—In Rapur Pargana Sarwepalli Sirkar of Karnatakam Taluk, the village of Kalichedu pertaining to (illegible) Hyderabad Chidananda Mutte in the said Amale and Pergana has been granted with the tanks, forests, gardens and water sources, as shrotriem to Gulam Imam, Abdur Ghani, Aminuddin and Munariddin for a beriz of 130 (one hundred and thirty) pagodas, from Fasli 1168. It is ordered that the said beriz should be paid in the sirkar treasury and that they should enjoy the hidden treasures therein and all kinds of incomes (therefrom) from son to grandson and so on in succession—Jalahat 23.

It will be observed that this document purports to convey to the grantees an absolute right to the minerals in the land and if it were a genuine document there would be no doubt that the appellants would be entitled to the declaration which they seek. On receipt of this document, the Collector caused an inquiry to be made into its origin and the document itself was submitted to Mr. Brewester who was then the Government Examiner of Questioned Documents. After Brewester's opinion had been obtained the Collector intimated to the

Company that the claim for exemption from royalty could not be accepted and that the royalty must be paid before any mica was removed. This decision led to the institution of the present suit. In considering the question of the genuineness of Ex. Q and in order to decide whether the appellants are entitled to the minerals apart from this document, it is necessary to refer to Exs. B, C, C-1, J, K and G, the genuineness of which is admitted. Ex. B is a letter dated 29th November 1790 written by the Collector (Richard Dighton) to Gulam Imam, the then shrotriemdar of Kalichedu, and is in the following terms :

As stated in the shrotriem list in the sirkar, you should pay the beriz of 130 (one hundred and thirty pagodas) as per instalments into the treasury at Nellore in respect of the village of Kalichedu which is of our shrotriem in Rapur Pargana, obtain a receipt and happily enjoy the income derived from that village. The kapus should be paid as per mamul and kept happy.

The original of this document is in Telugu and the word "income" is a translation of the Sanscrit word "phalam" which means "fruit" "crop" or "produce". The next document in order of date is Ex. C-1. The date is 29th October 1835 and the document comprises answers to a questionnaire prepared by the acting Tahsildar at the time and submitted to the shrotriemdar. I will quote from it the following questions and answers :

Q. — How many years ago was this shrotriem granted ?

A. — About 100 years ago.

Q. — To whom was this shrotriem granted ?

A. — In the Company's administration it was granted to Gulam Imam Sahib, Aminuddin Sahib, Muniuddin Sahib and (illegible) others.

Exhibit C is a statement, dated 5th November 1843, submitted by the shrotriemdar and others to the Tahsildar. They had been called upon to produce the title deeds and they explained that they had been sent to the Collector (J. B. Travers) in 1801 and had not been received back. Ex. J. comprises extracts from the list of sanads relating to various shrotriemdars prepared in the time of Richard Dighton. These extracts refer to three grants in the Parsi (Persian) language made in Fasli 1170, which corresponds to 1760, one grant in 1179 (1769) and another 1187 (1777). The two last mentioned grants were also in Persian. Ex. K is the shrotriem register of 1802 and according to the entire entries therein the original grant of the Kalichedu village was made on 28th August 1758. There is however no evidence showing the source of this information. Ex. G is an extract from the register of sanads, prepared at the time of the Inam Commission (1861) and in this register the date of the original grant is also given as 28th August 1758. In the last column of Ex. G it is also mentioned that the grants were in Persian.

I now come to the most important of the admitted exhibits, Ex. E, which is the Inam Register itself. We have here a full description of the lands granted to the appellants' predecessors-in-title. They are described as consisting of 1647.41 acres of dry land, 112.50 acres of wet land, 9.37 acres of garden land and 636.77 acres of poromboke land. Column 1 of the register was for entries showing by whom the land was granted and in what year, and column 12 for further particulars with regard to the claim and the documents held in support of it. In this case separate entries have not been made but under these two columns we find a statement beginning "Account of fasli 1211 (1801). Five Persian parwanas herewith forwarded," and concluding with the assertion that the Deputy Collector proposed to adopt the figure of Rs. 946 as the value of the shrotriem. Column 21 contains the Deputy Collector's recommendation and the entry here is of much importance. I will quote it in full :

The shrotriem being of an older date than 50 years can be confirmed. The shrotriemdars are willing to enfranchise. Quit rent 1/8. Rs. 597 inclusive of jodi. In Mr. Traver's account of fasli 1211 this shrotriem was entered as a grant only for the lives of the persons in column 14. All of them died about 30 years ago and the shrotriem continues to be uninterruptedly enjoyed by the persons in column 16. Mr. Travers seems to have entered so because the word "hereditary" is not mentioned in the parwanas. Under the present rules the title is perfectly valid as 50 years' undisturbed possession is proved.

It may be observed that there is not a word in this register about minerals and the assessment of land revenue was based entirely on the value as agricultural land. We are of the opinion that the entries in Ex. B and the entries in the Inam Register prove that there was no grant of minerals. The wording in Ex. B is inconsistent with such a grant and it is to be remembered that Ex. B was written by Richard Dighton, the Collector of the District in the year 1790. The entries in column 21 of Ex. E show that in the opinion of J. B. Travers, the Collector in 1801, the original grant was one of life-interest only and this opinion was based on the wording of the original shrotriem documents which were

placed before him. This is to be gathered from Ex. C. The Government agreed to treat the grant as being a hereditary grant because the land had been occupied by the grantees and their successors for over 50 years but this action on the part of the Government could not in any way alter the nature of the original grant. That a document like Ex. Q could not have been in existence at the time when the Inam register was prepared, is shown from the fact that the entries in the register are entirely inconsistent with Ex. Q and this document is supposed to come from the Collector's file.

This is enough in itself to demonstrate the fraudulent nature of Ex. Q; but the matter does not rest there. As I have already pointed out, the original grants were in Persian, while Ex. Q is in Telugu. The person who was responsible for the fabrication of Ex. Q must either have overlooked this fact or have thought that it would not be detected. It would, of course, be a far more difficult matter to forge a document in Persian in this province than in Telugu. That the document of Ex. Q is said to be a copy could not have been on the file of the Collector when he wrote to the lessee on 19th September 1924 calling for the payment of royalty. This action was taken as the result of the question being raised by the Mica Inspector and the Collector having inquired into the matter. Therefore the conclusion that this document was introduced in the Collector's file some time between 19th September 1924 and 12th November 1924 is irresistible. Mr. Scott, the present Government Examiner of Questioned Documents has given it as his opinion that the signature on Ex. Q had been traced from Ex. L and we have no doubt that Mr. Scott's conclusion is correct. In addition to the reasons which he himself has given the evidence shows that a document of this nature could not have been in existence before 1924. We have therefore no hesitation in holding that the learned trial Judge came to the correct conclusion when he held that Ex. Q had been fabricated and fraudulently placed in the Collector's file.

I will now turn to the argument of the learned Advocate-General that even if Ex. Q is eliminated the other evidence shows that the judgment of the lower Court is erroneous. Here it must be borne in mind that the burden of proving that the original grant did pass the right to the minerals is upon the appellants: 44 Mad 421[1] and 58 Cal 1187[2] at page 1195. The learned Advocate-General has placed great reliance on the decision in 49 Bom 99.[3] In that case there was a grant to two Parsi shipbuilders of land within the City of Bombay. The grant was confirmed by a document dated 11th September 1798 which stated:

> We hereby ratify and confirm the said grant with a due proportion of Foras and Perteneas to their family and descendants.

The Court held that this was sufficient to give to the grantees a right to the minerals, because in the grant no kind of right was reserved to the Government. Under these circumstances the Court thought that even in the absence of the words expressly referring to the right to the minerals all the rights of the Crown were conveyed. In the present case however, we have not the original grant before us and later documents indicate that the grant was merely of surface rights.

In this connexion I will refer to the decision of the Privy Council in 44 Mad 421.[1] There the grant which was dated 1750 stated that its purpose was that the grantee having appropriated to his own use the produce of the seasons each year might pray for the prosperity of the Empire and should pay a fixed yearly sum to the sirkar. It was held that this did not operate to pass to the grantee the right to the quarries and minerals on the land. The Government had in fact recognized this land as being freehold at the time of the Inam Settlement but their Lordships held that this fact did not in any way add to the terms of the grant which determined the question. At page 429 of the report Sir Lawrence Jenkins who delivered the judgment observes:

> Can then the plaintiff successfully claim that under these terms the full right to the quarries and minerals passed to them? Their Lordships think not. The grant was of a village in inam, and the rules of English law as to real property in England can afford no guidance as to what passed. A grant of this description may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of each case. There is nothing here to

1. Secy. of State v. Srinivasachariar, (1921) 8 A I R P C 1=60 I C 230=44 Mad 421=48 I A 56 (P C).
2. Gobinda Narayan Singh v. Shyamlal Singh, (1931) 18 A I R P C 89=131 I C 753=58 Cal 1187=58 I A 125 (P C).
3. Secy. of State v. Shantaram Narayan, (1925) 12 A I R Bom 12=84 I C 397=49 Bom 99=26 Bom L R 847.

suggest that the original grant contained words somtimes employed in Indian documents, where it is the intention that the inam grant of a village should create such an interest in land as would vest the minerals in the grantee. Nor does the language suggest that any further benefit to the grantee was contemplated or intended than such as might be derived from the ordinary use of the land for the purposes of cultivation. It was not a complete transfer for value of all that was in the grantor; the interest bestowed was merely something carved out of his larger interest which still remained in him as a reversion; the grantor was the ruling power, the grantee, a Brahmin whose assiduous prayers were engaged; a jodi was reserved and the purpose of the grant was to ensure the subsistence of the grantee by the appropriation to his use of 'the produce of the seasons each year'.

In the case now before us a jodi was reserved, the grant was a grant to pious Mahomedans by way of shrotriem, and Exs. B and E certainly point to the grant being of a limited nature. The learned Advocate-General has pressed upon us the following passage from the judgment of Lord Wensleydale in 7 H L C 650 at p. 684 =11 E R 259 at page 272[4]:

The construction of a deed is always for the Court: but in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor. In deeds, as well as wills, the state of the subject at the time of the execution may always be inquired into; and as with respect to ancient deeds the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed.

The suggestion is that because mica has been worked from this land from 1900 we should presume from this usage that the original grant permitted this. The principle referred to by Lord Wensleydale has no application to a case where for over a hundred years from the date of the grant the land was used entirely for the purpose of producing crops and mining only undertaken in recent years. That the principle can have no application is shown from the decision of the Judicial Committee in 58 Cal 1187[2] where it was said:

If the 'conduct' relied upon were even approximately contemporaneous with the severance of Achra from the parent estate and so belonged to a period when it might be assumed that both parties were well acquainted with their rights, it might be of some evidentiary value; but coming as it does, after a lapse of at least a century and a half, when no one has any very certain idea of what the real rights are, or how they originated, their Lordships think that it would be most unsafe to hold, merely upon the strength of such uncertain material as this, that the respondents had proved affirmatively their title to the subsoil rights.

In this case we have in addition definite indications from authentic documents that the original grant did not pass the rights to the minerals. Another case relied upon by the learned Advocate-General is that in 37 Mad 322.[5] This case was quoted to us because at p. 340 of the report Sankaran Nair J. makes this statement:

In the deeds of conveyances before the days of British Rule and in conveyances executed even afterwards, at least in the early years of the century, by mirasdars and landed proprietors like zamindars, inamdars, etc., which have come before the Courts, it is generally stated that the lands are conveyed with the eight incidents of ownership.

One of the eight incidents of ownership is the right to minerals. The fact that at one time it was usual to convey the minerals rights when lands were granted does not shift the burden of proving that in this particular case the right to the minerals was granted to the original grantee. The learned Advocate-General did not contend that there was any presumption in favour of his clients, nor could he. The question must depend upon the terms of the original grant. Here the evidence points the other way. We consider that the case was rightly decided by the trial Court and the appeal must consequently be dismissed with costs in favour of respondent 1.

C.R.K./D.S. *Appeal dismissed.*

4. Waterpark v. Fennell, (1859) 7 H L C 650 (684)=5 Jur (N S) 1135=7 W R 634=115 R R 317=11 E R 259 (272).

5. Secy. of State v. Janakirammayya, (1914) 1 A I R Mad 534=18 I C 770=37 Mad 322=24 M L J 365.

A. I. R. 1938 Madras 738

HORWILL J.

M. Irulandi Servai and others — Petitioners.

v.

V. R. A. Veerappa Chettiar — Respondent.

Civil Misc. Petn. No. 5363 of 1937, Decided on 22nd February 1938, to issue a writ and to quash proceedings of Collector, Ramnad, D/. 22nd November 1937.

Madras Estates Land Act (1 of 1908), S. 74 —S. 74 was not intended to settle disputes regarding validity of adoption by landlord or claims of rival landlords *(Obiter)*.

Section 74 was not intended to settle disputes regarding the validity of an adoption made by a landlord or the claims of rival landlords It was intended to enable the Collector to ascertain under certain circumstances what is quantity or value of the crops raised. [P 739 C 1]

Where therefore two parties make an application under S. 74 to a Deputy Collector for the settlement of such disputes, the proper order for him to pass would be to dismiss the application and refer the parties to a Civil Court. And when the Deputy Collector settles the dispute under S. 75 (2), the jurisdiction of the District Collector in revision would be ousted; and subject to a possible appeal to the District Court the order of the Deputy Collector is final. [P 739 C 1, 2]

K. V. Sesha Ayyangar and N. S. Mani—*for Petitioners.*

V. Ramaswamy Aiyar—*for Respondent.*

Order.—The respondent to this application adopted a son about seven years ago and the validity of that adoption has been in dispute ever since; and I understand that litigation is pending in several Courts in which the validity of the adoption is questioned. In the year 1936.37 certain ryots of respondent 1 paid rent to the adopted son and respondent 1 thereupon filed an application under S. 74, Madras Estates Land Act for the appointment of an appraiser to estimate the amount of crop payable by the ryots to him. The Tahsildar was appointed; and the ryots appeared before him and said that they had paid rent to the adopted son as they had always done in the past and that nothing more was due from them. The Tahsildar made a report to this effect; and the Deputy Collector, after recording evidence, held that the ryots had paid rent to the adopted son as they had always done in the past and that nothing further was due from them. He therefore dismissed the application. The District Collector, purporting to act under S. 205 of the Act, revised the order of the Deputy Collector and ordered a fresh inquiry. This application has now been filed by the ryots, contending that the order of the Deputy Collector was passed under S. 75 (8) (b) of the Act and that therefore the jurisdiction of the Collector was ousted, because an appeal lies to the District Court under sub.s. 8 (e).

There can be little doubt from a reading of S. 74 that it was not intended to settle disputes regarding the validity of an adoption or the claims of rival landlords. It was intended to enable the Collector to ascertain under certain circumstances what is the quantity or value of crops raised. It would therefore seem that the proper order of the Deputy Collector would be to have dismissed the application under S. 74 and referred the parties to a Civil Court; but it is not necessary in this application for me to definitely hold that such an application by the respondent did not lie. If an application under S. 74 did lie, then the Deputy Collector could only settle the disputes between the parties under S. 75 (2), on the ground that the ryots have alleged that no rent was payable. His decision would then be under S. 75 (8) (b), from the decision on which an appeal would lie to the District Court; and the jurisdiction of the District Collector in revision would be ousted. In any case therefore subject to a possible appeal to the District Court, the order of the Deputy Collector was final. This petition is therefore allowed with costs (pleader's fee Rs. 35), and the order of the District Collector set aside (Memo of costs will follow.)

C.R.K./R.M. *Petition allowed.*

---

* A. I. R. 1938 Madras 739

LEACH C. J. AND LAKSHMANA RAO J.

Nanduri Durga Mallikarjuna Vara Prasada Rao and another —

Appellants.

v.

Kadiyala Venkataratnam and others—

Respondents.

Appeal No. 223 of 1933, Decided on 18th January 1938, against decree of Sub-Judge, Bezwada, in O. S. No. 32 of 1932.

*** Hindu Law — Manager of joint family entering into money lending transaction — Suit to recover money can be filed by him in his own name.**

Managers of Hindu family come within S. 230, Contract Act : *7 Cal 739 and 27 All 361, Rel. on.* [P 740 C 2]

Where a person who is the manager of the family money lending business as well as manager of the family enters into a money lending transaction, he is entitled to sue to recover it in his own name without stating in the plaint that he is suing to recover on behalf of the family : *32 Mad 284, held overruled by 33 All 272 (P C) ; Case law referred.* [P 741 C 1]

V. Suryanarayana for P. Satyanarayana Rao — *for Appellants.*

A. Lakshmayya and V. Govindarajachari — *for Respondents.*

Leach C. J. — The plaintiff in the suit out of which this appeal arises was one Kadiala Venkataratnam, who is now dead and is represented by his widow, respondent 2 and his younger brother respondent 3. The suit was instituted in the Court of the Subordinate Judge of Bezwada to recover from the appellant and his father a sum of Rs. 7529.9.0 representing moneys which the plaintiff said he had paid to the

creditors of the appellant's father. The suit was decreed. The plaintiff's case was that the appellant's father was indebted to two Marwaris, one of the name of Chunnilal Venichand to whom he owed Rs. 2500, and the other of the name of Sankarlal Rupchand to whom he owed Rs. 2000. These loans had been advanced on promissory notes, Exs. A and C. The interest due brought the total figure to Rs. 7529-9-0. It was at the request of the appellant's father that he paid off the Marwaris, and having discharged the debts payment was acknowledged by endorsements on the instruments. The money which the plaintiff had advanced was money belonging to the joint family composed of himself and respondent 3. The plaintiff did not sue as the manager of the family but brought the suit in his own name. The first point which has been taken in appeal is that inasmuch as he did not sue as the manager of the family the action cannot be maintained. This objection was not taken in the written statement, but was taken after the examination of the plaintiff, which disclosed that the money advanced was joint family money. The question was dealt with by the learned trial Judge and decided against the appellant.

The question of the right of a manager of a joint Hindu family to sue in his own name in respect of a contract entered into by him in his own name was considered by the Judicial Committee in 33 All 272.[1] In that case, the plaintiffs had sued as the managers of a business belonging to their joint family. The Allahabad High Court held that the suit as framed did not lie: 29 All 311.[2] The Court considered that the plaintiffs ought to have added as parties all the other members of the joint family. This decision was reversed by the Privy Council. In the judgment which was delivered by Lord Robson appears this passage:

> Is there any principle of law, or any custom applicable to a case like this, according to which the managing members of a Hindu joint family, entrusted with the management of the business must be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names? The defendant is, of course, entitled to insist on all the persons with whom he expressly contracted being made parties to the suit, and that was done in the action as originally framed in this case.

In 18 Mad 33[3] this Court had expressed the view that a manager could not sue without joining all those interested with him and the Judicial Committee referred to this decision in the course of their judgment in 33 All 272.[1] While pointing out that the case in 18 Mad 33[3] might be supported on the ground that the single plaintiff in that case was not shown to be the managing member of the family or to be the only partner of the business with which the litigation was concerned, their Lordships observed that the proposition that the manager could not sue without joining all those interested with him was going too far. Their Lordships then went on to hold that the original plaintiffs in the case before them were entitled, as the sole managers of the family business, to make in their own names the contracts which gave rise to the claim, and that they properly sued on such contracts without joining the other members of the family. S. 230, Contract Act, allows an agent who does not disclose the name of his principal to maintain a suit on a contract entered into by him on behalf of the principal, and that managers of Hindu families come within this Section was expressly recognized in 7 Cal 739[4] and 27 All 361.[5]

The learned advocate for the appellant has relied on two decisions of this Court. The first is the case in 6 Mad 27,[6] but it is clear that this decision has no application here. It was a suit by a junior member of a joint family to establish water rights claimed on behalf of the family and he neglected to make the other members of the family parties. It was held that the suit as framed would not lie, and obviously it would not. The second case to which the learned advocate for the appellant has drawn our attention is that in 32 Mad 284,[7] and this decision does lend support for the argument advanced by him. But therein no attention was paid to the provisions of S. 230, Contract Act, and must be deemed to be overruled by the decision of the Judicial Committee in 33 All 272.[1] Moreover, this decision was founded on the decision in 29 All 311,[2] which was overruled by the

1. Kishan Prasad v. Har Narain Singh, (1911) 33 All 272 = 9 I C 739 = 8 A L J 256 (P C).
2. Shamrathi Singh v. Kishan Prasad, (1907) 29 All 311 = 4 A L J 194 = 1907 A W N 58.
3. Alagappa Chetti v. Vellian Chetti, (1895) 18 Mad 33 = 4 M L J 283.
4. Bungsee Singh v. Soodist Lall, (1881) 7 Cal 739 = 10 C L R 263.
5. Gopal Das v. Badri Nath, (1905) 27 All 361 = 2 A L J 3 = 1904 A W N 282.
6. Arunachala Pillai v. Vaidhyalinga Mudaliar, (1883) 6 Mad 27.
7. Seshan Pattar v. Veera Raghava Pattar, (1909) 32 Mad 284 = 4 I C 38 = 19 M L J 372.

Privy Council in 33 All 272.[1] In the present case the evidence shows that the transaction was entered into by the plaintiff and it also discloses that he was the manager of the family money lending business as well as the manager of the family. Therefore he was entitled to sue in his own name without stating in his plaint that he was suing to recover on behalf of the family.

The only other point taken by the learned advocate for the appellant is that the trial Court was wrong in holding that the money had been advanced by the plaintiff. The appellant's case is that the Marwaris had been paid off by his father through one Sarma who has not been called as a witness. It is common ground that on 3rd March 1929 Chunnilal Venichand was paid Rs. 2500, due to him and that Sankarlal Rupchand was paid the Rs. 2000 which was due to him. It has been proved that the plaintiff raised on that date from Sankarlal Rupchand Rs. 3000 under Ex. D, and a sum of Rs. 2000 from another Marwari named Heerachand. It was with these loans that he paid off the debts due to Chunnilal Venichand and Sankarlal Rupchand by the appellant's father. The trial Court also accepted the evidence of the plaintiff that the money for the discharge of the debts to the two Marwaris was provided in this way and rejected the defence evidence that the appellant's father raised the money and handed it over to Sarma to pay. The learned advocate for the appellant has been unable to suggest any reason why the plaintiff should bring a false suit and has been driven to the suggestion that the plaintiff and the Marwaris entered into a conspiracy to defeat the appellant's father. Why the Marwaris should conspire with the plaintiff is not disclosed. While it is true that Sankarlal Rupchand did get a promissory note from the plaintiff, Chunnilal Venichand did not. He got his money however, and the fact that he had been paid by the plaintiff was endorsed on the promissory note. This was also done on the promissory note in favour of Sankarlal Rupchand. No reason has been advanced why we should refuse to concur in the finding of the learned trial Judge which is based on the positive evidence of the Marwaris and other witnesses who were present at the time. The learned trial Judge has carefully considered the evidence, and we think that he was fully justified in coming to the conclusion which he did. In fact we regard the defence story as being a fantastic one. The appeal therefore fails and must be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 741

LEACH C. J. AND LAKSHMANA RAO J.

M. Narayana Singh — Appellant.

v.

K. Batcha Saheb and another — Respondents.

Appeal No. 241 of 1933, Decided on 19th January 1938, against decree of Dist. Court, Chingleput, in O. S. No. 9 of 1931.

Specific Relief Act (1877), S. 42 — Mortgage attached in execution of decree—Assignee of mortgage, whose application for removal of attachment is dismissed, applying under O. 21, R. 63, Civil P. C. for declaration that assignment is valid — Suit is not barred by S. 42 although consequential relief is not claimed.

The Proviso to S. 42 of the Specific Relief Act does not operate to take away from a party against whom an order has been made under Order 21, Rr. 60, 61 or 62 the special right conferred by O. 21, R. 63 to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach. [P 742 C 1]

Where, on the attachment of a mortgage in execution of a decree, the assignee of the mortgage makes an application for removal of the attachment, and on dismissal of the application brings a suit under O. 21, R. 63 for a declaration that the assignment in his favour is valid and for vacating the order dismissing the application for removal of attachment, such a suit is not barred by S. 42, Specific Relief Act, although no consequential relief is claimed. The mere fact that the assignor of the mortgage is made party to the suit does not alter the nature of the suit: *29 Mad 151 and A I R 1919 Mad 257, Rel. on; A I R 1935 Mad 1002, Disting.* [P 742 C 1]

P. K. Gopalakrishnan for P. G. Krishna Iyer — *for Appellant.*

K. Rajah Iyer and T. E. Ramabhadrachari — *for Respondents.*

Leach C. J. — The appellant attached mortgages of certain immovable properties in execution of a decree passed by the Subordinate Judge of Chingleput in O. S. No. 6 of 1919. Respondent 1 claimed to be the assignee of the mortgages and applied for removal of the attachment. His application was dismissed and he then filed this suit in accordance with the provisions of O. 21, R. 63, Civil P. C. He asked for a declaration that the assignment of the mortgage in his favour by respondent 2 was valid and for the vacation of the order dismissing the application for removal of the attachment. His suit was successful and the declarations asked for were granted. The appellant desires this Court to set aside

the decree on two grounds. In the first place he says the suit as framed does not lie inasmuch as consequential relief was not claimed. In the second place he says that the trial Court erred in holding that the assignment of the mortgages was valid.

The appellant has not printed the pleadings nor has he printed the evidence. With regard to the first point he argues that inasmuch as the assignor of the mortgage was made a party to the suit he should have added a prayer for possession and therefore a suit for a mere declaration is not maintainable. This suit, as I have already mentioned, was filed under the provisions of O. 21, R. 63, Civil P. C., and a plaintiff suing under that Rule is only required to obtain a declaration of his rights. In 42 Mad 143[1] at p. 153, Krishnan J. pointed out that under that Rule the plaintiff can sue to establish the right which he claims to the property in dispute. The question was also dealt with by a Full Bench of this Court consisting of White C. J. and Subramania Ayyar and Davies JJ. in 29 Mad 151.[2] There it was held that the Proviso to S. 42, Specific Relief Act does not operate to take away from a party against whom an order has been made under Ss. 280, 281 or 282, Civil P. C., 1882 (which correspond to O. 21, Rr. 60, 61 and 62 respectively of the Code of 1908) the special right conferred by S. 283 (now O. 21, R. 63) to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach. In that case the plaintiff brought the suit under S. 283, Civil P. C., 1882, for a declaration of his right as mortgagee of the attached properties and for cancellation of the order of rejection. That suit was therefore on all fours with the present suit. The mere fact that the assignor of the mortgage was joined as a party cannot alter the character of the suit. The learned advocate for the appellant has drawn our attention to the decision of Pandrang Row J. in 42 M L W 649.[3] The question for decision there was whether the valuation of the suit for the purpose of jurisdiction was correct, and we do not regard that case as having a bearing on the question before us. Even if the decisions were intended to have the effect which the learned advocate says it has, we should be bound to follow the judgment of the Full Bench in 29 Mad 151.[2] Moreover it follows from what I have said that we accept it as correctly stating the law. The present suit was one clearly under O. 21, R. 63 and was properly framed.

Inasmuch as the appellant has not printed the evidence he is not in a position to challenge the findings of the learned trial Judge on the facts. The learned trial Judge has considered the evidence and there is nothing in his judgment which shows that he took an incorrect view of the evidence. In these circumstances his decision must stand. The appeal fails and will be dismissed with costs in favour of respondent 1.

C.R.K./R.M. *Appeal dismissed.*

1. Puthiyapurayil Pokker v. Chandrakandi Kunhamad, (1919) 6 A I R Mad 257 = 51 I C 714 = 42 Mad 143 = 36 M L J 231.
2. Krishnan Soorayya v. Pathma Bee, (1906) 29 Mad 151.
3. Mohammad Hussain Ambalam v. Ramanatha Iyer, (1935) 22 A I R Mad 1002 = 158 I C 1015 = 42 M L W 649.

A. I. R. 1938 Madras 742

HORWILL J.

In re Komma Harichandra Reddy and others — Petitioners.

Criminal Revn. No. 880 and Petn. No. 824 of 1937, Decided on 24th March 1938, to revise the Judgment of First Class Sub-divisional Magistrate, Jammalmadugu, D/- 22nd October 1937.

(a) Criminal P. C. (1898), S. 436—Further enquiry means further consideration of evidence.

When an order of discharge is set aside and further enquiry ordered, the enquiry recommences where it was left off at the time when the improper order of discharge was passed. Further enquiry does not mean merely an examination of witnesses, but a further consideration of the evidence: *14 Mad 334 (FB), Rel. on.* [P 743 C 1]

(b) Criminal P. C. (1898), S. 350—Prior to framing of charge accused is not entitled to have de novo enquiry—Magistrate is not bound to examine witnesses afresh.

Prior to the framing of the charge, an accused is not entitled under S. 350 to have a de novo enquiry. Criminal Procedure Code does not recognize that there is the principle of natural justice, which requires that every Magistrate should begin his enquiry afresh and see the witnesses for himself before he convicts the accused. The resummoning of witnesses is entirely left to the discretion of the Magistrate. If he does not feel it necessary to examine any witnesses afresh it is not incumbent on him to do so: *A I R 1931 Mad 488, Rel. on.* [P 743 C 1, 2]

(c) Criminal P. C. (1898), S. 350—Resummoning witnesses is not tantamount to recommencing enquiry.

The resummoning of the witnesses is not tantamount to recommencing the inquiry; even if the Magistrate, when he resummons the witnesses, contemplates recommencing the enquiry, he is not precluded from changing his mind before he recommences the enquiry. [P 743 C 2]

A. Narasimha Iyer, P. Chandra Reddi and R. Ramalinga Reddy — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — The petitioners were convicted by the Stationary Sub-Magistrate of Pulivendla under Ss. 147, 341 and 342, I. P. C., and petitioner 6 under S. 323, I. P. C. also; and they were fined Rs. 10 each on each count. The convictions and sentences were confirmed by the Appellate Court. There was first an enquiry by the Stationary Sub-Magistrate of Pulivendla and the accused were discharged. The matter was then taken in revision to the Sessions Judge, who thought that the order of discharge was improperly passed and ordered a further enquiry into the matter under S. 436, Criminal P. C. The Stationary Sub-Magistrate decided to summon the prosecution witnesses already examined; and upon being told by the Sub-Inspector conducting the prosecution that it was not necessary to examine the prosecution witnesses, the Magistrate did not do so. He presumably considered the evidence already on record and then framed a charge. The trial ended in a conviction. It is now argued that the Magistrate was bound to begin the enquiry afresh. I find nothing in any Section of the Criminal Procedure Code which justifies this argument. When an order of discharge is set aside and further enquiry ordered, the enquiry recommences where it was left off at the time when the improper order of discharge was passed. Further enquiry, as pointed out in 14 Mad 334,[1] does not mean merely an examination of witnesses, but a further consideration of the evidence; and the Magistrate was therefore justified upon perusing the evidence in framing the charge.

Prior to the framing of the charge, an accused is not entitled under S. 350, Criminal P. C. to have a de novo enquiry. S. 350 gives the accused a right to have a de novo trial. It has been held by this Court that the trial begins only after the framing of a charge. I can therefore see nothing wrong in the proceedings of the Sub-Magistrate. It is however argued from 6 All 367,[2] 14 I C 607[3] and 3 Lah 115,[4] that the principle of natural justice requires that every Magistrate should begin his enquiry afresh and see the witnesses for himself before he convicts the accused. I do not think that the Criminal Procedure Code recognizes or suggests that there is such a principle of natural justice. On the contrary, it negatives the existence of such a principle; for, it leaves the resummoning of witnesses entirely to the discretion of the Magistrate. He may feel that he would like to see a witness or question him further; and S. 350 (1) gives him authority to do so. If he does not feel it necessary to examine any witnesses afresh, it is not incumbent on him to do so. After the framing of the charge, he had in any event an opportunity of seeing the witnesses for himself during the further cross-examination. This matter has come before this Court on many occasions, and was considered by Jackson J. in 54 Mad 512,[5] where he held that there was no obligation laid on the Magistrate to begin the enquiry afresh.

A further argument advanced is that even though the Magistrate is given a discretion to continue the enquiry from the place where it was left by his predecessor he exercised the choice in favour of commencing the enquiry de novo by summoning the witnesses. I cannot agree that the resummoning of the witnesses is tantamount to recommencing the inquiry; and even if it is true that the Magistrate, when he resummoned the witnesses contemplated recommencing the enquiry, he was not precluded from changing his mind before he recommenced the enquiry. The evidence before the Courts below was considered sufficient by them to sustain a conviction; and I am not prepared to interfere in revision with that finding. The petition is therefore dismissed.

C.R.K./D.S. *Petition dismissed.*

1. Queen-Empress v. Balasinnathambi, (1891) 14 Mad 334=1 M L J 343=2 Weir 557 (F B).
2. Queen-Empress v. Hasnu, (1884) 6 All 367=1884 A W N 130.
3. Ram Dial v. Emperor, (1912) 14 I C 607=9 A L J 310=13 Cr L J 255.
4. Saheb Din v. Emperor, (1922) 9 A I R Lah 49=66 I C 826=33 Cr L J 380=3 Lah 115.
5. Lakshmi Reddy v. Muni Reddy, (1931) 18 A I R Mad 488=1931 Cr C 552=131 I C 5=32 Cr L J 635=54 Mad 512=60 M L J 524.

A. I. R. 1938 Madras 743

BURN J.

Emperor.

v.

Kuzikkal Krishnan and others.

Criminal Appeals Nos. 478 to 485 of 1937, Decided on 11th March 1938, against acquittal by Joint Magistrate Pollachi, in C. A. Nos. 14 to 21 of 1937.

(a) Motor Vehicles Act (1914), Rules under — Madras Motor Vehicles Rules, R. 30 (a) — "Let for hire" — Lorry without "G" permit engaged for journey from Calicut to Pollachi for hire — Offence is committed in District of Malabar as well as in District of Coimbatore if lorry gets out of limits of District of Malabar.

When a lorry without "G" permit is engaged for a journey from Calicut to Pollachi for hire, it is quite justifiable to say that the vehicle has been let for hire along the public roads in the Presidency of Madras, in the Districts of Malabar and Coimbatore and therefore the offence is committed in the District of Malabar as well as in the District of Coimbatore if the lorry gets beyond the limits of the District of Malabar on its journey to Pollachi. It is an error to think that it was the intention of the framers of the Motor Vehicles Rules that no "G" permits should be necessary for the local areas through which lorries passed. It would be much more reasonable to suppose that the framers of the Motor Vehicles Rules intended that permits should be taken out for every area through which vehicles engaged or plied for hire travel. [P 744 C 2]

(b) Motor Vehicles Act (1914), S. 16—Madras Motor Vehicles Rules, R. 30 (a)—Trial for violating R. 30 (a)—Several offences committed on different dates by several owners and drivers —Joint trial is objectionable.

If both the owner and the driver had committed the offence in respect of a single journey, there is no objection to the joint trial of those two but it is very objectionable that several owners and several drivers should be tried in one trial for several offences committed on different dates. [P 744 C 2; P 745 C 1]

M. C. Sridharan — for Accused.

Judgment. — These are appeals preferred by the Government from the judgment of the learned Joint Magistrate of Pollachi in C. A. Nos. 14 to 21 of 1937. Those appeals were from the decisions of the Stationary Sub-Magistrate of Pollachi who convicted several persons of an offence under S. 16, Motor Vehicles Act for violating R. 30 (a) (1) (i) of the Madras Motor Vehicles Rules. The facts in each case were that lorries had been engaged at Calicut to deliver bags of grain at Pollachi. In some cases the owners of the lorries alone were prosecuted; in other cases both the owners and the drivers were prosecuted. They were all convicted by the learned Stationary Sub-Magistrate. The owners were sentenced to fines of Rs. 50 and the drivers to fines of Rs. 20. On appeal the learned Joint Magistrate found it established that these lorries had been engaged for hire at Calicut and he said it was not disputed that the owners of them had not obtained permits in Form G as required by R. 30 (a) (1) (i) of the Madras Motor Vehicles Rules but the learned Joint Magistrate held that the convictions were bad because there had been no plying for hire in the District of Coimbatore of which Pollachi is a division. The learned Joint Magistrate says that the lorries were plying for hire only at Calicut and there was no plying for hire in Pollachi. He noticed the words in R. 30 that "no motor vehicle shall be let or plied for hire in any local area or along any public road in the Presidency of Madras" but he said that he did not know exactly what was the meaning of the words "let for hire." He held that letting for hire must be one definite and localised act and that in the present cases even if the charge was that the vehicles were let for hire, the letting had been done and completed at Calicut and therefore neither the police nor the magistracy of Pollachi had any jurisdiction in respect of these cases. The learned Joint Magistrate, I think, has erred in this discussion of R. 30 (a). The wording is that

> no motor vehicle shall be let or plied for hire in any local area or along any public road in the Presidency of Madras, unless the registered owner of such vehicle has obtained a special permit .... in Form G.

When a lorry is engaged for a journey from Calicut to Pollachi for hire, it is in my opinion quite justifiable to say that the vehicle has been let for hire along the public roads in the Presidency of Madras in the Districts of Malabar and Coimbatore and therefore the offence is committed in the District of Malabar as well as in the District of Coimbatore if the lorry gets beyond the limits of the District of Malabar on its journey to Pollachi. The learned Joint Magistrate, I think, is clearly in error in thinking that it was the intention of the framers of the Motor Vehicles Rules that no G permits should be necessary for the local areas through which the lorries passed. It would be much more reasonable to suppose that the framers of the Motor Vehicles Rules intended that permits should be taken out for every area through which vehicles engaged or plied for hire travel.

Having expressed this view on the question of law, I am not prepared to interfere with the acquittals in these cases for two reasons. One is that the trial by the learned Sub-Magistrate was very unsatisfactory. Many cases which ought to have been tried separately were lumped together and tried together and this is very undesirable. The offence committed by each person in such cases is his own offence and he should be tried separately for it. If both the owner and the driver had committed the offence in respect of a single journey,

there is no objection to the joint trial of those two, but it is very objectionable in my opinion that several owners and several drivers should be tried in one trial for several offences committed on different dates. The second reason why I am not even going so far as to order a retrial of these cases is that Mr. Sridharan, who appears for the respondents, has pointed out that no evidence was given in any of these cases that the vehicles were not provided with G permits. I have no doubt, as the learned Joint Magistrate has remarked, that in fact there were no G permits for these lorries on the dates mentioned. Obviously if G permits had been in existence, there would have been no prosecutions; or if there had been, the defence of the accused would have been simple. It is nevertheless a defect and a fatal defect in the prosecution that there was no evidence let in of this essential fact. For these reasons I shall dismiss these appeals.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1938 Madras 745

HORWILL J.

G. M. Rajulu — Petitioner.

v.

M. Govindan Nair — Respondent.

Civil Misc. Petn. No. 1684 of 1938, Decided on 30th March 1938.

(a) Civil P. C. (1908), S. 24—Transfer of suits — Same parties filing suits against each other in different Courts on same cause of action — Suits should be tried by same Court.

Where two persons file suits against each other in different Courts on the same cause of action, it is desirable that in the best interests of the parties and in order that the Courts might not give contradictory findings, the suits should be tried by the same Court by ordering transfer. [P 745 C 2]

(b) Madras City Civil Courts Act (7 of 1892), S. 3 — S. 3 gives purpose for which Court is established — Suit transferred to it however can be tried by it.

Section 3 merely sets forth the purpose for which the Madras City Civil Court was to be established and cannot be read to mean that the Madras City Civil Court after its establishment would not be competent to try and dispose of suits that were transferred to it. [P 745 C 2]

(c) Madras City Civil Courts Act (7 of 1892), S. 5 (1) — Power of Court — Small Cause suit transferred to it can be tried by City Civil Court.

Section 5 (1) gives the Judge of the City Civil Court power to try and dispose of any suit cognizable by the Small Cause Court. Hence the City Civil Judge is competent to try and dispose of the Small Cause suit if it is transferred to it. [P 746 C 1]

(d) Civil P. C. (1908), S. 24 — Delay in applying for transfer.

Delay of twelve days in applying for transfer is not sufficient to warrant refusing a remedy which should ultimately be convenient to both parties. [P 746 C 1]

Thayagarajan — *for Petitioner.*

O. T. G. Nambiar — *for Respondent.*

Order. — This is an application under S. 24, Civil P. C., to transfer a suit from the Presidency Small Cause Court to the Madras City Civil Court. Two suits relate to the same matter and arise out of a contract between the parties. The suit filed in the City Civil Court is by the contractor alleging breach of contract by the person who entrusted the work to him. The suit in the Small Cause Court is by the person who entrusted the work, alleging breach of contract by the contractor. Each claims damages. It is clearly in the best interest of the parties to have these cases tried together, and it would cause very great inconvenience if the two Courts were to give different findings on the same question, especially as an appeal would lie from one decision but not from the other.

The transfer is however objected to on the ground that the City Civil Court is not competent to try or dispose of the suit within the meaning of S. 24 (a), Civil P. C. That argument is based on the wording of S. 3, City Civil Courts Act, which empowered the local Government to establish the Madras City Civil Court with jurisdiction to receive, try and dispose of all suits, etc. arising within the City of Madras of the value not exceeding Rs. 2500 and excepting suits cognizable by the Small Cause Court and other Courts. This Section merely sets forth the purpose for which the Madras City Civil Court was to be established and cannot be read to mean that the Madras City Civil Court after its establishment would not be competent to try and dispose of suits that were transferred to it. A District Munsif, for example, cannot receive, try and dispose of suits that lie within the jurisdiction of another District Munsif's Court, but that does not prevent the District Court or the High Court from transferring the suit from the one Court to the other. In the same way a District Court and a District Munsif's Court may have concurrent jurisdiction to try the suits of a value not exceeding Rs. 3000 but a District Court cannot receive a suit of the value of less than Rs. 3000 although it can try and dispose of it. I do not therefore think that S. 3, Madras City

Civil Courts Act, prevents the City Civil Court from trying Suit No. 1831 of 1938 if it is transferred to it.

Section 5 (1) of the same Act gives to the Judge of the City Civil Court all the powers of a Judge of a Small Cause Court in respect of cases cognizable by that Court. "By that Court" must mean Judge of the Small Cause Court. S. 5 (1) therefore gives the Judge of the City Civil Court power to try and dispose of any suit cognizable by the Small Cause Court. The various duties that have to be performed by the Judges of the Small Cause Court and the Judge of the City Civil Court are determined by the Chief Justice of the High Court under S. 5 (2). I therefore feel no doubt that the City Civil Judge is competent to try and dispose of the Small Cause suit if it is transferred to it. Another objection is that the petitioner has not made his application promptly. An application was made before the Judge of the Small Cause Court to stay the suit before him pending the disposal of the suit in the City Civil Court. That application was dismissed on 15th March 1938. The present application was filed on 28th March 1938; and it is argued that on account of this delay this Court ought not to grant any indulgence to the petitioner. The petitioner states that this delay is due to the fact that he proposed to file a revision petition against the order of the Chief Judge of the Small Cause Court refusing to stay the suit. Whether that excuse is valid or not, I cannot say; but I do not consider that this delay of 12 days is sufficient to warrant my refusing a remedy which should ultimately be as convenient to the respondent as to the petitioner. This petition is therefore allowed with costs. As the suit transferred is of a small cause nature, it is desirable that it and the City Civil Court Suit No. 238 of 1938 should be disposed of early, before the vacation if possible.

C.R.K./B.D. *Petition allowed.*

---

* A. I. R. 1938 Madras 746

ABDUR RAHMAN J.

Mohamed Rowther—Petitioner.

v.

Tinnevelly Municipal Council —

Respondent.

Civil Revn. Petn. No. 1036 of 1936, Decided on 11th March 1938, from decree of Sub.Judge, Tinnevelly, in S. C. S. No. 170 of 1935.

(a) Transfer of Property Act (1882), S. 107 —Lease of right to collect fees of slaughter houses and fish bazaars — Lease at time of registration not executed by lessor — Lease is invalid.

The right to collect the fees of slaughter houses and fish bazaars amounts to a profit arising out of land and falls within the definition of immovable property as given in S. 3, Clause 25, General Clauses Act. The letting of such right would therefore fall within the definition of a 'lease' as defined in S. 105, T. P. Act, and would require to be executed by both the lessor and the lessee under S. 107, T. P. Act. Where the lease is executed by the lessee and presented for registration by him but at the time of the registration it is not executed on behalf of the lessor, such lease is invalid. [P 747 C 1]

(b) Madras District Municipalities Act (5 of 1920), S. 69 — Contract should be signed by councillors either immediately or within reasonable time.

The Municipal Councillors cannot be held to be entitled to sign a contract at any time—even if they do so after years and just before the institution of the suit, this would be unreasonable. A contract cannot remain in a state of suspended animation for an indefinite period. It should therefore be signed by them either almost immediately or within such a period as may not be considered to be unreasonable in the circumstances of the case. [P 747 C 2]

(c) Madras District Municipalities Act (5 of 1920), S. 69 (2)—Contract not in conformity with S. 69 (2)—Contract is unenforceable not only against Municipality but also against other party to contract.

It cannot be contended that a contract not in conformity with the provisions of S. 69 is not enforceable only against the Municipal Council, but can be enforced by the Municipal Council against the other party to the contract. A contract is a bilateral act and necessarily implies mutuality. If it is not binding on one party, it cannot be held to be binding on the other as well: *30 Mad 290*; *A I R 1930 Mad 600 and A I R 1938 Mad 90, Rel. on.* [P 747 C 2; P 748 C 1]

*** (d) Transfer of Property Act (1882), S. 53-A— S. 53-A is generally only available to defendant.**

Section 53-A is, generally speaking, only available to a defendant. It is only in exceptional cases such as in a suit for specific performance that it may be availed of by the plaintiff. Apart from S. 53-A, the doctrine of part performance is not applicable to India : *A I R 1935 Pat 291 (F B), Rel. on.* [P 748 C 1]

(e) Madras District Municipalities Act (5 of 1920), Ss. 68 and 69— Lease not in conformity with Ss. 68 and 69— Lease though invalid, Municipality is entitled to relief under S. 65, Contract Act, if lessee has secured benefit of lease.

A lease by the Municipality not in conformity with Ss. 68 and 69, Madras District Municipalities Act, and S. 107, T. P. Act, is invalid. But a suit based on it cannot be dismissed on such technical grounds; if the lessee has secured the benefit

of the lease, the Municipality is entitled to relief under S. 65, Contract Act. [P 748 C 2]

S. K. Ahmed Meeran—*for Petitioner.*

P. N. Marthandam Pillai —

for Respondent.

Order. — This revision arises from a decree passed in a suit filed for recovery of two cists for November and December 1934 under a lease dated 22nd March 1934 (Ex. A) executed by the defendant in favour of the Tinnevelly Municipal Council under which the right to collect the fees of slaughter houses and fish bazaars was let by the latter to the former. The right to collect fees for the above mentioned places amounts to a profit arising out of land and falls within the definition of immovable property as given in S. 3, Cl. 25, General Clauses Act. It would therefore fall within the definition of a "lease" as defined in S. 105, T. P. Act and would require to be executed by both the lessor and the lessee under S. 107 of the Act. The lease was for one year but inasmuch as a yearly rent was reserved, it could only be made under a registered instrument, although one-fourth of the rent was paid by the lessee in advance at the time of the execution of the lease and the remaining three-fourths was recoverable in nine monthly instalments. It is true that the lease was executed by the lessee and presented for registration by him, but at the time of the registration it was not executed on behalf of the lessor, although certain signatures purporting to be those of the President and two members of the Tinnevelly Municipal Council appear to have been put after registration on the document itself. This is clear from the registration copy of the lease filed on behalf of the defendant.

It would thus follow that the lease fails to fulfil the requirements of S. 107, T. P. Act and would therefore be invalid. The counsel for the respondent has tried to meet the contention by characterizing the instrument (Ex. A) as an agreement to lease. But the tenor of the document leaves no doubt in my mind that it falls within the definition of a lease and not that of a mere agreement as suggested by him and found by the lower Court. This interpretation receives its support also from the fact that an agreement to let the right to collect fees from slaughter houses and fish bazaars was executed on 3rd January 1934 and has been produced by the plaintiff (Ex. C). Moreover, this is a contract of more than Rs. 1000 and the sanction of the Municipal Council had to be taken under S. 68 (2), Act 5 of 1920 before it was made. A copy of the resolution of the Municipal Council authorizing the President or the members to execute the lease as required by S. 68, District Municipalities Act has not been produced on behalf of the plaintiff and in the absence of any such authority it would be difficult to hold — even if the registered lease deed was signed by the President and two other members — that they did so under the authority of the Municipal Council.

These are not the only objections which have been raised on behalf of the petitioner. His counsel further contends that the lease is unenforceable as it does not comply with the provisions of S. 69, District Municipalities Act, under which the lease has to be signed by two Municipal Councillors. The respondent's counsel urges in reply that the lease has been signed by them although after it was registered. He is not in a position however to state the date on which it was signed. It was for the Municipal Council to prove that the formalities required by S. 69 were duly observed and in view of the only witness who was examined on its behalf and whose statement cannot be accepted, as he stated that the signatures of the Councillors were placed on the document before registration, I cannot assume that the terms of the Section were complied with. Moreover the date on which these signatures were placed on the lease had to be established. The Municipal Councillors cannot be held to be entitled to sign a contract at any time — even if they do so after years and just before the institution of the suit, this would be unreasonable. A contract cannot remain in a state of suspended animation for an indefinite period. It should therefore be signed by them in my opinion either almost immediately or within such a period as may not be considered to be unreasonable in the circumstances of the case.

The penalty for the omission of this formality is provided in S. 69 (2) which declares a contract made otherwise than in conformity with the provisions of S. 69 and the last preceding Sections, to be not binding on the Municipal Council. It has been argued that this provision only means that the lease is not binding on the Municipal Council but it does not lay down that it would not be binding on the other party. In other words the contention is that it is not enforceable against the Municipal Council but can be

enforced by the Municipal Council against the other party to the contract. This has no force in my opinion. A contract is a bilateral act and necessarily implies mutuality. If it is not binding on one party, it cannot be held to be binding on the other as well. The same view was taken in 30 Mad 290,[1] 58 M L J 377[2] and 46 M L W 892.[3] The conclusion is therefore irresistible that the document has not been executed by the lessor and fails to comply with the mandatory provisions of Ss. 68 and 69, District Municipalities Act and of S. 107, T. P. Act. It cannot, for the reasons given above, be held to be enforceable and the action of the Municipal Council on the basis of such a contract cannot be sustained.

It has been contended on behalf of the petitioner that the document being inadmissible for want of registration and being unenforceable for want of the requisite authority of the Municipal Council and in the absence of Municipal Councillors' signatures as required by law, the suit should have been dismissed. In reply, the respondent's counsel tried in the first instance to invoke the doctrine of part performance as defined in S. 53-A, T. P. Act. This is however based on a misconception. S. 53-A, T. P. Act is generally speaking only available to a defendant. It is only in exceptional cases such as in a suit for specific performance that it may be availed of by the plaintiff. Apart from S. 53-A the doctrine of part performance is not applicable to India: *see* 14 Pat 672.[4] This contention must therefore be decided against the respondent.

The counsel for the respondent tried to argue in the end that having secured the benefit of the lease, it would be extremely unjust to dismiss the plaintiff's suit on merely technical grounds when it is possible to grant relief on the principle underlying S. 65, Contract Act and decree the claim as the amount of compensation can be very fairly taken to what the defendant had agreed to pay each month. On the other hand it is contended mainly on the authorities in (1883) 8 A C 517,[5] 30 Mad 290[1] and 37 M L W 429[6] that the grant of relief in the manner suggested by the plaintiff's counsel would virtually reduce the wholesome provision of the statute to a nullity. It was further urged that it was impossible to pass a decree at once as the defendant had suffered heavily in consequence of another person carrying on similar trade in the vicinity and that the Municipal Council did not help the defendant in either removing or getting rid of him in spite of several representations made in this behalf. The counsel for the petitioner also stated that evidence in regard to the loss suffered by his client was not led in the case as his client was advised that the suit was not maintainable on the basis of the lease which was both inadmissible and unenforceable. There is a great deal of force in these contentions but I consider it to be inequitable to permit the defendant to succeed on the merely technical objections when he has apparently had advantage of the lease and it is possible to go into the merits of the case on the principle underlying S. 65, Contract Act and to ascertain if the plaintiff is entitled to any relief. I do not think the invalidity of the lease prevents the Municipal Council from recovering such amount as may be found to be reasonable in the circumstances. On the other hand it is impossible for me to decide the case as it stands, on the ground that the rent agreed to be paid by the defendant should be considered to be a fair measure of compensation to be awarded under S. 65, Contract Act. There is no sufficient data before me to adjust equities between the parties, if the ground of complaint as urged by the defendant in his written statement has any truth at all. The question as to what amount is reasonable has not been gone into as the case proceeded upon the lease alone.

I am therefore compelled in a case like this to set aside the decree of the lower Court and remand the suit for a de novo trial granting leave to the plaintiff to amend its plaint claiming relief under S. 65, Contract Act, to which the defendant would in the ordinary course be entitled to plead. The parties will then lead such additional

1. Raman Chetty v. Municipal Council of Kumbakonam, (1907) 30 Mad 290=2 M L T 294.
2. Municipal Council, Tiruvarur v. Kannuswami Pillai, (1930) 17 A I R Mad 600=127 I C 120 =53 Mad 352=58 M L J 377.
3. Municipal Council, Dharapuram v. Mohammad Ismail, (1938) 25 A I R Mad 90 = 46 M L W 892.
4. Ramakrishna Jha v. Jainandan Jha, (1935) 22 A I R Pat 291=157 I C 98=14 Pat 672=16 P L T 451 (F B).
5. Young & Co. v. Mayor, etc. of Royal Leamington Spe, (1883) 8 A C 517=52 L J Q B 713= 49 L T 1=31 W R 925=47 J P 660.
6. Srivilliputtur Municipal Council v. Arunachala Nadar, (1933) 20 A I R Mad 332 = 144 I C 784=37 M L W 429.

evidence in the case as they think necessary. In the circumstances of the case however, the plaintiff shall pay a sum of Rs. 100 as costs to the defendant which will not be taken into account in taxing the costs of the suit. The revision petition is therefore allowed and the suit remanded to the lower Court for disposal according to law bearing the directions given above in mind.

C.R.K./D.S. *Suit remanded.*

A. I. R. 1938 Madras 749

LEACH C. J. AND LAKSHMANA RAO J.

Sankara Mining Syndicate Ltd., Nellore and another — Appellants.

v.

Secretary of State and others — Respondents.

Appeal No. 346 of 1932, Decided on 11th February 1938, against decree of Sub-Judge, Nellore, in O. S. No. 67 of 1929.

(a) Government of India Act (1919), Ss. 30 (2), 45—Local Government granting mining leases to *A* and *R* reserving portion of land (referred to as margin) between lands allotted to each to prevent disputes—Each lessee anxious to obtain lease of margin—*A* obtaining order from Local Government granting lease in his favour—*R* appealing to Government of India and obtaining a lease in his favour—Suit instituted by *A* against Secretary of State and *R*, claiming declaration that order granting lease to *R* was illegal and decree for specific performance of contract alleged to have been entered into between him and Local Government—Order of Government of India setting aside order granting lease to *R* held intra vires under S. 45—As no formal lease was signed and executed by Collector, there was no contract which could be specifically enforced against Secretary of State.

The Local Government granted two mining leases to *A* and *R* respectively excluding and reserving a strip of land, referred to as 'margin', between the lands allotted to each, to prevent disputes between the two lessees. Each of the lessees was anxious to obtain a lease of the margin and after several petitions and appeals by either party, the Board of Revenue directed that neither party should be given any portion of the margin. *A* appealed against the Board's order to the Local Government which passed an order directing that the margin should be assigned to *A* after reserving a small strip between the two lands. An order was passed by the Collector accordingly and communicated to *A*. Before it could be complied with, *R* appealed to the Government of India which held that the Local Government had no power to direct that the lease be given to any particular person and that the power to grant the mining leases was delegated under R. 4 of the Mining Rules to the Board of Revenue. The order in favour of *A* being thus held ultra vires, was cancelled and the Board of Revenue granted the lease of the margin to *R*. *A* thereupon instituted a suit against the Secretary of State in Council and *R* for a declaration that the order of Local Government granting lease to *R* was illegal and for a decree for specific performance of the contract for lease of the margin which he alleged had been entered into between him and the Local Government :

Held that the ordinary law of principal and agent did not apply. The statutory authority to grant mining leases, having passed from the Local Government to Board of Revenue by the order under R. 4 of the Mining Rules, the Local Government had no power to grant the lease to *A*. The order of the Government of India setting aside the Local Government's order granting lease to *A* was intra vires. S. 45, Government of India Act, gave full powers to Government of India to interfere with the orders of Local Government in such matters. By reason of S. 30 (2), Government of India Act, the prescribed rules governing the execution of contracts with the Local Government, not having been complied with and no formal lease having been signed and executed by the Collector, there was no enforceable contract against the Secretary of State in Council : *A I R 1934 Bom 277 and A I R 1927 Rang 14, Rel. on.*

[P 752 C 1, 2]

(b) Madras Mining Rules, R. 46 — Words 'right of applicant' in R. 46 cannot be read as recognition of vested right — Effect of R. 46 stated.

The words "the right of the applicant" in R. 46 cannot be read as a recognition of a vested right. The effect of the rule is that if the applicant does not complete the contract within six months the order directing the lease to issue will lapse unless the time is extended. [P 752 C 2]

S. Srinivasa Iyengar and B. Jagannadha Doss — *for Appellants.*

Govt. Pleader, The Advocate-General, K. Umamaheswaran and K. Subramaniam — *for Respondents.*

Leach C. J.—This appeal arises out of a suit filed in the Court of the Subordinate Judge of Nellore by the appellant against the Secretary of State for India in Council, (respondent 1), and Yettigadda Audemma, (respondent 2), for a declaration that an order of the Local Government granting a mining lease to Yettigadda Audemma is illegal and for a decree for specific performance of a contract which he alleged had been entered into between him and the Local Government for a lease of the area in suit. In 1903 the Local Government granted a mining lease of the area known as Survey No. 499 to one R. V. Kuppuswami Aiyar. The lessee subsequently transferred this lease to the appellant Company. In 1904 the Local Government granted a mining lease in respect of the area known as Survey No. 500 to Kalappa Chetti, the husband of respondent 2. Kalappa Chetti is now dead and the lease of this area has vested in respondent 2. From

respondent 2's area a strip of land three furlongs in length and 133 feet in breadth, lying on the boundary of Survey No. 499, was excluded from Kalappa Chetti's lease. This area has been referred to as the "margin" and I will so refer to it in this judgment. The object in reserving the margin was to prevent disputes between the two lessees. On 5th August 1923 the appellant Company applied to the Collector for a lease of the margin. A similar application was filed by respondent 2 on 4th September 1923.

The Collector considered both the petitions and by an order dated 1st October 1923 rejected them as he was of the opinion that it was not desirable to grant a lease of the margin to either of them. Respondent 2 appealed against this order to the Board of Revenue, which confirmed the Collector's order on 8th November 1924. Respondent 2 then preferred an appeal to the Local Government, which by an order dated 31st July 1925 granted her petition. The appellant Company was dissatisfied with this decision and applied to the Local Government to reconsider it and to grant the area to the appellant Company. The Local Government did reconsider the matter and decided to cancel the lease of the margin to respondent 2 on the ground that its previous order was ultra vires and had been passed without full knowledge of the fact that respondent 2, or her predecessors-in-title, had undermined the margin of the land to a considerable extent and had extracted mica therefrom. The Local Government left it to the Collector to determine whether any portion of the margin should be leased and, if so, to whom. On 15th March 1926 respondent 2 filed another petition asking that a lease of the margin be granted to her, and two days later the appellant Company applied. The Sub-Collector thereupon held an inquiry into the matter and found that there had in fact been encroachment by respondent 2 after the Collector's order of 1st October 1923. He was however unable to ascertain the extent of the encroachment that had taken place and therefore recommended that the Collector should allot a moiety of the margin to each of the petitioners, leaving a strip of 10 feet in breadth between the two holdings. The Collector accepted this recommendation, but the parties were dissatisfied with it and further appeals were preferred to the Board of Revenue. By an order dated 7th February 1927, the Board of Revenue reversed the Collector's order and directed that neither party should be given any portion of the margin.

The appellant company appealed against the Board's order to the Local Government which by an order dated 7th May 1927 directed that the margin should be given to the appellant company after the reservation of a strip of five links lying on respondent 2's boundary. The Local Government considered that respondent 2 had forfeited any claim to consideration. In pursuance of this direction of the Local Government, the Collector on 27th March 1927 passed a formal order directing that the margin originally excluded from Survey No. 500 should be assigned to the appellant company, after reserving a strip of five links as suggested in the order of the Local Government. The order of the Collector was communicated to the appellant company on 10th June 1927 and the appellant company was required to deposit in the treasury a sum of Rs. 3 as a sketch fee and Rs. 100 by way of security deposit. Before the order of the Collector of 27th March 1927 could be complied with, respondent 2 appealed to the Government of India and asked the Local Government for a stay of all proceedings pending the receipt of the order of the Government of India. The stay was granted on 20th July 1927. The orders of the Government of India were communicated to the Board of Revenue in a letter dated 14th June 1928. In this letter the Government of India expressed the opinion that as the power to grant mining leases had been delegated to the Board of Revenue the Local Government could not interfere with the Board's orders so long as the Board had acted, whether by granting a lease or refusing to grant a lease, and that the Local Government could not direct the Board to grant a mining lease to a particular person. All that the Local Government could do was to give a direction to the Board of Revenue that a particular area should be assigned on a mining lease. In view of this decision the order passed by the Local Government directing the Board of Revenue to assign to the appellant company the area was ultra vires and was accordingly cancelled.

In accordance with this order of the Government of India, the Board of Revenue on 11th October 1928 granted a lease of the margin to respondent 2, leaving a strip of five links as a visible boundary between the two areas. On 4th December 1928 a

formal lease of this area was granted to respondent 2. The present suit was filed on 11th October 1928 for a decree cancelling the lease to respondent 2 and granting one to the appellant Company. The trial Court found against the appellant Company on all of its contentions and dismissed the suit. Before us three arguments have been advanced in support of the appeal. In the first place it is said that the Government of India exceeded its powers when it cancelled the order of the Local Government and left the matter open. In the second place, it is said that even if the Local Government was bound to obey the order of the Government of India, the order of the Board of Revenue dated 27th May 1927, granting the lease to the appellant Company, amounted to an acceptance of an offer to take the lease on the usual terms and therefore there was a binding contract which entitled the appellant Company to a decree for specific performance. The third argument is that, even if there was no contract in law, the appellant company was entitled to the lease as the mining rules recognized that by virtue of the order of 27th May 1927 it had got a vested right in the margin. The arguments involve the consideration of certain Sections of the Government of India Act, 1919, and certain statutory rules. The Government of India Act, 1935, does not apply because the case concerns events which took place before that Act was placed on the statute book. S. 28 (1) of the Act of 1919 states:

> The Secretary of State in Council may with the concurrence of a majority of votes at a meeting of the Council of India, sell and dispose of any real or personal estate for the time being vested in His Majesty for the purpose of the Government of India, and raise money on any such real (or personal) estate by way of mortgage, (or otherwise) and make the proper assurances for any of those purposes.

Section 30 (1) provides that the Governor-General in Council and any Local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate vested in His Majesty for the purposes of the Government of India. Like powers are given for mortgaging and the granting of assurances. But it has to be borne in mind that with regard to the exercise of powers conferred on the Governor-General in Council or Local Government, the exercise must be on behalf of and in the name of the Secretary of State in Council. S. 30 (2) is in these terms:

> Every assurance and contract made for the purposes of sub-s. (1) of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorizes, and if so executed may be enforced by or against the Secretary of State in Council for the time being.

The only other Section which this case is concerned with is S. 45 (1) which says:

> Subject to the provisions of this Act and rules made thereunder, every Local Government shall obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of its proceeding and all matters which ought, in its opinion, to be reported to him, or as to which he requires information and is under his superintendence, direction and control in all matters relating to the government of its province.

This sub-section is very wide in its application. The Government of India have framed certain rules regulating the grant of mining concessions, and the validity of these rules is not in question. Under R. 1 no mining lease can be granted by a Local Government otherwise than in accordance with the rules, except with the previous sanction of the Secretary of State for India in Council, or with that of the Governor-General in Council under any general or special authority which he may have received in this behalf from the Secretary of State in Council. R. 4 states that for the purpose of the rules the Local Government may, in provinces where there is a Board of Revenue, delegate to such authority all or any of the powers conferred on the Local Government by the rules. The authority of the Local Government to grant mining leases has been delegated to the Board of Revenue, and it was for this reason that the Government of India cancelled the order of the Local Government with regard to the margin. At one time it was thought that the Local Government had the power to revise orders of the Board of Revenue and a note to this effect was inserted in the previous edition of the "Mining Manual." The deletion of this note was however directed by an order of the Local Government dated 19th November 1925, the Local Government recognizing that it had not the power to revise.

The learned advocate for the appellant company contends that inasmuch as the rules refer to delegation and not to devolution, the Local Government must be deemed to have still vested in it powers of granting leases, irrespective of the power granted in this behalf to the Board of Revenue. The

acceptance of this contention would mean that in this province there would be two authorities with equal powers of granting leases. The learned advocate for the appellant company would have it that the ordinary law of principal and agent must be applied. We are unable to accept this contention. In our opinion, the statutory authority to grant mining leases passed from the Local Government to the Board of Revenue by the order made under R. 4. The Local Government agrees with the Government of India that this is the effect of the order; and we see no ground for disputing this. Consequently we hold that the Local Government had no power to reverse the order of the Board of Revenue granting the lease to respondent 2. We are also of the opinion that the order of the Government of India setting aside the Local Government's order was intra vires. S. 45 gives the Government of India full power to interfere with the orders of the Local Government in matters of this nature. This disposes of the first argument.

With regard to the contention that a valid contract had been entered into by the Local Government with the appellant company and consequently the appellant company is entitled to a decree for specific performance, we have seen that by reason of S. 30 (2), Government of India Act, 1919, contracts have to be executed by the person and in the manner directed by the Governor-General in Council and until they are so executed they cannot be enforced by or against the Secretary of State in Council. The short answer to the second argument is that the Governor-General in Council has prescribed rules governing the execution of contracts with the Local Government and they required a formal lease to be executed by the Collector. They have been framed in the exercise of the powers conferred by sub-s. 2 of S. 30, and are published in the Manual of Statutory Rules and Orders. Therefore, until a formal lease has been signed, there can be no enforceable contract against the Secretary of State in Council. The wording of the sub-section in my opinion leaves no room for any other construction; but, if authority is required it is to be found in 58 Bom 660[1] at p. 706 and in 4 Rang 291[2] at p. 300. In this case no lease was executed and therefore there is no enforceable contract. The third argument hardly calls for serious consideration. It is based on the fact that R. 46 of the Mining Rules states:

> If a lease is not executed within six months after leave has been granted for it, the right of the applicant to such lease shall be held to have lapsed, unless the Local Government for special reasons consents to grant the same notwithstanding the delay, or considers that the delay is not attributable to the applicant.

Emphasis is laid on the words "right of the applicant." These words cannot be read as a recognition of a vested right. The effect of the rule merely is that if the applicant does not complete the contract within six months, the order directing the lease to issue will lapse unless the time is extended. For these reasons we consider that the decision of the trial Court is right and the appeal must be dismissed with costs, one set to respondent 1 and one set to respondent 2.

C.R.K./R.M. *Appeal dismissed.*

1. Municipal Corporation of Bombay v. Secretary of State, (1934) 21 A I R Bom 277=152 I C 947=36 Bom L R 568=58 Bom 660.

2. Secretary of State v. Chettiar Firm, (1927) 14 A I R Rang 14=98 I C 323=4 Rang 291.

A. I. R. 1938 Madras 752

PANDRANG ROW J.

C. A. V. Baluswami Naidu—Appellant.

v.

Official Receiver, Madura and another — Respondents.

Appeals Nos. 117 and 118 of 1933, Decided on 28th January 1938, against orders of Dist. Court, Madura, D/- 22nd March 1933.

(a) Provincial Insolvency Act (1920), S. 37 —Vesting order can be passed subsequent to order of annulment.

The order that the right, title and interest of insolvent shall vest in the Official Receiver made subsequent to the order of annulment is valid : *A I R 1933 Pat 84, A I R 1934 Lah 468* and *A I R 1936 Cal 573, Rel. on.* [P 753 C 1]

(b) Provincial Insolvency Act (1920), S. 28 —After adjudication of deceased father his creditor bringing suit without leave of Court against his son as legal representative to recover debts due by deceased father—Son's share in family property attached—Suit being against provisions of S. 28 attachment is invalid and son's share vests in Official Receiver.

An adjudication was made some time after the death of the insolvent. After the adjudication the creditor of the deceased instituted a suit without leave of the Court against the son for recovery of the debts due by the deceased father and attached the son's share. The son was sued as a legal representative of the deceased father and the claim was only against the family property in his hands :

Held that the suit was against the property of the insolvent in the hands of his son though the properties were family properties in which the son had his own share. The suit being against the provisions of S. 28, the attachment was invalid and hence the son's share vested in the Official Receiver : *A I R 1934 Mad 217, Disting.*

[P 754 C 2 ; P 755 C 1]

B. Sitarama Rao and P. S. Narayanaswamy Iyer — *for Appellant.*

K. Bhashyam Ayyangar, P. N. Appuswamy Iyer and K. S. Desikan — *for Respondents.*

Judgment.—A review was granted in these appeals as my previous decision* allowing these appeals was based on the sole ground that at the time the Official Receiver attempted to sell the properties, the adjudication of the insolvent had been annulled and there was no order vesting the property in the Official Receiver. It has now been discovered—and the fact is not denied—that there was such an order, namely the order of the Subordinate Judge dated 8th December 1927, to the effect that the right, title and interest of the insolvent in the properties shall revest in the Official Receiver and that he should sell the same and distribute the proceeds among the creditors. This order was passed within a month after the annulment, the annulment being made on 11th November 1927. It was not seriously contended before me though the point was not abandoned, that the order of 8th December 1927 was without jurisdiction, because it was passed not simultaneously with the order of annulment but some time later. The point was not pressed seriously because of at least three decisions against any such contention, namely 12 Pat 163,[1] 15 Lah 698[2] and 40 C W N 1229.[3] In view of the fact that this point has been dealt with in at least three decided cases referred to above, it is, in my opinion, unnecessary for me to say more on this point than that I agree with the decisions in those cases and find that the order of the Subordinate Judge was perfectly valid. It follows therefore that the ground on which the appeals were originally allowed does not exist, and the appeals were therefore argued as regards the other points raised in the grounds of appeal.

It appears to have been contended in the lower Courts that the adjudication order in this case had effect only as against the insolvent's share in the assets of his firm and had no effect against his family property. That contention has not been repeated before me and I need not deal with it further than to say that I agree with the Courts below in dismissing that contention. The point argued before me in these appeals is that so far as the son's share at least is concerned, it must be held that the Official Receiver has no power to sell because of the attachment in execution of the decrees obtained by the appellants against the son and the subsequent sales in Court auction in their favour. The revesting of the properties in the Official Receiver puts an end to the case of the appellants so far as the father's share in the properties is concerned. But it is contended that the son's share stands on a different footing because, though the power of the father to sell the son's share, which is admittedly the father's property vested in the Official Receiver on adjudication, nevertheless, that power is lost and cannot be availed of by the Official Receiver by reason of the attachment of the son's share. The proposition is not seriously contested that if there is a valid attachment of the son's share, the Official Receiver cannot avail himself of the father's power to sell the son's share for the satisfaction of his proper debts. The question therefore has been argued whether there was in this case any attachment of the son's share and if so whether it is valid and binding on the Official Receiver. Actually what happened in this case was, there was an adjudication on 26th November 1923 some time after the insolvent had died, the death having taken place in 1922. After the adjudication, the appellants, or to be quite accurate, Baluswami Naidu and Abbas Rowther, instituted suits against the son for recovery of debts due by his deceased father though these were debts which could have been proved in insolvency and in respect of which therefore no other legal remedy was permitted by law so far as the property of the insolvent was concerned. Section 28, sub-s. (2), Provincial Insolvency Act runs as follows :

> On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided

*See A I R 1936 Mad 915.

1. Chouthmal Bhagirat v. Jokhiram, (1933) 20 A I R Pat 84=141 I C 836=12 Pat 163 = 13 P L T 775.
2. Ishar Das v. Mt. Fatima Bibi, (1934) 21 A I R Lah 468 = 158 I C 993 = 15 Lah 698 = 36 P L R 499.
3. Abdul Latiff v. J. R. Percival, (1936) 23 A I R Cal 573 = 166 I C 509 = 40 C W N 1229 = I L R (1937) 1 Cal 264.

and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose,

and there is no doubt (1) that the debt in respect of which the suits were launched against the son were debts provable under the Insolvency Act, (2) that the insolvency proceedings were pending at the time the suits were instituted and (3) that leave of the Court had not been obtained for the suits. The only question that remains is therefore whether the suits were directed against the property of the insolvent. The decrees passed in the two suits show that the claim of the plaintiffs was in respect of promissory notes executed by the deceased father and that the son was sued as the legal representative of his deceased father. The decree in one suit was to the effect that the son should, out of his father's assets, pay the sum decreed, while in the other suit the decree was to the effect that the plaintiff do recover from the family property of the father in the hands of the son. It would therefore appear that these suits were really directed against the property of the deceased insolvent in the hands of his son, though these properties were family properties in which the son had his own share. I am unable to say that these suits were not suits directed against the property of the insolvent in respect of debts due by the insolvent and provable in the insolvency. It is no doubt possible in abstract theory to split the suits into suits against the insolvent's share in the family property and suits against the son's share in the family property, but that is not how the suits were framed and the decrees were made. The suits were suits against the properties of the insolvent in the hands of his son, and it must be remembered in this connexion that the debts of the father were such that the whole of the family property including the son's share was liable for them. Sec. 53, Civil P. C. provides :

For the purposes of Ss. 50 and 52 (of the same Code) property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Section 52 of the Code provides :

Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

It must be presumed, in the absence of the orders of attachment and of sale, that in these cases the property that was attached was the property of the deceased father in the hands of the son and that it was this property that was sold. It follows therefore that what has taken place is something which is directly prohibited by S. 28, sub-s. (2), Provincial Insolvency Act, and I am unable to see why when there has been a definite infraction of the law, as in this case, the proceedings which were obviously carried on in defiance of the law should be so split up in order to extract therefrom a part which might with some plausibility be argued be not definitely prohibited by the law. In other words, I do not see why suits which were really against the entire family property should be regarded as being also in part suits against the son's share even when no relief was sought against the son personally. The son was sued only as the legal representative of his deceased father and the claim was only against the family property in his hands. Considerable reliance was placed by the advocate for the appellants on 66 M L J 412.[4] But that was a case in which there was a valid attachment before adjudication, an attachment to which no objection could be taken at the time it was made. It was only the subsequent adjudication that made any difference so far as the attachment was concerned. What was held in that case was that when there was a valid attachment of the entire family property before the adjudication of the father, the power to sell the son's share does not vest in the Official Receiver on adjudication. This proposition is not contested, and it does not apply to the present case where the validity of the attachment at the time it was made is attacked as being opposed to the provisions of S. 28, sub-s. (2), Provincial Insolvency Act. As observed by the learned District Judge, the filing of the suits against the son in respect of the debts of the father who had been adjudicated an insolvent was obviously dictated by a desire to benefit the plaintiffs at the expense of

4. Official Receiver, Coimbatore v. Arunachalla Chettiar, (1934) 21 A I R Mad 217 = 148 I C 787 = 66 M L J 412.

the general body of creditors, and there is no reason why this reprehensible tendency on the part of individual creditors to steal a march over others when the debtor has become an insolvent should be encouraged by what may be called 'splitting hairs' in this manner.

I am of opinion that the judgment of the District Judge in these cases is substantially in accordance with law; in any case I am not at all satisfied that the judgment of the District Judge is vitiated by any error of law. The appeals are therefore dismissed with costs.

C.R.K./D.S. *Appeals dismissed.*

---

* A. I. R. 1938 Madras 755

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Ratnaswami Nadar and others — Appellants.

v.

Prince of Arcot's Endowments, Trichinopoly — Respondent.

Appeals Nos. 324 of 1933 and 88 of 1934, Decided on 30th March 1938, against decree of Sub-Judge, Trichinopoly, in O. S. Nos. 84 and 109 of 1931.

*** Civil P. C. (1908), O. 1, R. 8—Representative suit lies in respect of declaration and injunction but not in respect of actions of debt, money claims, or liabilities in contract or tort —Suit under O. 1, Rule 8 against defendants representing large number of villagers holding karaiyedu tenure — Decree for consolidated sum representing mesne profits cannot be passed —Decree for possession, declaration and injunction can be passed.**

The procedure pertaining to representative suits is inapplicable to actions of debt, to money claims or to liabilities in contract or in tort : *(1928) 1 K B 663 and (1914) 2 K B 930, Rel. on.* [P 755 C 2; P 756 C 1]

A representative suit will lie as much in respect of a declaration as for an injunction : *(1928) 1 K B 663, Rel. on.* [P 756 C 2]

Where certain defendants are sued under O. 1, R. 8, as representing a large number of villagers holding a tenure called karaiyedu on the ground that they have taken unlawful possession of the land, a decree for a consolidated sum as representing the mesne profits cannot be passed. In so far as the decree is for possession, different considerations apply. The facts are common, giving rise to the same liability in regard to each member. There can be no difficulty in executing the decree against the person either on the record or absent; the liability of one individual does not differ from the liability of another. The absent members have no defences separate and distinct from those of the named defendants and of each other. Hence a decree for possession, declaration and injunction can be passed. [P 756 C 2]

A. V. Narayanaswamy Iyer — *for Appellants.*

T. M. Krishnaswamy Iyer and A. Balasubramania Iyer — *for Respondent.*

Venkatasubba Rao J.—Mr. Narayanaswami Iyer, the appellants' learned counsel, set himself to the task of showing that the judgment is wrong from the judgment itself, as beyond the pleadings nothing has been printed. His contention, that the lower Court's view that the lands form part of an "estate," or that they answer the description of "old waste," is wrong, does not require serious notice, as we cannot discover from the judgment that the appellants had any sort of possession, whether under the Act or outside it, which would confer on them any legal right. Then as to his next contention, the facts are briefly these: The defendants were sued under O. 1, R. 8, Civil P. C., as representing a large number of villagers (about 150 in number) too numerous to be individually impleaded. In the plaint it is stated that in pursuance of a conspiracy, they combined in order to deny the plaintiff's title and to take unlawful possession of the land. All that we need say is, that it does not appear from the judgment that this allegation has been made out. But we think on the facts as found, the plaintiffs were entitled to have recourse to O. 1, R. 8. The fact seems to be that the tenure obtaining in respect of the lands held by the defendants is that which goes by the name of karaiyedu. Under that system the lands are temporarily cultivated in separate shares by the cosharers and are subject to periodic re-distribution. The defendants' case, as may be inferred from the meagre record, appears to be that in virtue of their holding certain other lands in the village under karaiyedu form, they are entitled to similar rights in the suit land. That is to say, the right of the whole community extends to the whole land and the right of each member is similar to the right of every other.

We are therefore inclined to think that there is sufficient community of interest as to render the Rule applicable. Even so, the lower Court in our opinion is wrong in passing a decree for mesne profits. Though the point is not covered by Indian authority, the law seems quite clear under the corresponding English rule, that the procedure pertaining to representative suits is inapplicable to actions of debt, to money

claims or to liabilities in contract or in tort. The principle has been lucidly explained, and the authorities have been fully reviewed, by Fraser J. in *Hardie and Lane Ltd.* v. *Chiltern*,[1] whose judgment has been upheld by the Court of Appeal: (1928) 1 K B 663.[2] (1914) 2 K B 930[3] is one of the several cases cited by the learned Judge. In a common law action of debt for professional services rendered, the plaintiff sued four named defendants on their behalf and on behalf of all other members of an incorporated religious society, most of the members of which resided abroad. Buckley L. J. observed in the course of his judgment in (1914) 2 K B 930[3]:

> If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons. . . . . But when he had obtained his judgment, he could have had execution only against the share of these persons in that property. There is nothing representative about that. (Page 935).

Then the learned Lord Justice goes on to point out the distinction between an action for declaration and an action of debt:

> The plaintiff has not asked for any declaration of right . . . . . which, if affirmed in his favour could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party; but that is not the question for our determination. We have to determine whether this action ought to go on as that execution could be maintained against all the persons represented. In my judgment that would be impossible (cited in (1928) 1 K B 663[2] at pp. 684 and 685).

Sargent L. J., while upholding the judgment of Fraser J. in the *case of Hardie*[1] already referred to, after adverting to two important decisions (one relating to contract and the other to tort) declares:

> The judgments of this Court in both these reported cases show decisively how impossible it is that the named defendants can adequately represent for the purposes of defence the different individual members of the Association, since these individuals may obviously have defences separate and distinct from those of the named defendants and of each other (P. 699).

In the present case the Judge has granted a decree for a consolidated sum as representing the mesne profits. It is to be held that each individual of the 150 odd villagers is liable for mesne profits in respect of the entire land, although under the karaiyedu form of enjoyment, no ryot is in occupation of more than a fractional share of the whole land. The injustice of such a decree is obvious and the principle of the English decisions already quoted clearly applies. Nor can the decree in this respect be maintained as against the named defendants, no attempt having been made to apportion the liability, as what has been found due is the amount supposed to be payable by the entire group. We say nothing as to the plaintiffs' right to recover mesne profits, future or subsequent, in any separate proceeding; with that we are not concerned and we express no opinion on that matter.

In so far as the decree is for possession, different considerations apply. The facts are common, giving rise to the same liability in regard to each member. Let us apply the test laid down by Buckley L. J. There can be no difficulty in executing the decree against the person either on the record or absent; the liability of one individual does not differ from the liability of another—all being equally liable to be ejected. Then again, can it be said in the words of Sargent L. J. that the absent members have defences separate and distinct from those of the named defendants and of each other? Here also the answer must be in the negative. In so far as the decree is for possession, it should, we think, be upheld. From the judgment of Fraser J. cited above, it is clear that a representative suit will lie as much in respect of a declaration as for an injunction: (1928) 1 K B 663[2] at p. 686. In respect of these two reliefs also the lower Court's decree must be confirmed. In the result, in Appeal No. 324 of 1933, the decree of the Court below is affirmed except in so far as it pertains to the recovery of mesne profits; that portion of the decree, as already stated, is vacated. The order of that Court in regard to costs is maintained; in the appeal each party will bear his costs. As to Appeal No. 88 of 1934, it is dismissed with costs.

C.R.K./D.S. *Order accordingly*

---

1. (1927) 96 L J K B 773=43 T L R 477.
2. Hardie and Lane Ltd. v. Chilton, (1928) 1 K B 663 = 96 L J K B 1040 = 71 S J 664 = 43 T L R 709=138 L T 14.
3. Walker v. Sur, (1914) 2 K B 930=83 L J K B 1188=109 L T 888=30 T L R 171.

A. I. R. 1938 Madras 757

STODART J.

Alagar Raja and another—Petitioners.

v.

Narayana Raja and another —

Respondents.

Civil Misc. Petn. No. 165 of 1938, Decided on 8th March 1938, against decree of Sub-Judge, Ramnad at Madura, in A. S. No. 74 of 1933.

(a) Civil P. C. (1908), O. 22, R. 10 — Term suit in O. 22, R. 10 includes appeal and second appeal following on decree.

The term suit in O. 22, R. 10 includes an appeal and second appeal following on decree and the clause "the suit may, by leave of the Court, be continued" in O. 22, R. 10 means also that the appeal and the second appeal arising on the decree in the suit may be continued by or against the person who has acquired the interest. [P 758 C 1]

(b) Benami –Benamidar—Right of.

A benamidar is entitled to enforce his rights, whatever rights he possesses under his deed.

[P 758 C 2]

N. R. Raghavachari for K. Aravamudha Ayyangar — *for Petitioners.*

V. Ramaswami Iyer, K. V. Sesha Iyengar and R. Subramania Iyer —

for Respondents.

Order. — The question for decision in this petition arises in connexion with a second appeal the parties to which have reported compromise in the matter. The petitioners whose petition I shall describe presently have applied to be brought on the record and to defend the second appeal in lieu of the respondent in the appeal. They claim to be entitled to do this under O. 22, R. 10, Civil P. C., viz. on the ground that they have acquired an interest in the subject-matter of the suit which is in danger of being injured by the proposed compromise of their transferor, the respondent. The facts of the case are as follows: The plaintiff in this suit had three successive mortgages on the same items of property, viz. Survey No. 80 measuring 93 cents, Survey No. 79 measuring 17 cents, and another piece of land and a house. These two latter items are not particularly specified in the pleadings and their identity is not of any importance. The plaintiff in the suit, as I have said, was the mortgagee of this property by mortgages dated 13th September 1923, 3rd August 1927 and last a mortgage of a later date which is not now apparent from the papers in the case. The first of the plaintiffs' mortgage was for Rs. 1500, the second was for Rs. 800 and the third was for Rs. 210 and we have the plaintiffs' statement in his plaint to the effect that on the date of the suit, that is to say in 1931, these three mortgages amounted to Rs. 4000. The defendant was a man entitled in respect of a mortgage which was prior to all the foregoing mortgages. The mortgage extended over Survey Nos. 80 and 79 and it comprised two other survey numbers which are not the subject of the three succeeding mortgages. The original mortgagee had obtained a decree on his mortgage and assigned it to the defendant.

The amount of that decree was Rs. 375 if paid before 13th August 1929 and Rs. 620 if paid otherwise. It will be observed that even assuming that nothing has been paid on this mortgage, the amount due on it is only Rs. 620 as on 13th August 1929 and I would also observe that the two survey numbers which were included in the subsequent mortgages are exactly half the extent of land mortgaged in the first mortgage. Survey Nos. 80 and 79 are in the aggregate 1 acre 10 cents. The other two survey numbers comprised in the first mortgage are of the same extent. Coming to the plaintiffs' suit, the object of it was to obtain a declaration that the assignment of the decree on the first mortgage to the defendant was purely nominal and fraudulent since as a matter of fact the said decree had been discharged. The learned District Munsif of Srivilliputtur held against the plaintiff on this point but he also held that the plaintiff was entitled in equity to ask that his properties, viz. Survey Nos. 80 and 79, should be sold last. The Court evidently meant that the properties which were comprised in the three subsequent mortgages in favour of the plaintiff should in any execution proceedings taken by the defendant be put up for sale only after Survey Nos. 48 and 49. It should be remembered that Survey Nos. 48 and 49 are not included in any of the subsequent mortgages. This decision was appealed against by the defendant, representative of the first mortgagee. He objected to the decision of the trial Court in respect of the order by which the plaintiff was given the benefit of marshalling and his appeal was dismissed. He is the appellant in this second appeal and the respondent is the plaintiff in the suit. The validity of the first mortgage is now no longer in question.

The only question for consideration in the second appeal was whether the order of the Courts below in the matter of marshalling was correct and that question has

been settled between the parties, by their arriving at a compromise. The compromise is evidenced by a memorandum signed by the parties and by their learned advocates and it is to the effect that the plaintiff in consideration of a cash payment of Rs. 410 agrees that the defendant shall execute his decree by selling the property in any order he likes. Now coming to the position of these petitioners, they during the pendency of the suit in the trial Court took an assignment from the plaintiff of the first two of the plaintiffs' mortgages, that is to say the mortgages of 1923 and 1927 the face value of which is Rs. 2300. They apply to be allowed to continue the second appeal since of course the order for marshalling which the plaintiff has obtained is very much in favour of these petitioners. The only question I have to decide is whether these parties who now claim to continue the second appeal can be allowed to do so. The case, as I have said, appears to be governed by O. 22, R. 10, Civil P. C., which is as follows :

> In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

It seems to me that there are two questions for decision arising out of the terms of this Rule. The first is, does the suit include an appeal and second appeal following on decree? Sub-r. (2) is :

> The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

It appears to me that in sub-r. (2) the benefit indicated was the right to oppose or support the pending appeal. I think therefore that in O. 22, R. 10 the clause "the suit may, by leave of the Court, be continued" means also that the appeal and second appeal arising on the decree in the suit may be continued by or against the person who has acquired the interest. The second question for decision is whether these petitioners are as a matter of fact persons who have acquired an interest in the subject-matter of the suit now under decision. The object of that suit was to protect S. Nos. 80 and 79. The plaintiff desired to get rid of the first mortgage entirely. He did not succeed in doing so but in the result he got a very favourable order, viz. that S. Nos. 80 and 79 should not be sold before S. Nos. 48 and 49 were sold by the decree-holder in the first mortgage suit. In his plaint the plaintiff described the value of this protection which he claimed as Rs. 4000. During the suit, as I have explained, he transferred to these petitioners the major portion of the interest which he possessed in the property. In fact he transferred mortgages of the face value of Rs. 2300 retaining for his own interest only the last mortgage for Rs. 210. He fought the case upto the stage of first appeal thereby fighting not only his own battle but that of these petitioners. Now at the stage of second appeal he withdraws on being satisfied with a cash payment amounting probably to the whole of the money due on his last mortgage.

In these circumstances I think it is obvious that these petitioners have a very substantial interest in the suit. The order which I would have to pass if I accepted the compromise would prejudice these petitioners and entirely wipe out the benefit which accrued to them by reason of the decrees of the lower Courts. Other things being equal, I think the petitioners are entitled to be brought on the record and to continue this second appeal. It is objected however by the learned advocate for the respondent, i. e. the plaintiff in the suit that the assignment in favour of these petitioners is entirely benami. I do not think it necessary to enter into an inquiry on that point. The assignment is admitted to be true, that is to say the assignment of the two mortgages of 1923 and 1927. A benamidar is entitled to enforce his rights whatever rights he possesses under his deed. In the result the petition is allowed.

C.R.K./R.M. *Petition allowed.*

---

* A. I. R. 1938 Madras 758

HORWILL J.

In re S. S. Batliwala

Accused—Appellant.

Criminal Appeal No. 645 of 1937, Decided on 14th March 1938, against the order of Sess. Judge, Nellore Division, in Case No. 34 of 1937.

(a) Criminal Trial—Sanction to prosecute — Order of sanction containing merely a request to Deputy Inspector-General as head of C. I. D. to depute officer of Inspector's rank to file complaint — Complaint filed by Inspector deputed by Superintendent, Special Branch, C. I. D., is properly filed.

Where the order sanctioning the prosecution for sedition contained merely a request to the Deputy Inspector-General as head of the C. I. D. to depute a certain officer not below the rank of Inspector to

file the complaint and a complaint is filed by the Inspector deputed by the Superintendent, Special Branch, C. I. D., the prosecution is properly filed, though the Inspector is not deputed by the Deputy Inspector himself, as there is no intention on the part of the Government that the Inspector of the Deputy General's choice only should file the complaint : *8 Bom H C R 32, Disting.* [P 760 C 2]

(b) Government of India Act (1935), S. 49 (1) — Governor not required to consult his Ministers before performing executive acts — Governor exercising his individual judgment though not required to do so — Still his act cannot be questioned.

There is no provision in the Act which requires the Governor to consult his Ministers before performing executive acts. The Instrument of Instructions implies that he should consult his Ministers; for without consulting them, he would not be able to be guided by their advice ; but he is not legally required to do so. The remedy for any unconstitutional act on the part of the Governor is not legal action but constitutional action—the resignation of the Ministers if they consider that the unconstitutional act of the Governor is of sufficient importance to warrant their resignation, and a request that the Governor be recalled. [P 761 C 2]

In the case of a sanction to prosecute under S. 196, Criminal P. C., the Governor is certainly not required to exercise his individual judgment ; but that does not mean that in exercising his individual judgment he is acting unlawfully and that his act can be called in question in a Court of law. [P 762 C 1]

(c) Government of India Act (1935), S. 50 (3) — Prohibition contained in S. 50 (3) is general.

The prohibition contained in S. 50 (3) that anything done by the Governor shall not be questioned on the ground that he ought or ought not to have acted in his discretion or ought not to have exercised his individual judgment is a general one and not confined to cases in which the question arises whether any matter is or is not a matter as respects which the Governor is required to act in his discretion or to exercise his individual judgment. [P 761 C 2 ; P 762 C 1]

(d) Governor — Powers of — Self-governing dominion — Governor needs extraordinary powers to interfere in case of grave crisis though such powers are rarely exercised.

The Governor of a small colony inhabited by primitive and backward peoples has very much less power than the Governor-General of a self-governing dominion, the reason being that in the former the Government is carried out personally by the Governor and the officials subordinate to him ; but in the case of a self-governing dominion where the Government is, in practice, in the hands of the people, the Governor needs extraordinary powers to interfere where a grave crisis arises ; but these extraordinary powers he rarely uses. [P 762 C 2]

(e) Penal Code (1860), S. 124-A— Report of short-hand writer — Short-hand writer neither missing nor misunderstanding very much, but committing a few mistakes in recording and transcribing — Report is reliable though undue importance to particular sentence is not safe.

No doubt every short-hand writer is fallible and may make a few mistakes (e. g. grammatical) both in the recording of the subject-matter of the speech and in transcribing the short-hand notes. But if he has neither missed nor misunderstood very much, the report of the short-hand writer may be relied upon as accurately reproducing in substance and in words what the accused actually said in the speech, though it would not be safe to attach undue significance to any particular sentence. [P 762 C 2; P 763 C 1]

(f) Penal Code (1860), S. 124-A — Seditious speech—Test.

A man may make ninety-nine non-seditious speeches, yet his hundredth speech might be full of sedition. [P 763 C 1]

*** (g) Penal Code (1860), S. 124-A — Essentials of — Speech is to be adjudged not by the views of accused or his political party — Advocacy of principles is not sedition but adoption of methods and modes intended to cause disaffection towards Government is—It is possible to express dissatisfaction with Government without exciting disaffection.**

A Court cannot take account of the principles of a political party and declare that an offence which is punishable under the Penal Code is not an offence because it does not contravene the principles of that party. Moreover it is not the advocacy of certain principles—however extreme they may be—that the law punishes, but the adoption of methods of address intended to cause disaffection towards the Government established by law or to bring that Government into hatred or contempt. It is quite possible to express dissatisfaction with the Government without exciting disaffection and a speech will have to be judged not by the political views of the accused or his party, but by the purpose of the accused in expressing those opinions in the way he did. Fair criticism of the Government is no offence ; but the question the Court has to decide is whether the speech of the accused indicated an intention to promote hostility and ill-will towards the Government. If a person attempts to bring the Government into hatred or contempt or to excite disaffection towards it, force and violence are encouraged which may lead to a conflict with the authorities with the certainty that there will be a grievous loss of life. S. 124-A is intended as much to protect the people against agitators as it is to maintain the stability of the Government. [P 763 C 1, 2]

The accused began his speech by a slanderous attack on the local zamindar exploiting the local grievances. Then he dilated on the poverty of the people and said : "The peasantry was being ground down in poverty and even a dog will turn, if you go on beating too much." He made frequent references to the story of a rebel, who had similarly exploited the local grievances and brought about a rebellion relieving the distress of the poor by looting treasuries, but did not give his history at once. He gave the history of the British occupation of India and compared the British to a guest with a snake in his heart and the zamindar's ancestor to a traitorous brother who helped to impoverish his bretheren, and proceeded: "What are your feelings for the man though he is your brother, flesh of your flesh and blood of your blood ? I ask you what are your feelings first towards your brother and then towards the marauder, the dacoit, the man with the serpent's

heart who came as a guest to your house? What are your feelings towards these two?" Then he began a highly coloured story of the rebel hero, who enabled the people to rise against oppression, the story containing contemptuous references to the police, and stating that they were paid to shoot people. Then he said there were thousands of persons like the rebel determined not only to drive out the Britisher, take charge of the treasuries, but also to kill the poisonous snake sitting in the heart of the British Imperialism. He concluded : "All India is organizing. Everybody is organizing so that when the final fight comes, we shall kick these Britishers out":

Held that though the speaker was entitled to abuse the British, the speech was a direct incitement to the people to violence against the Government established. [P 764 C 2 ; P 765 C 1]

B. Jagannadha Das for S. Suryaprakasam — *for Appellant.*

Public Prosecutor — *for the Crown.*

Judgment. — The appellant, a member of the All-India Congress Socialist Party, has been convicted by the Sessions Judge of Nellore of the offence of having delivered a seditious speech punishable under Sec. 124-A, I. P. C. The accused had toured throughout the Andhra Desa doing propaganda work on behalf of his party; and the speech in question was delivered at Venkatagiri at the end of his tour. Two preliminary objections have been raised with regard to the validity of the prosecution. The first point taken is that there was no proper sanction, in that His Excellency the Governor did not consult his Ministers—as he was bound to do before sanctioning the prosecution and, secondly, that the prosecution was not filed in accordance with the order sanctioning the prosecution, in that the Circle Inspector who filed the complaint was not deputed by the Deputy Inspector-General of Police, C. I. D., as required by the sanction order, but by the Superintendent, Special Branch, C. I. D. The second point can be briefly disposed of. Para. 2 of the order of the Government is :

The Deputy Inspector-General of Police, Railways and C. I. D., is requested to depute an officer of the Special Branch, C. I. D., of the rank not lower than that of Inspector of Police, to prefer a complaint in the Court of the District Magistrate of Nellore.

The letter issued in consequence of this order, Ex. A, is from A. F. Bulkley Esq., Deputy Inspector-General of Police, Railways and C. I. D., Madras, to M. R. Ry. V. Ayyasami Naidu Avergal, Inspector of Police, Special Branch, C. I. D., Madras. The letter authorizes the officer to whom the letter was addressed to prefer a complaint in the Court of the District Magistrate, Nellore, against the accused in respect of the speech delivered by him at Venkatagiri on 3rd September 1937. The letter was signed by Mr. Colebrook, the Superintendent, Special Branch, C. I. D., not as such but "for Deputy Inspector-General of Police, Railways and C. I. D." The body of the letter and the words at the bottom, "Deputy Inspector-General of Police, Railways and C. I. D.," were typed. The signature of Mr. Colebrook and the word "for" were in ink, which is clear proof that Mr. Colebrook signed not on his own account but as one authorized to sign on behalf of the Deputy Inspector-General of Police, Railways and C. I. D. Mr. Bulkley, Deputy Inspector-General of Police, is a touring officer and Mr. Colebrook was the senior officer working in his office. There is therefore no reason to doubt that Mr. Colebrook was authorized to sign such orders. Even if it was Mr. Colebrook and not Mr. Bulkley who deputed Mr. Ayyasami Naidu to file the complaint, I should still be of opinion that the complaint was properly filed. The order of the Government contained merely a request to depute a certain officer of the special branch, C. I. D., not below the rank of Inspector, to file the complaint. It is clear from the order that the Government had no intention that only an Inspector of Mr. Bulkley's choice should file the complaint. He was ordered to depute the Inspector because he was the head of the C. I. D. Mr. Colebrook was in charge of the Special Branch of the C. I. D., of which Mr. Ayyasami Naidu was an Inspector. Mr. Jagannadha Das had placed reliance on 8 Bom H C R 32 *(Crown cases)*[1] in which an order sanctioning prosecution of a highly placed Magistrate directed that the complaint should be filed by a responsible I. C. S. Magistrate specifically named ; and it was held in that case that it was clear that the Government intended that that particular I. C. S. gentleman should file the complaint and no other, that the Government clearly thought it advisable that this particular gentleman should consider the case against the accused and select such acts of his as he deemed suitable and proper for the subject of a charge, and that it was not the intention of the Government that this power of discrimination should be delegated to some other person of a lower rank. As already pointed out, the Government clearly had no intention in the present

1. Reg v. Vinayak Devakar, (1871) 8 Bom H C R 32 (Crown cases).

case that any particular officer should file the complaint.

The order sanctioning the prosecution, Ex. B, purports to be the order of the Provincial Government and to have been issued by the order of His Excellency the Governor who under S. 49 (1), Government of India Act, 1935, exercises the executive authority of the Provincial Government. The order was authenticated by Mr. Brakenbury, the Chief Secretary, in accordance with certain rules framed by His Excellency the Governor in consultation with the then Ministers. The sanction therefore seems to be in order and there is nothing in it which would prevent the Court from applying the principle enunciated in S. 114, Illus. (e), Evidence Act, that public acts are regularly done. However, Mr. Jagannadha Das states that a speech delivered by the Hon'ble Member for Courts and Prisons, reported in a local paper contained a statement that he (the Hon'ble member for Courts and Prisons) had not been consulted with regard to the prosecution. This statement raised some doubt in the minds of the counsel for the accused whether His Excellency the Governor had consulted his Ministers ; and in order to ascertain whether that was done, the Court was requested to summon the Hon'ble the Prime Minister and the Hon'ble the Minister for Courts and Prisons. Had these Ministers pleaded privilege, the Court would undoubtedly have upheld their claim and the trial would have proceeded on the assumption that the sanction was properly accorded. Probably it could also have been successfully contended that the Court was not at liberty to probe into the acts and conversations of the Governor and his Ministers which had led up to the passing of the order and that the Court was bound to assume that the order was regularly passed. The learned Public Prosecutor, in order to avoid any unpleasantness that might arise with regard to the summoning of Ministers as defence witnesses, was prepared to assume, although he had no reason to believe that such was the case, that His Excellency the Governor had acted without consulting his Ministers. The learned Sessions Judge was therefore bound to consider whether the failure of His Excellency the Governor to consult his Ministers invalidated the sanction and a very learned and lengthy argument has been addressed to me by Mr. Jagannadha Das on this question.

The Government of India Act of 1935, in so far as it relates to the administration of provincial affairs, contemplates that in certain cases the Governor should act in his discretion, and do what he thinks to be right independently of any opinions that may be held by his Ministers. In certain cases, too, he has to exercise his own independent judgment ; in other cases, it is clearly presumed that he will consult his Ministers : and the Instrument of Instructions issued to the Governor requires him to be guided by his Ministers in those matters in which he is not required to act in his discretion or to exercise his individual judgment. Admittedly, by virtue of S. 53 (2) of the Act, the Courts cannot question any act done by the Governor on the ground that he has not followed the Instrument of Instructions ; but it is contended by Mr. Jagannadha Das that the Governor is legally bound to consult his Ministers even though his acts cannot be called in question on the ground that he was not guided by the advice tendered. Except in S. 59 (5), however, I find no reference in the Government of India Act to any legal duty cast upon the Governor to consult his Ministers. S. 59, Cls. (2) and (3), relate to the drawing up of certain rules and to the making of certain orders and instruments and their authentication ; and S. 59 (5) requires the Governor to consult his Ministers with regard to the discharge of his functions under these sub-rules.

There is no provision in the Act which requires the Governor to consult his Ministers before performing executive acts. The Instrument of Instructions implies that he should consult his Ministers ; for without consulting them he would not be able to be guided by their advice ; but he is not legally required to do so. The remedy for any unconstitutional act on the part of the Governor is not legal action but constitutional action — the resignation of the Ministers if they consider that the unconstitutional act of the Governor is of sufficient importance to warrant their resignation and a request that the Governor be recalled. S. 50 (3) is to the effect that the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion or ought or ought not to have exercised his individual judgment; but it is argued that these words cannot be severed from the first part of sub-s. (3) of S. 50 and relate only to cases in which the question arises whether any matter is or is not a

matter as respects which the Governor is required to act in his discretion or to exercise his individual judgment. But if the latter part of this sub-section had this very limited meaning, all these words set out above would be unnecessary and all that would be required would be to add after the words "the decision of the Governor in his discretion shall be final" the words "and shall not be called in question." It has been pointed out that S. 271 (2-b) requires that with respect to the sanctioning of prosecutions of public servants which would be under S. 197, Criminal P. C., the Governor shall exercise his individual judgment. It is therefore argued that as nothing is said about S. 196, it must be assumed, by implication, that the Governor is bound to consult his Ministers before sanctioning a prosecution. S. 271 was drawn up for the protection of public servants, who are under the special protection of the Governor and it is in order that public servants shall not be victimized that the Governor is required to exercise his own individual judgment in sanctioning or withholding sanction to prosecute them. In the case of a sanction to prosecute under S. 196, Criminal P. C., the Governor is certainly not required to exercise his individual judgment; but that does not mean that in exercising his individual judgment he is acting unlawfully and that his act can be called in question in a Court of law. It is pointed out that in matters where the Governor is required to exercise his individual judgment or to act in his discretion, his acts are subject to supervision by the Governor-General but in matters where he should be guided by his Ministers there is no such right of interference by the Governor-General.

It is therefore argued that the Government of India Act could not be so anomalous as to permit the Governor to act autocratically in a matter in which he should be guided by his Ministers and yet should be under the control of the Governor-General in matters in which he is required to exercise his individual judgment or to act in his discretion. This argument ignores the constitutional remedy of the Ministers and the people to which reference has already been made. Very much the same criticism might be made of the argument that as the Government of India Act is meant to give more power into the hands of the elected representatives of the people and contains many provisions which are almost identical with provisions in the constitution of the great self-governing dominions, it could not be meant to give the Governor such autocratic powers. This argument moreover is based on the fallacy that the more advanced the constitution the less the powers of the Governor. The contrary is true. The Governor of a small colony inhabited by primitive and backward peoples has very much less power than the Governor-General of a self-governing dominion, the reason being that in the former the Government is carried out personally by the Governor and the officials subordinate to him; but in the case of a self-governing dominion where the Government is, in practice, in the hands of the people, the Governor needs extraordinary powers to interfere when a grave crisis arises; but these extraordinary powers he rarely uses. Even in the self-governing dominions the Governor-General has not infrequently resisted the Legislature and the Ministers by withholding and reserving bills. I am therefore satisfied that there is nothing in the Government of India Act which imposed a legal obligation upon His Excellency the Governor to consult his Ministers before sanctioning the prosecution of the accused. It would perhaps be as well before leaving this question to again point out that the learned Public Prosecutor does not admit that there was no consultation.

On the question whether the accused was actually guilty of sedition, a further preliminary objection has been taken that it is not safe to rely on the reported speech which was recorded by a shorthand writer and later transcribed. No doubt every shorthand writer is fallible and undoubtedly a few mistakes were made both in the recording of the subject-matter of the speech and in transcribing the shorthand notes; but it cannot be doubted, upon a reading of the whole of the reported speech, that the shorthand writer has neither missed nor misunderstood very much. Emphasis was laid on certain grammatical mistakes in the speech and it was pointed out that one sentence contained no predicate; but it cannot be doubted for a moment that even the best and the most renowned speakers make frequent grammatical mistakes and, where the sentence is involved, sometimes forget how the sentence began, with the result that a sentence which may have conveyed a clear meaning to the hearers is not, grammatically speaking, complete and correct (in reading through the judgment after

the stenographer had transcribed it, I found one such unfinished sentence of my own). While therefore it would be unsafe to rely on any chance word or to attach undue significance to any particular sentence, there can be no doubt that what the short-hand writer has sent to the Government and which has been filed in this case does very accurately reproduce in substance and in words what the accused actually said in the speech delivered by him at Venkatagiri on 3rd September last. It may be noted that no objection to the correctness of the report was taken in the Magistrate's Court; and it was only in the Sessions Court that this point was thought of. The interpreter of the accused, who was examined as a defence witness, said that it was only after getting into the witness-box that he read it carefully and noted the incorrect portions.

Mr. Jagannadha Doss has further tried to divert attention from the actual speech made by pointing out that the accused made many other speeches in Andhra Desa which were delivered during a propaganda tour on behalf of his party; and that with respect to none of those other speeches has a similar charge been made against him. From this I have been asked to conclude that the accused could not have had a seditious intention when he delivered this particular speech at Venkatagiri. I am unable to accept this argument; for a man may make ninety-nine non-seditious speeches and yet his hundredth speech might be full of sedition. Moreover, we know very little about the speeches made by the accused in other places. Only one witness speaks on this subject and he heard only one speech. He was a highly educated gentleman, of 58 years of age, and not likely to be roused to violence against his better judgment by a young man like the accused. Another reason why I have been asked not to attach too much importance to the spoken word is that the opinions expressed in the speech were in accordance with the principles of the Congress party, whose members now govern in the majority of the provinces of India; but clearly a Court cannot take account of the principles of a political party and declare that an offence which is punishable under the Penal Code is not an offence because it does not contravene the principles of that party. Moreover, it is not the advocacy of certain principles—however extreme they may be—that the law punishes; but the adoption of methods and modes of address intended to cause disaffection towards the Government established by law or to bring that Government into hatred or contempt. It is quite possible to express dissatisfaction with the Government without exciting disaffection; and this speech will have to be judged not by the political views of the accused or his party but by the purpose of the accused in expressing those opinions in the way he did. Fair criticism of the Government is no offence; but the question the Court had to decide was whether the speech of the accused indicated an intention to promote hostility and ill-will towards the Government. If a person attempts to bring the Government into hatred or contempt or to excite disaffection towards it, force and violence are encouraged which may lead to a conflict with the authorities with the certainty that there will be a grievous loss of life. S. 124-A is intended as much to protect the people against agitators as it is to maintain the stability of the Government.

Mr. Jagannadha Doss has stated that it was part of the instructions of persons going on propaganda tours that they should exploit local grievances and that it was in accordance with this principle that when the accused went to Venkatagiri he began his speech by a slanderous diatribe against the zamindar of Venkatagiri. One of the local grievances appears to have been that certain persons who had been in the habit of cutting fuel in the local forests were not allowed to do so; and the accused dilates on the poverty of the people and the way they were being ground down by the zamindar and says :

> Do you know what happens if there is a terrific tyranny and there is nobody to succour the poor ? Do you remember a man called Alluri Sitharamaraju (a man who similarly exploited local grievances and brought about a rebellion) ? Have you heard about his history ? And do you know what he did ?

He then expatiates on the wretched state of the people in Venkatagiri and refers to a certain criminal case against a man for killing a boar, and this gave the accused an opportunity to attack the magistracy. He says :

> He brought him (the boar) down to earth and this British Government, whose Magistrates are supposed to be doyens of justice and equity and are the most corrupt officials I have ever seen in the world, these people .....

Then he says :

> The peasantry is being ground down in poverty and even a dog will turn if you go on beating too much. I ask you once again, do you remember the history of Alluri Sitharamaraju ?

The accused does not however give the story of Sitharamaraju at once but returns to another attack on the zamindar. He then gives what purports to be a history of the British occupation of India and compares the British to a guest with a snake in his heart and the zamindar's ancestor to a traitorous brother who helped to impoverish his brethren. This guest with a snake's heart is referred to in the first person and we find these words :

There is poverty. Will you allow me to have a small corner of your house ? I shall sit down and sell a small little thing like tobacco and send the money to my country. Will you allow it ? You with a magnanimous heart said 'alright.' Get this corner and then I got some persons in your family supposing your blood brother, to come with me and conspire with me so that I can make everybody quarrel and take charge of the whole house. Your wife will not be your wife. She will be my wife. Your brothers and sisters shall be slaving away for me and with what aim ? That I may carry the whole wealth of your household to my own land.

Then after a few more remarks in the same vein chiefly directed towards the zamindar's ancestor, he says with respect to that ancestor :

He has turned everybody in the family a slave to this foreigner. He has gone and sold his country to me. What are your feelings for the man though he is your brother, flesh of your flesh and blood of your blood ? I ask you what are your feelings first towards your brother and then towards the marauder, the dacoit, the man with the serpent's heart who came as a guest to your house ? What are your feelings towards these two ? I want to talk to you about Alluri Sitharamaraju.

Then begins a highly coloured story of Sitharamaraju, in which he is painted as a hero who enabled the people to rise against oppression, the story containing contemptuous references to the police. He says of Sitharamaraju :

He is a man who came from Andhra Desa and when there was terrific repression by this British Government, its police, guns, and arms, he said 'I do not care for my future or what happens to me. I shall make a band of followers and I shall see that in this land of West Godavari or East Godavari or Kistna these Britishers shall lead a life as brothers and did it. Do you know how he did it ? He was not like the British officials who came with lathis and bullets and shoot on innocent people who are not ready or who have no guns. No, no. He used to give notice ..... If you care to be present, be present and hand over the keys (of the Treasury); but if you want to test me, remember I shall shoot you down like a dog, and what used to happen ? The Police officers are certainly very brave when you have not got arms in your hand ..... and these officers and these militaries and these police officers who are very brave in shooting down the people and tyrannizing over them, they used to throw down their guns and run for their lives.

The speech continues in much the same strain, with an accusation that the police officers were paid to shoot down the people. Then he says :

But today in this country there are thousands of people like Alluri who have come out and said they will not rest until all the exploiters in the land shall be thrown out, until this foreign marauder, dacoit, who has got in under false pretences is thrown out of this land with the poison that is sitting in his heart, with the snake that is sitting in his heart..... these Alluris in this country have determined that not only will they drive out the Britisher, hand over the wealth, take charge of treasuries in this country; but also have determined that the poisonous snake which is sitting in the heart of British Imperialism shall be killed and not allowed to poison our life breath every minute and allow our Harijans to die of starvation, our poor peasants to go in poverty and misery and have no hopes of civilization at any time, no future for their children, no education, no clothes.

He then goes on to discuss the present political situation and says that the present Prime Minister has gone to jail in order that this British Governor and this British Government shall pack out of this country and he points out that now the Congress are in power, that even the soldiers and police and Government servants want to be free from British Imperialism, and that they also know that this country is a slave country because British Imperialism is here. He exhorts the people either to enforce the zamindar to give them fuel or to march out and take the fuel themselves and concludes :

All India is organising. Everybody is organising, so that when the final fight comes we shall kick these Britishers out.

There can be no doubt from a reading of the whole of this speech, of which extracts have been given above, that it is a direct incitement to the people to violence against the Government as now established, which the accused has described as the British Government. That by the "British Government" he means the Government as now established is particularly clear where he compares the kist payable on Government lands with the rates payable on zamindari lands, where he describes the charge on Government lands as being levied by the "British Government." It is of course true that any speaker is entitled to abuse the British and nobody has ever said that such abuse amounts to sedition. On the contrary, it is commonly counted as patriotism. But the accused is not here concerned with ancient history and with individuals of British nationality ; but with the Government as now established, which in his speech he

has identified with the Government that was established in the early stages of the British occupation and which is responsible, jointly with the zamindar, for the poverty and distress now existing. Alluri, the hero, relieved distress by looting the treasuries; and there are thousands of Alluris today. The accused clearly did not, as his learned advocate would have me believe, identify the existing Government with the Congress Ministry. The Government means much more than the Ministers; and includes the machinery with which the Ministers have to work. The accused was always aware of this distinction between the Government and the Ministry; and it was against the Government that the accused intended to cause disaffection. Even if this distinction was not present in his mind, the speech would still be seditious; for the Harijans and others to whom the accused addressed his remarks were clearly exhorted to resist the tyrannous authority then existing—the authority which in practice was being exercised by the Ministers then in power and the officials who were carrying out their policy.

The sedition does not end with the denunciation of the Government and an exhortation to the people to follow the thousands of Alluris of today; but includes the bringing into hatred and contempt the magistracy and the police. Attacks of this kind on Government employees scandalise the Government by casting a reflection on those who are entrusted with the administration of public affairs and naturally tend to endanger the public peace; and this, undoubtedly, as can be seen from the passages extracted above, is what the accused intended. The learned counsel for the accused has pointed out a few (for there are only very few) passages which read more peacefully, as where, after inviting the people to shout with him "long live revolution" he described revolution as meaning that :

> We (the people of India) shall change the structure of society so that man will not exploit man, one man shall not be rich and thousands poor,

and so on, which the Public Prosecutor has aptly compared with the interjections of Mark Antony in his funeral oration over Julius Ceasar when, in a clever speech urging the people to rebellion, he added at frequent intervals, "For Brutus is an honourable man." The conviction is therefore right. The sentence is a moderate one. The conviction and sentence are therefore confirmed and the appeal dismissed.

C.R.K./V.B.B. *Appeal dismissed.*

✻ A. I. R. 1938 Madras 765

LEACH C. J. AND MADHAVAN NAIR J.

Ragunathan — Appellant.

v.

P. N. Ravuthakanni and others — Respondents.

Appeal No. 347 of 1933, Decided on 16th March 1938, against decree of Sub-Judge, Ramnad at Madura, in O. S. No. 69 of 1931.

✻ Minor — Covenant by guardian to sell immovable property — Covenant cannot be enforced against minor—Minor is not liable to return earnest money paid to guardian under covenant.

An infant cannot contract in this country and a covenant by his guardian for the sale of immovable property cannot be enforced against him : *39 Cal 232 and A I R 1919 Mad 641 (FB), Rel. on.* [P 766 C 1]

The earnest money paid to the guardian can only be treated as being security for the performance of a contract which in law was no contract at all. Earnest money is paid as a guarantee that the contract will be performed. The payment cannot be regarded as falling within S. 68, Contract Act or as being repayable under Hindu law on the ground that it was paid for the minor's benefit. Hence the minor is not liable to return the earnest money : *(1875) 10 Ch A 512; (1884) 27 Ch D 89 and (1889) 14 A C 429, Rel. on: A I R 1917 Pat 332, Dissent.* [P 766 C 1, 2]

T. M. Ramaswamy Iyer—*for Appellant.*

V. N. Venkatavaradachari and P. Rajagopalan — *for Respondents.*

Leach C. J. — This appeal raises the question of the liability of a minor to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by the guardian on his behalf. On 20th August 1931 Andalammal, the mother and guardian of the appellant, agreed to sell to the respondent, the minor's shares in a village. The price agreed upon was Rs. 7125, of which Rs. 500 was paid in advance. It is common ground that certain creditors of the estate were pressing for the payment of their debts and the intention was to sell the minor's interests in the village to discharge these liabilities. The sale was not completed, and the property was sold by the mother to a third party, defendant 2 in the suit, out of which this appeal arises. The suit was for a decree for specific performance of the contract, but before the case came on for hearing it was realized

that the Court could not grant this relief. An infant cannot contract in this country and a covenant by his guardian for the sale of immovable property cannot be enforced against him: 39 Cal 232[1] and 42 Mad 185.[2] An application was then made for leave to amend the plaint by adding a prayer for the return of the earnest money. This application was granted, and at the trial the only question which was raised was whether the respondent was entitled to the return of the Rs. 500. The learned trial Judge held that he was, on the ground that the minor was liable, unless it could be shown that he had not received the benefit of the Rs. 500. On this basis he granted a decree for the return of the amount with interest. The appellant challenges the correctness of the decision. Defendant 2 is not concerned with this question, and has therefore not been made a party to the appeal.

It may be taken that it was necessary to sell this property of the minor for the purpose of paying off pressing creditors. This was alleged in the plaint and it was acknowledged in the appellant's written statement that he had to sell the property to defendant 2 "owing to the pressing necessities of the creditors." It would appear that it was out of the money which the mother received from defendant 2 that the debts were in fact discharged. What has become of the Rs. 500 paid to the appellant's mother by the respondent has not been disclosed. The learned advocate for the appellant contends that there can be no decree for the return of earnest money paid under a void contract. On the other hand the learned advocate for the respondent says that as the contract was entered into in order to raise money to pay off creditors, the Rs. 500 must be treated as having been paid to the guardian for necessaries or for his benefit. In our opinion, the appellant is entitled to succeed. It is true, that the guardian was compelled to sell the property of the minor to pay off debts for which the minor's estate was liable, and if a conveyance had been executed, no doubt the respondent would have obtained a valid title to the property, but the Rs. 500 can only be treated as being security for the performance of a contract which in law was no contract at all. Earnest money is paid as a guarantee that the contract will be performed. James L. J. so held in (1875) 10 Ch A 512,[3] where there was a contract for the sale of immovable property with a stipulation that a portion of the purchase money should be paid immediately, and his definition was accepted by the Court of Appeal in (1884) 27 Ch D 89[4] and by the House of Lords in (1889) 14 A C 429.[5] In the last mentioned case Lord Macnaghten observed :

> The deposit serves two purposes—if the purchase is carried out it goes against the purchase money —but its primary purpose is this, it is a guarantee that the purchaser means business.

The price to be paid for the land in the present case was Rs. 7125 and the Rs. 500 was paid as a guarantee that the respondent would pay the balance. It cannot be regarded as a payment to the appellant or to the appellant's guardian for any other purpose. The respondent says that the contract was not carried out because of the default of the appellant's guardian; on the other hand, the appellant puts the blame on to the respondent. It matters not on whose shoulders the blame must be placed. All that we have to consider is the purpose for which this money was paid. The respondent's advocate does not contend that a minor can be made liable for the return of earnest money paid under a void contract. He says that the payment must be treated as falling within S. 68, Contract Act, or as being for the benefit of a Hindu minor and therefore repayable under his personal law. We are unable to regard the payment as falling within S. 68 or as being repayable under Hindu law on the ground that it was paid for the minor's benefit. We can only regard it as being paid by the respondent as a guarantee that he would fulfil his part of the contract and as far as we know it remained with the guardian for this purpose.

The learned advocate for the respondent has referred us to 2 Pat L J 627[6] which was a case in which a minor member of a joint Hindu family had executed an agreement of sale of immovable property and

1. Mir Sarwarjan v. Fakhuruddin Mahomed, (1912) 39 Cal 232=13 I C 331=39 I A 1=16 C W N 74= 15 C L J 69 (P C).
2. Rama Jogayya v. Jagannadhan, (1919) 6 A I R Mad 641=49 I C 872=42 Mad 185=36 M L J 29 (F B).
3. Ex parte Barrell, In re Parnell, (1875) 10 Ch A 512=33 L T 115=23 W R 846.
4. Howe v. Smith, (1884) 27 Ch D 89=53 L J Ch 1055=50 L T 573=48 J P 773=32 W R 802.
5. Soper v. Arnold, (1889), 14 A C 429 = 59 L J Ch 214=61 L T 702=38 W R 449.
6. Pathak Kali Charan Ram v. Ram Deni Ram, (1917) 4 A I R Pat 332=42 I C 693 = 2 Pat L J 627.

had received an advance of Rs. 125 as earnest money. The object in selling the property was to defray the marriage expenses of the minor's brother. The Court treated the expenses as being necessary expenses and granted a decree for the return of the earnest money as the contract was not fulfilled. The learned Judges regarded the case as falling under S. 68, Contract Act. They did not consider the question whether the earnest money should be treated as security for the performance of a void contract. We are unable to accept this decision as embodying a correct statement of the law applying to a case like the one before us. For these reasons the appeal will be allowed and the suit dismissed with costs in favour of the appellant in both the Courts. The costs of the appellant will include the fee paid to the Court guardian and also the cost of the printed papers supplied to him.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 767

WADSWORTH J.

T. Rathnavelu Chettiar — Applicant.

v.

P. M. S. Subramaniam Chetty and others — Respondents.

Appln. Nos. 2700 and 2701 of 1937, Decided on 8th December 1937.

Mortgage—Suit for partition by *G* branch of family against *S* branch—Pending suit *S* mortgaging family properties as manager of joint family — Mortgagee obtaining decree for substituted security in shape of whatever might be allotted to *S's* branch—Partition suit ripened into decree—Mortgaged properties allotted to *G's* branch and in addition certain cash sum as owelty to be realized out of share allotted to *S's* branch—*G's* branch held entitled to charge over properties allotted to *S's* branch—Proper security to which mortgagee was entitled stated.

There were two branches of a family represented by *S* and *G*. *G's* branch instituted a suit against *S's* branch for partition. Pending the suit, *S* mortgaged certain items of property as manager of the joint family. In a suit by the mortgagee on his mortgage he was given a decree for substituted security in the shape of whatever might be allotted to the share of *S's* branch. Meanwhile the partition suit ripened into a final decree as a result of which the items mortgaged to the mortgagee were allotted to *G's* branch and, besides these, *G's* branch was given a right to a payment of certain sum by way of owelty to equalize the shares. This sum was directed to be paid out of the share of the family property allotted to *S's* branch. Subsequently the mortgagee proceeded to execute his mortgage decree against properties allotted to *S's* branch and sold certain items :

Held that the mortgagee had the right to execute his decree, but that right was subject to any prior or more powerful rights residing in *G's* branch. Since the right declared in favour of *G's* branch was the right to receive a cash sum out of the proceeds of these properties, there was no reason why *G's* branch should be made to sell them over again instead of directing its claim against the cash which had in fact resulted from the sale of those properties : [P 768 C 2]

Held further that as the decree ordered the payment "out of share of *S's* branch of the family property" and the share was itself specified in the schedule attached to the decree a charge was created in favour of *G's* branch over properties allotted to *S's* branch. The proper security to which the mortgagee was entitled could not be more than the actual share of the mortgagor, which could only be calculated after deducting properties of a value equivalent to the amount which he had to pay in order to equalise the shares : *34 Mad 47 and 35 Cal 388, Rel. on ; 3 Mad 35, Disting.* [P 769 C 1, 2]

K. Narasimha Iyer for T. V. Subramania Iyer — *for Applicant.*

N. K. Mohanarangam Pillai — *for Respondents.*

Order.—These applications are brought by way of appeal against the order of the learned Master in a matter arising out of a partition in a family consisting of two branches descending from two brothers, Sadasiva Chetty and Gangadhara Chetty. Gangadhara had a son Thaywmana Chetty who has since died, and his branch is represented by his widow Visalakshi. Sadasiva has left two sons. On 24th March 1931, Visalakshi on behalf of her minor son filed a pauper petition claiming partition. This was registered as a suit in September of the same year and resulted in a final decree on 14th September 1934. On 22nd July 1931, that is to say, approximately four months after the pauper petition was filed, Sadasiva mortgaged two items of property to the present appellant. The mortgage was executed by Sadasiva for himself and as manager of the joint family and as guardian of his minor nephew, the son of Gangadhara; and it was also executed by his own adult son. This mortgage is not referred to in the partition suit, and the appellant was not a party to that suit. On 4th August 1934, the appellant brought a suit on his mortgage impleading the two sons of Sadasiva, who was by this time dead, and also the minor son of Gangadhara and he claimed a decree against the hypotheca on the ground that his mortgage was binding on the family. Alternatively, he asked for substituted security in the shape of whatever was allotted to the share of Sadasiva's

branch. Eventually he was given a decree for substituted security. Meanwhile the partition suit had ripened into a final decree as a result of which both of the items mortgaged to the appellant were allotted to Gangadhara's branch; and besides the properties actually allotted to them, Gangadhara's branch was given a right to a payment of Rs. 2228.12.2 by way of owelty to equalize the shares. The original decree made this payable out of the assets of the share of defendant 1 (Sadasiva) but he having died, it was amended so that clause 11 runs : "Defendants 2 and 3 (i. e. Sadasiva's sons) do from and out of the assets of defendant 1, deceased (i. e. Sadasiva) and out of their share of the family property pay," the amount decreed to Gangadhara's son.

Subsequently the appellant proceeded to execute his mortgage decree against the properties allotted to Sadasiva's branch. There were three properties which were sold in execution : (1) No. 109, Egmore High Road, which was sold subject to a mortgage for Rs. 5560, recognized in the partition suit as binding on the family. In the sale the equity of redemption was purchased by the appellant for Rs. 1550, which was set off against his mortgage decree, and he has himself subsequently redeemed the mortgage for Rs. 5560 which binds the whole family. (2) Lands at Arasur which were purchased by the appellant for Rupees 600, this amount being set off against the appellant's mortgage decree. (3) Property at Ponneri, subject to a mortgage for Rupees 500 in favour of a third party. The equity of redemption in this item was purchased by a stranger for Rs. 1000, which amount is in Court deposit. The only additional fact to be noted is that the amount due on the appellant's mortgage decree at the time of its execution was Rs. 3563. The two applications against which these appeals are preferred were (1) an application by the appellant to the Master for the payment of the Court deposit of Rs. 1000 the proceeds of the sale of the third item referred to above, towards the discharge of the appellant's decree. (2) An application by Gangadhara's widow, firstly for the payment of the same sum of Rs. 1000 towards the amount due by way of owelty, secondly for a direction to the appellant to pay back the amount, Rs. 1550, credited to his mortgage decree as a result of the sale of the first item. There is no prayer for the payment of the amount of Rs. 600 credited as a result of the sale of item 2. The questions which arise out of these appeals are : (1) What is the extent of any charge which the appellant may have against Sadasiva's share ? (2) Was any charge created by the provision in clause 11 of the partition decree for the payment of owelty ? (3) If so, can it be enforced by a mere direction to the appellant to pay back that which he has received as a result of the sale of item 1 ? or should it not be enforced by a regular application for execution ? (4) If both the appellant and Visalakshi are entitled to a charge over the properties, which has the priority ?

I will deal first with the contention that, whatever be the merits of the respondent's applications, the form in which they have been made is wrong. As I understand it, the appellant's contention is that, if the respondent were to file an execution petition and bring the properties to sale subject to the prior encumbrance, the appellant being in the position of both prior encumbrancer and of puisne encumbrancer, the result might well be that the amount due on the prior encumbrance would swallow up the whole of the proceeds of item 1 ; and that the appellant has a right to demand that this procedure be followed. It seems to me that this contention, which does not appear to have been advanced before the Master, is very technical. I cannot see why when these properties have been brought to sale by the appellant under his mortgage decree the respondent should not have a right of recourse against the proceeds of that sale rather than against the lands in the hands of a stranger. The appellant had the right to execute his decree, but that right was subject to any prior or more powerful rights residing in others. Since the right declared in favour of the respondent was the right to receive a cash sum out of the proceeds of these properties, I see no reason why the respondent should be made to sell them over again instead of directing his claim against the cash which has in fact resulted from the sale of those properties.

Turning to the question of the existence or non-existence of a charge in favour of the respondent, the appellant relies on a very old case reported in 3 Mad 35[1] in which it was held that an indefinite order for the satisfaction of a decree out of the assets of a deceased person creates no charge on the property in the hands of the purchaser

1. Dorayya v. Ramayya, (1881) 3 Mad 35.

provided that the purchase was not fraudulent. This case has been discussed and distinguished in a case reported in 34 Mad 47,[2] wherein it was held that when the decree makes 'the properties' liable to satisfy a debt and it appears from a construction of it that the word 'properties' does not refer to the properties of the party generally but to certain specific properties, the identity of which is clear, a charge is created. That ruling surely would govern the facts of the present case where the decree orders the payment "out of their share of the family property" and the share is itself specified in the schedule attached to the decree. Another case which has been referred to is the Full Bench ruling reported in 35 Cal 388,[3] wherein it was held that cosharers who have been given a specific charge over an amount awarded by way of owelty are entitled to a prior charge over a particular property as against the mortgagees of an undivided share of one of the coparceners. In that case the present difficulty does not really arise at all, for the whole question here is whether a charge is created in favour of the person who has the right to owelty, whereas in that ruling the existence of a charge is perfectly clear.

The question really seems to reduce itself to this. What is the right which the appellant gets by reason of his decree for a sum of money against a substituted security consisting of the share of his mortgagor? Is it a right against the whole of the properties allotted at partition to that mortgagor regardless of any incident of the partition which is in derogation of that share, or is it a right to proceed against the net share of his mortgagor, after making allowance for any deductions which under the partition decree have to be met from it? Another way of putting it is this: Is the share of the mortgagor the properties actually allotted to him coupled with an obligation to pay a certain amount in cash, or is it certain properties less an extent the value of which would be equivalent to the cash amount decreed by way of equalization? It seems to me that in equity the latter view is the only possible view. If we assume that the mortgagee from a coparcener who has mortgaged properties not allotted to him in a partition has a right to proceed against the whole of the specific properties allotted to the mortgagor regardless of any liability by way of equalization of shares, the result surely is to enlarge the security of the mortgagee beyond that to which he is in equity entitled. The Courts have recognized in such circumstances the right of the mortgagee to fasten his mortgage on the properties allotted to the mortgagor. But there is no reason, merely because the difficulties of division make it desirable to give to the mortgagor more than his proper share while requiring him to make a cash payment to his coparceners, to allow to the mortgagee the benefit of that excess allotment. The proper security to which the mortgagee is entitled should not be more than the actual share of the mortgagor, which can only be calculated after deducting properties of a value equivalent to the amount which he has to pay in order to equalize the shares.

In the result therefore I hold that the learned Master is right in directing the payment to the respondent of the amounts claimed and I dismiss the appeals with costs.

C.R.K./D.S. *Appeals dismissed.*

2. Manikam Pillai v. Audinarayana Pillai, (1911) 34 Mad 47=5 I C 917=20 M L J 407=(1910) M W N 568.
3. Mahomed Kazim Shah v. Robert Savi Hills, (1908) 35 Cal 388=12 C W N 373.

1938 M/97 & 98

A. I. R. 1938 Madras 769

KING J.

Zamindar of Biridi Estate and another — Appellants.

v.

Kunjo Kumari Devi Patto Monima — Respondent.

Second Appeal No. 775 of 1933, Decided on 25th January 1938, against decree of Dist. Court, Ganjam, in A. S. No. 98 of 1932.

Madras Estates Land Act (1 of 1908), S. 26 (3)—Land granted to *D* permanently by predecessor of *P*—No rent was payable for first seven faslis and subsequently Rs. 19-12-0 per annum for ever — *P* suing *D* claiming Rs. 959-7-0 for three years—Matter held governed by S. 26 (3) and question for decision was what was lawful rent at the time of grant—Document embodying terms of grant held admissible in evidence even though not registered.

A predecessor of *P* granted certain lands to *D*. The terms of the grant were that *D* should remain permanently in possession of the land, that no rent at all was payable for the first seven faslis and subsequently the rent should be payable for ever at the rate of Rs. 19-12-0 per annum. *P* sued *D* claiming Rs. 959-7-0 as rent for three years. *D* put forward the document embodying the terms of the grant made in his favour claiming that only Rs. 19-12-0 was payable per year. It was

contended by *P* that the document not being registered was inadmissible in evidence under Sec. 49, Registration Act:

Held that the document was admissible in evidence. As it did not require registration under S. 107, T. P. Act, it was not affected by Sec. 49, Registration Act: *32 Mad 532, Rel. on.* [P 770 C 2]

Held also that the matter was governed by S. 26 (3), Madras Estates Land Act, and the real question to be decided was what was the lawful rent payable by *D* at the time when the grant was made. [P 770 C 2]

V. Govindarajachari — *for Appellants.*

G. Lakshmanna and G. Chandrasekhara Sastry — *for Respondent.*

Judgment. — The question at issue in this appeal is the correct amount of rent payable upon 200 acres of land which were granted by a predecessor of the plaintiff to the defendant in the year 1904. The terms under which the grant was made were that the defendant should remain permanently in possession of the land, that no rent at all should be payable for the first seven faslis and that from fasli 1322 onwards rent should be payable for ever at the rate of Rs. 19.12.0 per annum. These terms were embodied in a document Ex. 1 which was filed by the defendant in the suit. The suit was brought by the present zamindar of Biridi Estate under S. 77, Madras Estates Land Act, for the recovery of the rent for faslis 1339, 1340 and 1341. He made no reference to the terms of the grant to the defendant in his plaint and claimed that the proper rent was such that for the three years Rs. 959-7-0 was due to him. The defendant in resisting the suit put forward Ex. 1 and claimed that only Rs. 19-12-0 per year was payable for the three faslis. The learned Deputy Collector who tried the case held that Ex. 1 was inadmissible in evidence as it had not been registered, that under the Madras Impartible Estates Act the previous zamindar was not empowered under S. 4 to let this land on a permanent rate of rent which was so low as Rs. 19.12.0 and further under S. 26 (3), Madras Estates Land Act, the arrangement made by the zamindar of 1904 cannot be binding upon the present plaintiff. He however held that the plaintiff had put forward an exaggerated claim and after fixing what he considered the correct rate of rent gave the plaintiff a decree for Rupees 581 odd. In appeal the learned District Judge of Ganjam held in effect, though without specifically saying so, that Ex. 1 was not compulsorily registrable as it was not a lease, that it was only an ordinary patta and that no enhancement of rent fixed by Ex. 1 could be made except under S. 30 of the Act. He accordingly allowed the appeal and gave the plaintiff a decree only for the amount admitted by the defendant.

The first point argued in second appeal is that Ex. 1 is inadmissible in evidence under S. 49, Registration Act. This argument seems to me clearly untenable. It is conceded that Ex. 1 does not require registration under S. 107, T. P. Act, as whether with or without Ex. 1 the defendant acquires a permanent right of occupancy as soon as she is let into possession, and 32 Mad 532[1] seems to me clear authority for the position that Ex. 1 requires no registration under S. 107; it is not affected by S. 49, Registration Act. The next and main point argued is with reference to S. 26 (3), Madras Estates Land Act. There can be no doubt at all that S. 26 (3) is the Section which must be applied by any Court which is trying this suit even though it may not have been specifically pleaded by the plaintiff and the learned advocate for respondent does not now contend that the terms of Ex. 1 themselves prevent the application of this Section. The learned District Judge for some reason has completely overlooked this Section. The Section runs as follows:

> Except as provided by sub-s. (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood.

The real crux therefore of this matter is what was the lawful rent payable by the defendant at the time when the grant was made, i. e. in 1904 or in other words, whether in view of all the circumstances of the case the sum of Rs. 19.12.0 per annum fixed by Ex. 1 as payable in and after fasli 1322 is the lawful rent. If that is the lawful rent then as no steps have been taken by the plaintiff to enhance it under the Act, the present decree of the learned District Judge will be right. To ascertain whether it is the lawful rent it will be necessary to consider whether S. 26 (1) applies to this case or not, and that point is specifically left open by this judgment to the learned District Judge. If it should be found that Rs. 19-12-0 is lower than the

1. Kaki Subbanadhi v. Muthu Rangayya, (1909) 32 Mad 532=4 I C 1039.

lawful rate of rent, then it will be necessary to determine what the lawful rate of rent was. The decree of the learned District Judge will accordingly be set aside, and the appeal remanded to him for fresh disposal in the light of the foregoing observations. It will not be necessary to consider the argument based upon the Impartible Estates Act, for obviously if the rate fixed by Ex. 1 is the lawful rate it cannot now be assailed under that Act. Costs of this appeal will abide the event. Court-fee on the memo of appeal will be refunded. Leave to appeal is refused.

C.R.K./R.M. *Appeal remanded.*

A. I. R. 1938 Madras 771

VENKATARAMANA RAO J.

Mathiyam Bivi Ammal and another
— Petitioners.

v.

Union Bank Ltd., Kumbakonam
— Respondent.

Civil Revn. Petn. No. 71 of 1938, Decided on 5th April 1938, to revise orders by Dist. Munsif, Kumbakonam, D/- 23rd December 1937 and 7th January 1938.

Civil P. C. (1908), O. 21, R. 41 — Power vested in Court by O. 21, R. 41 is discretionary and should be exercised with caution — Garnishee totally denying the debt — Court should order his examination or direct him to produce his account books, only if it is satisfied that it would better enable decree-holder to proceed with execution and would prevent possible fraud or collusion.

Order 21, R. 41 prima facie empowers the Court to examine any person other than the judgment-debtor including an alleged garnishee. But the power vested in the Court by O. 21, R. 41 is discretionary and should be cautiously exercised. The exercise of the discretionary power to examine a garnishee must be ordinarily limited to cases where the garnishee admits the debt and the Court may find out the exact extent of the debt before ordering execution. But if the debt is totally denied, the Court ought not to ordinarily examine the garnishee or direct him to produce account books, unless it is satisfied on the affidavits or on the examination of the judgment-debtor that in the interests of the decree-holder, the garnishee should be examined and his books produced to better enable him to proceed with the execution, and to prevent a possible fraud or collusion between the judgment-debtor and the garnishee. For that purpose, the alleged garnishee may be examined with reference to the books or other documents which he may be directed to produce for finding out whether there were any dealings between him and the judgment-debtor and there would thus be a probability of a debt being due and the garnishee ought not to be subjected to any examination or cross-examination for the purpose of determining whether the liability subsists or not : *English cases referred to.*

[P 772 C 2 ; P 774 C 1]

K. Rajah Iyer and R. Sundaralingam — *for Petitioners.*

N. Srinivasa Iyengar and S. Ramachandran — *for Respondent.*

Order. — This revision petition arises out of an order passed by the learned District Munsif of Kumbakonam, under O. 21, R. 41, Civil P. C. The respondent, the Union Bank Ltd., Kumbakonam obtained a decree against one Kalyanarama Iyer. After obtaining the said decree the Bank made an application to examine the petitioners Muthiyam Bivi Ammal and her agent Sheriff Rowther and also to produce the account books and other documents in their possession for the purpose of finding out whether any sum of money is due and owing by them to the judgment-debtor in the suit. In answer to the said notices an affidavit was filed denying that any sum of money is due by them to the judgment-debtor and objecting to their examination and production of the account books. The learned District Munsif made an order that Muthiyam Bivi Ammal must produce the account books and in making the order he observed as follows :

I am constrained to order Muthiyam Bivi Ammal to produce her account books into Court. She may rest assured that she need not have any apprehension that this decree-holder will be permitted to fish out any information from her account books and use it against her in O. S. No. 17 of 1937 of the Kumbakonam Sub-Court or in any other litigations.

It may be mentioned that O. S. No. 17 of 1937 was a suit by the Union Bank against her in respect of certain dealings and one of the allegations by her in her affidavit was that the Bank was trying to fish out information regarding it by causing the production of her account books. It is with reference to that allegation that the learned Judge made the observation referred to above. But the main contention of Mr. Rajah Iyer is that, as his clients have denied the existence of any debt due and owing to the judgment-debtor, it is not open to the Court under O. 21, R. 41, to examine them or direct them to produce any account books. In support of the contention, the argument which he advanced was that where a debt is alleged to be due to a judgment-debtor from a person and the said debt is attached and the debtor denies the debt, it is not open to the executing Court to go into the truth or existence of the debt but can only direct a sale

thereof or appoint a receiver to realize the same; it would be anomalous that even before the attachment a person can be examined and asked to produce his account books when he is denying the debt. In order to appreciate this contention it is necessary to examine the scope of O. 21, R. 41, Civil P. C. The object of the said Section is no doubt clear. It is to enable a decree-holder to get the necessary information in regard to the properties of his judgment-debtor so that he can realize his debt by resorting to his property which is available without difficulty and trouble. It is in effect a provision to obtain discovery in aid of the execution of the decree which he has obtained. The Section says that the decree-holder may apply to the Court for an order that the judgment-debtor, or in the case of a corporation, any officer thereof or any other person may be orally examined and the Section empowers a Court to make an order for the attendance and examination of those persons, namely the judgment-debtor or officer or other person and also cause them to produce any books or documents. According to the plain language of the Section "any other person" might include a garnishee, that is, a person who owes or is alleged to owe a debt to the judgment-debtor. But the question still remains, in what circumstances can the examination of such a person be permitted and subject to what limitations ? In 1859 when the Civil Procedure Code was first enacted in India, that is Act 8 of 1859, a similar provision was made. That was S. 219, which ran thus :

> Before granting the order for a general attachment or at the instance of the plaintiff at any time after judgment and before complete execution of the decree, the Court may summon the person against whom the application is made and examine him as to the property liable to be seized in satisfaction of the judgment. The Court may also, of its own motion or at the instance of any person interested in the inquiry, summon any other person whom it may think necessary and examine him in respect to such property and may require the person summoned to produce all deeds and documents in his possession or power relating to such property.

It will be seen that that Section was to be resorted to in cases where an application is made for a general attachment of the moveable property of a judgment-debtor and the Court was given a very wide discretion not only to summon a person against whom the application is made but also to summon any other person whom it may think necessary and examine him. In the 1877 Code, provision for general attachment was done away with and S. 219 was modified and enacted as S. 267 which ran thus :

> The Court may, of its own motion or on the application of the decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power relating to such property and before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued.

It will be seen from this Section, that the Court is empowered to summon any person whom it thinks necessary and may require the person summoned to produce any document in his possession or power : *vide* 17 Bom 514[1] (a mortgagee in possession). The corresponding provision in the Code of 1882 was word for word the same as that of the Code of 1877. In the present Code it is made very clear that an application can be made for the examination of any person other than the judgment-debtor as indicated in Cl. (c), as Cl. (a) relates to an individual judgment-debtor and Cl. (b) relates to a corporation being the judgment-debtor. Prima facie therefore, having regard to the history of this Section, it cannot be doubted that a person other than the judgment-debtor including an alleged garnishee may be examined under the Section. But the question that still remains, as already stated, is, what is the extent of the power conferred by the Rule? It may be instructive in this connexion to examine the history of the corresponding rule in English law during the corresponding period commencing from 1854. Sec. 60 of the Common Law Procedure Act, 1854 ran thus :

> It shall be lawful for any creditor who has obtained a judgment to apply to the Court or a Judge for a rule or order that the judgment-debtor shall be orally examined as to any or what debts are owing to him and the Court or Judge may make such rule or order for the examination of such judgment-debtor and for the production of any books or documents.

It will be seen that this Section provided only for the examination of the judgment-debtor. As observed by Jessel M. R. in (1881) 16 Ch D 8[2] at p. 12, the examination must be directed to

> any question fairly pertinent to the subject-matter of the inquiry, which means put with a view to ascertain so far as possible, by discovery from a

1. In re Premji Trikomdas, (1893) 17 Bom 514.
2. Republic of Costa Rica v. Shrousberg, (1881) 16 Ch D 8=50 L J Ch 7=43 L T 399=29 W R 179.

reluctant defendant, what debts are owing to him, ought to be answered by the defendant.

This Rule was in substance repeated in 1875 Rules (O. 45, R. 1) and later modified and re-enacted as O. 42, R. 32 which runs thus :

> When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a Judge or an officer of the Court as the Court or Judge shall appoint; and the Court or Judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents.

On a construction of this Rule it was held that the words "any other person," occurring in the latter part will not have the effect of extending the Rule to a person other than the judgment-debtor or the past or present officer of a corporation which happens to be the judgment-debtor. In (1896) 2 Q B 338,[3] the Court declined to examine an assignee of the judgment-debtor to whom the judgment-debtor assigned all arrears of income due and owing to her, the reason being the language of the Section did not permit it. Smith L. J. observed thus :

> What is really sought here is to get evidence from Blyth (the assignee) in order that the charge, mortgage, or whatever it is may be impeached, and this ought not to be allowed under this procedure.

In the case of debts however in England there is a procedure provided for ascertaining the existence of a debt in execution proceedings so that if the garnishee denies the debt, an issue can be raised and decided regarding his liability : *vide* the provisions of O. 45, R. 4 of the Rules of the Supreme Court; but there is no corresponding provision in the Civil Procedure Code whereby an executing Court can go into the liability of a garnishee if it is disputed. Our High Court in more than one decision has taken the view that it is not for the executing Court to determine whether a debt is actually due or not, so that if the garnishee denies the debt the Court has always directed the sale of the debt or the appointment of a receiver to realize the debt, the question as regards the liability of the garnishee being relegated to proceedings taken expressly for the recovery of the actual debt. I must state that some cases have taken the view that under O. 21, R. 66 it may be open to the Court before directing a sale to ascertain if a debt exists and direct the sale only if it appears prima facie to the Court that the debt is due; but that examination is only for purposes of O. 21, R. 66 and the proceedings under that Section are always characterized as ministerial and not judicial.

The question now arises that if there is no procedure open to an executing Court to determine upon the truth of the debt which is attached when the garnishee denies the debt, can this be indirectly accomplished under O. 21, R. 41? If not, what has the Court to do when an application is made for the examination of the alleged garnishee who comes to the Court and denies that he owes anything to the judgment-debtor? What the Section says is that the Court may make an order for the examination of the persons mentioned therein. A discretion is therefore vested in the Court and that discretion has to be exercised in the case of a garnishee by also taking into consideration the other provisions of the Code. In a case reported in A I R 1933 Sind 350,[4] Rupchand J. C. seems to have taken the view that if a garnishee denies a debt he ought not to be examined under O. 21, R. 41, relying upon certain observations in (1886) 3 T L R 193,[5] where it was held that a garnishee who disputes his liability to the judgment-debtor is not a person who can properly be ordered to attend for examination under O. 42, R. 32 of the Rules of the Supreme Court and that if the power to order such examination is given by the Rule, it is a discretionary power and ought only to be exercised with great caution. Cave J. made the following observations in that case :

> It would be perfectly monstrous that where an issue had been arrived at between two parties, one of whom alleged that money was due from the other to the judgment-debtor and the other denied that allegation, the person who alleged that the money was due should be able to summon the other before the Registrar for the purpose of examining him about matters which really had to be tried in the issue.

It will be seen that the view of Cave J. is that if an issue is raised as to the existence of the debt it ought to be tried in other proceedings and a Court should not embark on the trial of that issue in a proceeding

3. Hood Barls v. Heriot, (1896) 2 Q B 338=65 L J Q B 622=45 W R 1=75 L T 15.

4. Lalchand Lekhraj v. Abdul Rehman, (1933) 20 A I R Sind 350=148 I C 154.

5. Jeffries v. Tomitson, (1886) 3 T L R 193.

under O. 42, R. 32. In the course of the argument Cave J. made the observation that even if there is a power, it should be cautiously exercised. It may be urged that the English rule is not the same as the Indian rule. But in my opinion the same principle has to be kept in view in construing O. 21, R. 41, Civil P. C., especially where the Code does not confer power on the executing Court to adjudicate as to the liability of the garnishee. So the discretionary power that is vested under O. 21, R. 41 to examine a garnishee must ordinarily be limited to cases where the garnishee admits the debt and the Court may find out the exact extent of the debt before ordering execution. But if the debt is totally denied, the Court ought not to ordinarily examine the garnishee or direct him to produce account books unless it is satisfied on the affidavits or on the examination of the judgment-debtor that in the interests of the decree-holder the garnishee should be examined and his books produced to better enable him to proceed with the execution and to prevent a possible fraud or collusion between the judgment-debtor and the garnishee. For that purpose the alleged garnishee may be examined with reference to the books or other documents which he may be directed to produce for finding out whether there were any dealings between him and the judgment-debtor and there would thus be a probability of a debt being due and the garnishee ought not to be subjected to any examination or cross-examination for the purpose of determining whether the liability subsists or not. In this case I take it that the learned Judge in making the order which he did was satisfied that in the interests of the decree-holder to prevent a possible fraud or collusion it is necessary to have the books produced into Court. I find from the order of the learned Judge that he is anxious to safeguard the rights of the petitioners and assured them that the decree-holder will not be allowed to fish out information with reference to O. S. No. 17 of 1937 (Kumbakonam Sub-Court). I am therefore not inclined to interfere with his order in revision.

It has been brought to my notice that a very large number of books and documents have been directed to be produced. I do not know why the village accounts were asked to be produced. The only books that could throw any light on the question of debt would be the day book, ledgers, chitta books and rough account books and a reference to those books ought to be quite enough to satisfy whether there were dealings between the judgment-debtor and the petitioners and as a result of such dealings any sum is likely to be due and owing by them to the judgment-debtors and any order for further production would be oppressive. With these observations I dismiss the petition but without costs.

C.R.K./R.M. *Petition dismissed.*

---

* A. I. R. 1938 Madras 774

MADHAVAN NAIR AND STODART JJ.

Pangudaya Pillai and another — *Defendants*—Appellants.

v.

Uthandiya Pillai and others — *Plaintiffs*—Respondents.

Second Appeal No. 573 of 1933, Decided on 15th February 1938, against decree of Dist. Court, Trichinopoly, in A. S. No. 92 of 1932.

(a) Hindu Law—Debts—Co-parcener—Person acquiring separate property by incurring debts—Property thrown into hotchpot and divided—Other members are not liable for debts.

The fact that a piece of property originally purchased as separate property was thrown into hotchpot and divided in partition will not by itself make other members of a joint Hindu family liable for the debts incurred by the purchaser for acquiring that property. [P 776 C 1]

(b) Hindu Law—Debts—Loan to manager—Partition—Creditor must sue in time — Or else must obtain acknowledgments of all members who were not parties to loan.

A person who lends money to the manager of a joint family by way of simple loan may sue for it, partition or no partition, within the statutory period. If he does not wish to do that but prefers, as many creditors do prefer, to leave his money out at interest, is it too much to expect of him that he should enquire whether the family is still undivided? So that, if it is not, he may obtain acknowledgments of the debt from those members of the family who did not contract with him at the time of the loan. [P 776 C 1, 2]

***(c) Limitation Act (1908), Ss. 20, 21—Joint Hindu family — Manager contracting debt — Partition — Acknowledgment by one cannot keep debt alive against others.**

After partition by making payments towards the loan and placing them on record as required by S. 20, Limitation Act, the person who, as manager of the family originally contracted the debt, cannot keep it alive against the other members of the family, assuming that it is a debt binding on the family : *Civ. Revn. Petn. No. 623 of 1933 and A I R 1937 Mad 586, Rel. on; A I R 1933 Mad 708, Explained.* [P 776 C 2; P 778 C 2]

(d) Hindu Law—Manager—Pronote executed by manager — Remedies open to creditor explained.

Legal remedies open to a person who lends money on a promissory note, to the managing members of a joint family are well defined. While the family is still joint, the creditor can file a suit against the managing member alone and can obtain a decree against him on the promissory note; and if he proves that the debt is binding on the family, a declaration that he, the plaintiff, is entitled to execute his decree by attachment and sale of the joint family property. At the time of execution proceedings however, the junior members of a family are at liberty to dispute the binding nature of the debts; and in order to forestall all such objections, the creditor may implead the junior members in a suit itself, and if they dispute the binding nature of the debt he can have that question tried. Partition does not put an end to the liability of the junior members but the nature of the remedy is changed. In the first place the suit must be filed in the first instance against all the members of the family. In the second place the decree against the junior members will be in the form of a declaration that execution may be had by attachment and sale of that portion of the property which each got at partition and of which he still retains possession : *A I R 1936 Mad 956, Rel. on.* [P 777 C 2; P 778 C 1]

(e) Limitation Act (1908), S. 20—Joint liability of Hindu undivided family for family debt is not debt within S. 20.

Joint liabilities of the members of an undivided Hindu family for a family debt, is not a debt within the meaning of S. 20 so that one member by making a part payment can keep the debt alive against all others. [P 778 C 2]

T. V. Muthukrishna Iyer and A. V. Narayanaswamy Iyer — *for Appellants.*

K. Bhashyam Iyengar and T. R. Srinivasan — *for Respondents.*

Stodart J.—The suit on which this second appeal arises was based on a promissory note executed by defendant 1. Defendants 2 and 3, the present appellants, are the younger brothers of defendant 1. Plaintiff alleged that they were present when the money was lent and the note executed but this was not believed in the trial Court. Plaintiff further alleged that defendant 1 was manager of the joint family consisting of himself and his brothers defendants 2 and 3, that the note was to secure a loan which was contracted for the benefit of the family and that the three brothers continued undivided upto the date of suit. It was found however at the trial that the family had become divided in 1920 the year after the execution of the note and further that the plaintiff had become aware of this change of status at least as early as 1924. Two main questions arose for decision :

1. Was the loan contracted for the benefit of the family?

2. Do the endorsements of part payment made on the note by defendant 1 avail to save the bar of limitation against defendants 2 and 3?

The learned District Munsif found that out of the consideration of Rs. 700, Rs. 300 was expended on purchasing a small piece of land and Rs. 100 in discharging the balance of the price of a house site previously purchased. He did not find that these transactions were prima facie advantageous to the family but held that since the land, which was purchased by defendant 1 alone, for Rs. 300, was brought into the hotchpot at the partition and divided amongst the brothers, defendants 2 and 3 were also liable to discharge the debt. On the point of limitation he held that the suit was barred against defendants 2 and 3. On appeal the learned District Judge agreed with the trial Court that defendants 2 and 3 were liable for the debt and on the point of limitation he reversed the decision of the District Munsif holding that the payments made by defendant 1 after partition operated to extend the time for a suit as against defendants 2 and 3. Both of these adverse findings are now attacked and on both grounds we think this appeal should succeed. The promissory note is as follows :

Promissory note executed on 23rd April 1919 by Arunachalam Pillai in favour of Sappania Pillai. Amount borrowed by me from you this day in cash on account of my urgency for purchasing land is Rs. 700. I shall pay this sum etc.

There is nothing here to indicate that the land was originally purchased for the family. On the contrary defendant 1 Arunachalam declares that he purchased it for himself and he does not describe himself as being acting as the manager of the family. Nor as we have observed is there anything to show that the land purchased was beneficial to the family. On the contrary, if the only profit which the family as such derived from the loan was this small piece of land for which Rs. 300 was paid, then the whole transaction was imprudent. For, the annual profit from 22 cents, even of wet land as this was, would not suffice to meet the interest of Rs. 84 on the loan of Rs. 700. Apart from that, even if we assume for the sake of argument that the land was a profitable investment, there is no indication at all that in order to buy it, it was necessary to borrow money and that the price could not have been met out of the annual profits of the family property or out of accumulated savings. As for the lower Court's reasoning that defendants 2 and 3 would be liable for the debt because the land was shared with them at partition,

that we think is unsound. For defendant 1, the actual purchaser, may have thrown the land into hotchpot to compensate for some advantage contributed by defendants 2 and 3. Defendant 1 had his own separate business and presumably some assets of his own and some liabilities which he alone was bound to discharge. It is quite possible that defendants 2 and 3 contributed something at the partition of 1920, to counterbalance which each got 7 cents out of the land purchased in 1919. The fact therefore that the land purchased in the sole name of defendant 1, was subsequently divided amongst all the defendants, does not by itself show that the purchase was intended for the benefit of the family or that, in point of fact, it resulted in any benefit to the family as such. The appellants are, we think, bound to succeed on this ground alone.

Coming to the question of limitation a very interesting argument has been advanced for the respondent by Mr. Sitarama Rao who has brought to the question at issue his extensive knowledge of the case law bearing on this somewhat difficult subject. The facts as found we have already stated. In more detail they are as follows: The promissory note was executed in 1919. In 1920 the defendants became divided. Neither at the time of the execution of the promissory note, nor at the time of the partition is there anything to show that these appellants were aware of the loan. After the partition, if the endorsements on the note are to be accepted, defendant 1 made four payments of interest, namely on 27th April 1921, Rs. 100; on 12th April 1924, Rs. 5; on 16th March 1927, Rs. 10; and on 5th March 1930, Rs. 5. At no time, so far as the evidence goes, did defendants 2 and 3 become aware of the loan. The suit was filed on 11th June 1931. The result is somewhat astonishing, namely that eleven years after partition the junior members of the family should find themselves called upon to meet a claim founded on a prepartition debt, of which until that moment they may not have had the slightest knowledge. The learned District Judge was of the opinion that it would be unjust if the right of a creditor to recover a family debt out of the whole property of the family could be defeated by partition. But we think his sympathy is misplaced. A person who lends money to the manager of a joint family by way of simple loan may sue for it, partition or no partition, within the statutory period. If he does not wish to do that but prefers — as many creditors do prefer—to leave his money out at interest, is it too much to expect of him that he should enquire whether the family is still undivided? So that, if it is not, he may obtain acknowledgments of the debt from those members of the family who did not contract with him at the time of the loan.

The question we have to decide is whether after partition by making payments towards the loan and placing them on record as required by S. 20, Limitation Act, the person who, as manager of the family originally contracted the debt, can keep it alive against the other members of the family—assuming of course that it is a debt binding on the family. Here for instance the plaintiff could have filed his suit at any time before 23rd April 1922 and could have got a decree against defendants 2 and 3, not, it is true, executable against them personally, but capable of being executed by the attachment and sale of any property they had got at the partition and which they still retained. Or, instead of filing a suit the plaintiff having learnt of the partition could have secured an acknowledgment from defendants 2 and 3, though of course this would have given him no lien on the property which they had obtained at the partition. But the debt would have been kept alive as against them. Can we go a step further and say that by accepting part payment of principal and interest from the senior member of the family the plaintiff actually kept the debt alive as against all the members? The point has been twice decided recently in this Court and in a sense adverse to the respondent. Curgenven J., as he then was, in Civil Revn. Petn. No. 623 of 1933 (not reported) held on facts which are similar to the facts of this case, that the point was governed by S. 21 (3) (b), Limitation Act. He said

> that payment, being made after partition, was not made by 'the manager for the time being' as required by S. 21 (3) (b), Limitation Act, and did not therefore avail to save limitation against the defendants' brother.

And Sir Owen Beasley C. J. in 45 M L W 767[1] held to the same effect. This present appeal has been referred to a Bench for decision on account of the alleged discrepancy between the Law Weekly case and

1. Rama Vadhyar v. Manian Vadhyar, (1937) 24 A I R Mad 586=173 I C 319=45 M L W 767.

56 Mad 833.[2] There is however no real discrepancy. For the latter case is one where the debt was contracted by a Hindu father before partition and the question was whether limitation was saved against his sons by payments made by him after partition. It was held that inasmuch as the pious duty of a Hindu son to pay his father's debts was not extinguished by partition the father's payments operated to keep the debt alive against the sons.

Now, examining the relevant Sections of the Limitation Act, S. 21 is explanatory of Ss. 19 and 20. By S. 19 the time for the suit is extended by an acknowledgment in writing signed by the person against whom the claim is made. By S. 20 the time is extended by a payment of interest or part payment of principal evidenced by the writing or signature of the debtor. In both cases the act which operates to give a fresh period of limitation may be done by an "agent duly authorized in this behalf." And S. 21 extends as it were the somewhat strict expression "duly authorized agent" to certain persons in whom authority to acknowledge lawful claims is vested in virtue of their legal relationship to the principal, such as the lawful guardian of a minor or the committee of a person of unsound mind. S. 21 (3) (b) is :

> For the purposes of the said Sections (Ss. 19 and 20) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family.

Curgenven J.'s reasoning in the case cited is that "the person liable to pay the debt" if his liability arises only on the ground that it is a family debt, cannot for the purpose of S. 20 be represented after partition by the person who was the family manager. Mr. Sitarama Rao's contention however is that S. 21 (3) (b) does not apply to the case at all. He bases his argument on a strict construction of S. 20. That Section so far as relevant is :

> Where interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt a fresh period of limitation shall be computed from the time when the payment was made.

And this has been interpreted as covering cases where there is a plurality of debtors and the payment is made by only one of them, saving of course the cases specifically excepted in S. 21 (2), of joint contractors, partners, executors or mortgagors. In all other cases payment by one gives a fresh period of limitation against all. This interpretation is now well established and it is unnecessary for us to refer in detail to the numerous instances which have been cited at the bar in which it has been applied. There is the case of the universal donee whose liability for the debts of the donor arises under S. 128, T. P. Act. Limitation against him is saved by a payment made by the donor after the date of the gift: 17 I C 619.[3] And the case of payment by one of several heirs towards the debt of a deceased person saving limitation against all who have taken the latter's property at his death: 56 M L J 630.[4] And the case where payment by the purchaser of the equity of redemption of interest on a mortgage saves limitation against the mortgagor of which 54 Cal 179[5] is an example. The proposition sought to be established by Mr. Sitarama Rao for the respondent is that in the case of a debt lawfully contracted for the necessity of a joint Hindu family, all the members of the family are co-debtors; so that part payment by one, acknowledged by writing as prescribed in S. 20, Limitation Act, gives a fresh period of limitation against all.

Now the legal remedies open to a person who lends money on a promissory note, to the managing member of a joint Hindu family have been well defined in a course of authorities which it is unnecessary for us to cite. While the family is still joint the creditor can file a suit against the managing member alone and can obtain a decree against him on the promissory note and, if he proves that the debt is binding on the family, a declaration that he, the plaintiff, is entitled to execute his decree by attachment and sale of the joint family property. At the time of execution proceedings however, the junior members of the family are at liberty to dispute the binding nature of the debts; and in order to forestall all such objections the creditor may implead the junior members in the suit itself and if they dispute the binding nature of the debt he can have that question tried. Partition does not put an end to the liability of the junior members but the nature of the

2. Munusami v. Kutti, (1933) 20 A I R Mad 708 =145 I C 404=56 Mad 833=65 M L J 311.

3. Velayudam Pillai v. Vaidhyalingam Pillai, (1912) 24 M L J 66=17 I C 619.

4. Narasimha Rama Iyer v. Ibrahim, (1929) 16 A I R Mad 419=118 I C 302=56 M L J 630.

5. Bhuban Mohan Singh v. Ram Govinda Gosami, (1926) 13 A I R Cal 1218=98 I C 204 =54 Cal 179=44 C L J 188.

remedy is changed. In the first place the suit must be filed in the first instance against all the members of the family. In the second place the decree against the junior members will be in the form of a declaration that execution may be had by attachment and sale of that portion of the property which each got at partition and of which he still retains possession. This is now a well-settled proposition of law and for authority we need only refer to the clear exposition of it by our learned brother Venkataramana Rao J. in A. A. A. O. No. 172 of 1933, reported in 44 M L W 476.[6] In the present case partition has taken place before the respondent took any steps to enforce his debt. The promissory note was executed on 23rd April 1919. Partition was effected in the following year; upto 23rd April 1922 the respondent could have filed his suit against all these defendants and obtained a decree of the kind just stated. He did not do so. But within that period he secured evidence of a part payment of interest by an endorsement on the promissory note in the handwriting of defendant 1; this, he now contends, by the operation of S. 20, Limitation Act, gave him a fresh period of limitation against all the members of the family and so with each successive payment. S. 20 is construed as meaning that, when any of the several persons liable to pay a debt, make a payment of interest, then from the date of that payment a fresh period of limitation shall be computed for a suit on the debt, which suit will lie against all persons liable to pay the debt.

Now accepting this construction of S. 20 it appears to us that the question for decision is reduced to this. Are defendants 2 and 3 persons liable to pay the debt within the meaning of S. 20? That question we think must be answered in the negative as the trial Court has answered it. The debt is the money now due on account of the money lent to defendant 1 on the promissory note. Certainly defendants 2 and 3 are not now liable to pay it. All that plaintiff can get by way of relief against them is a decree declaring that if they got any of the family property at partition and if they still retain that property or any part of it, then in execution of the decree that property may be attached and sold. This kind of contingent liability did not in our opinion make defendants 2 and 3 at the time when defendant 1 made the initial payment of interest nor at the times when he made each successive payment, co-debtors of defendant 1 in the sense implied in S. 20. Mr. Muthukrishna Aiyar for the appellants is in our opinion right when he contends that the joint liabilities of the members of an undivided Hindu family for a family debt, is not a debt within the meaning of S. 20 so that one member by making a part payment can keep the debt alive against all the others. His argument is that if it was that kind of a debt there would have been no necessity for the Legislature in 1928 to enact S. 21 (3) (b). The relevant words of that Section which we have already set out are :

> For the purposes of Ss. 19 and 20 where a liability has been incurred on behalf of a Hindu undivided family as such, a payment made by the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family.

Now, according to Mr. Sitarama Rao, S. 20 already provided for such cases. It enabled not only the manager but indeed any member of the family by making a payment towards the debt and acknowledging it in writing, to give the creditor a fresh period of limitation for a suit against all the members. But if that was the effect of S. 20 there was no need for the enactment of S. 21 (3) (b). Reading Ss. 20 and 21 together therefore we are unable to hold that the members of a joint family are for the purposes of S. 20, "persons liable to pay the debt" when the debt in question cannot be levied from them personally, but is merely recoverable by the sale of the joint family property, on foot of a decree made to that effect. Much less then are the said members "persons liable to pay the debt" when by reason of partition the joint family has disappeared and the debt is recoverable merely by sale of the property got at partition on foot of a decree made against those divided members, the operation of which decree is contingent on their still retaining possession of the said property or some of it. In the result we allow this second appeal. The decree of the District Munsif is restored and the appellants are awarded their costs throughout to be paid by the plaintiffs in the suit.

C.R.K./B.D. *Appeal allowed.*

---

6. Suryananayana v. Viswanadhan, (1936) 23 A I R Mad 956=168 I C 686=71 M L J 518 =44 M L W 476.

A. I. R. 1938 Madras 779

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Srinivasulu Naidu — Appellant.

v.

Damodaraswami Naidu and others — Respondents.

Appeal No. 99 of 1934, Decided on 22nd February 1938, against decree of Sub. Judge, Coimbatore, D/-18th December 1933.

(a) Interpretation of Statutes—Retrospective effect—Portions of statute which are silent in this regard should be taken as indicating prospective intention.

The general rule for deciding as to whether a particular Section of a statute has retrospective effect or not is that the portions of a statute which are silent in that regard, are to be taken prima facie as clearly indicating prospective intention only, acting from the time the Act comes into operation: *(1878) 3 A C 582; (1898) A C 469 and (1861) 10 C B (N S) 179, Rel. on.* [P 780 C 1]

(b) Transfer of Property Act (1882), S. 92 (as amended by Act 20 of 1929)—S. 92 is not retrospective.

Section 92, T. P. Act inserted by the Amending Act 20 of 1929, is not retrospective in its operation: *A I R 1931 Mad 110; A I R 1932 Mad 734 and A I R 1936 Mad 171 (FB), Rel. on; A I R 1932 All 489 (FB) and A I R 1937 All 588 (FB), Not foll.* [P 780 C 2; P 781 C 1]

(c) Mortgage—Subrogation—Partial subrogation is permissible even under law prevailing prior to amendment of T. P. Act in 1929.

Even according to the law that prevailed prior to the amendment of the Transfer of Property Act in 1929, partial subrogation was permissible, when the charge on a distinct item of the property mortgaged was completely discharged: *A I R 1924 PC 36; A I R 1936 Mad 473 and A I R 1922 Mad 249, Rel. on.* [P 781 C 2]

(d) Mortgage—Subrogation—Accrual of right—It is not necessary that payment must be made in addition and not out of purchase money.

For the right of subrogation to accrue, it is not necessary that there must be payment in addition to the purchase money and not out of purchase money: *10 Cal 1035 (PC); 29 Cal 154 (PC); A I R 1924 PC 36; 34 Mad 119; A I R 1930 Mad 51 and A I R 1936 Mad 171 (FB), Explained; A I R 1937 All 588 (FB), Dissent.; A I R 1932 P C 99, Commented upon.* [P 781 C 2]

(e) Mortgage—Subrogation—Person discharging prior mortgage personally liable to pay it—He is not entitled to subrogation—In other cases question is one of intention.

Where the person discharging a prior mortgage is one personally liable to pay it, as where the payment is made by the mortgagor himself, no question of subrogation arises. In all other cases, the matter is one of intention, the rule being that where there is no express evidence, such intention should be ascribed to the person paying as would show that he acted according to his interest: *29 Cal 154 (PC); 10 Cal 1035 (PC) and A I R 1924 PC 36, Rel. on.* [P 783 C 2]

V. Radhakrishnayya for M. Krishna Bharathi — *for Appellant.*

T. M. Krishnaswami Ayyar and N. Sivaramakrishna Ayyar—*for Respondents.*

Venkatasubba Rao J. — This appeal raises two important questions as to the law of subrogation. Another point has been raised whether S. 92, T. P. Act (newly added) dealing with subrogation has retrospective effect. The following facts are material: (a) On 3rd August 1918 defendant 1 granted a mortgage to one Rangiah Goundan over Survey No. 116 (the suit land) and certain other properties: (b) On 26th November 1922 the same defendant 1 granted a mortgage to one Rangaswami Naicken (the plaintiff's assignor) which comprised inter alia Survey No. 116 and the other items included in the earlier mortgage: (c) On 24th May 1925 by Ex. 1, defendant 1 sold Survey No. 116 to defendant 4, the brother of defendant 5, for Rs. 6000. The purchaser was directed to retain the sale price with himself and apply it to paying off in part the amount due to Rangiah Goundan under the mortgage of 1918: (d) On 27th November 1928 defendant 5 (he having in the meantime become entitled to the suit property in virtue of a family partition) made a final payment of Rs. 5000 (in addition to Rs. 2000 already paid) to Rangiah Goundan, who thereupon executed in his favour a deed of release relinquishing his rights over Survey No. 116: (e) On 11th November 1931 the plaintiff as the assignee, as already stated, of Rangaswami Naicken brought the present action to enforce the mortgage of 1922.

As the dates above will show, the conveyance—the root of defendant 5's title — is subsequent to the mortgage sued on, that of 1922; his later acquired right, if it stood alone, should obviously be postponed to the suit mortgage which is earlier in date. But the question is, whether he is entitled to keep alive, for his benefit and protection, any portion of the mortgage of 1918, discharged by him in part; in short whether he can invoke the doctrine of subrogation. S. 92, T. P. Act inserted by the Amending Act (20 of 1929) has crystallized, as it were the Indian law relating to subrogation. Prior to the amendment, the law of subrogation grew out of judicial decisions, and even the word 'subrogation' did not occur in the Act, although there were certain Sections in it which imperfectly recognized the doctrine. Under S. 92 partial subroga-

tion is not permitted. That by the payment of Rs. 7000, Rangiah Goundan's mortgage was discharged only partly, is admitted. It is therefore to the plaintiff's interest to contend (and he so contends) that S. 92 has retrospective effect. S. 63 of the Amendment Act declares that certain Sections of that Act shall not apply to transactions before the Act. S. 47 thereof, which corresponds to S. 92 with which we are concerned, is not among those Sections, and therefore by way of inference, it is argued that this Section has retrospective effect. The general rule is that :

> The portions of a statute which are silent in that regard, are to be taken prima facie as clearly indicating prospective intention, and prospective intention only, acting from the time the Act comes into operation : Lord Hatherley in (1878) 3 A C 582[1] at p. 598, citing Lord Granworth.

Lord Cairns, in the same case, lays down that any Court will be slow to construe an enactment as retrospective, and thereby as disturbing existing rights, unless Parliament has said that the enactment is to be construed retrospectively. But the plaintiff places reliance upon Cl. (d), S. 63 which runs thus :

> And nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930 in any proceeding pending in a Court on that date.

For the plaintiff it is urged that the Sections to which this clause refers (S. 92 being one of them) are expressly declared by it not to be retrospective in a limited sense. The necessary inference is, it is argued, that in other respects, the Sections must be held to have retrospective effect. There was a similar provision in the statute then under discussion, in the case before the House of Lords already adverted to, and referring to it Lord Hatherley observes that it should be deemed to have been put in, in the language of conveyancing, *ex majore cautela*. Lord Blackburn groups the Sections of the statute, which was being considered, under three headings :

> (a) Some expressed in terms that left no doubt that they were intended to be retrospective; (b) Some as to which it was equally clear, that they were not intended to be retrospective; (c) Others expressed in ambiguous terms.

Referring to group (c), his Lordship says that the general rule of every civilized nation is, in the absence of express words to the contrary, that any new law that is made, affects future transactions, not past ones; the opposite rule applies in regard to procedure and possibly in matters of evidence. 1898 A C 469[2] is a very strong case. There the respondent was dismissed when the Civil Service Act, 1884, was in force. By that Act the Government had no power to dismiss a civil servant except upon the grounds, after the enquiry which it prescribed. There was the later Act of 1895, S. 58 of which enacted :

> Nothing in this Act, or in the Civil Service Act of 1884, shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service.

This Act was passed five months after the summary dismissal of the respondent. It was argued that the provisions of S. 58 being declaratory, it must of necessity be held to be retrospective. This contention was repelled, Lord Watson holding :

> It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law.

It manifestly shocks one's sense of justice, as observed by Earle C. J. in (1861) 10 C B (N S) 179[3] at page 191, that an act legal at the time of doing it should be made unlawful by some new enactment (cited by Lord Watson in the case already referred to). In two cases the Allahabad High Court has held that S. 92 is retrospective : 54 All 897[4] and I L R (1937) All 880.[5] But the attention of the learned Judges was not called to the decisions of the House of Lords referred to above, which are of overwhelming authority. Our view receives support from three decisions of this Court, A I R 1931 Mad 110,[6] 56 Mad 169[7] and the observations of Varadachariar J. in 59 Mad 359.[8] We must therefore

1. Gardner v. Lucas, (1878) 3 A C 582.
2. Young v. Adams, (1898) A C 469=67 L J P C 75=78 L T 506=14 T L R 378.
3. Midland Railway Co. v. Pye, (1861) 10 C B (N S) 179=30 L J C P 314=4 L T 510=9 W R 658=142 E R 419.
4. Totaram v. Ramlal, (1932) 19 A I R All 489=139 I C 107=54 All 897=1932 A L J 627 (F B).
5. Hira Singh v. Jai Singh, (1937) 24 A I R All 588=171 I C 153=I L R (1937) All 880=1937 A L J 840 (F B).
6. Pichaiyappa Chetty v. Govindaraja Mudaly, (1931) 18 A I R Mad 110=130 I C 506.
7. Kanjee and Moolje Bros. v. Shunmugam Pillai, (1932) 19 A I R Mad 734=139 I C 870=56 Mad 169=63 M L J 587.
8. Lakshmi Amma v. Sankara Narayana Menon, (1936) 23 A I R Mad 171=160 I C 137=59 Mad 359=70 M L J 1 (F B).

reject the contention that S. 92 is retrospective. The question then arises, under the law that prevailed prior to the amendment, was partial subrogation permissible? The judgments on this point are conflicting and even the dicta of several learned Judges are contradictory. It is unnecessary to enquire what the various High Courts have held, as a decision of the Judicial Committee, 51 I A 140,[9] has declared the law in unequivocal terms: *vide* 70 M L J 506.[10] The facts of the Privy Council case were as follows: There were three mortgages: the first and the third being on the lands alone and the second on the crops also. The mortgagor's lands were brought to sale in execution of a simple money decree and purchased by one Pingala subject to the mortgages. The second mortgagee having obtained judgment on his mortgage, obtained orders for sale of the crops. Pingala or his representatives paid the second mortgagee sums of money and saved the crops from seizure. While this was going on, the third mortgagee sued to judgment upon his own mortgage and caused the lands to be sold out freed from the mortgages. After payment of the amount due to the first mortgagee, there remained in Court to the credit of the first mortgagee's action Rs. 1327 odd.

The question arose, who was entitled to this amount—Pingala or the third mortgagee? In other words, could Pingala claim that he stood in the shoes of the second mortgagee, and use the mortgage in the latter's favour, as a shield against the claims of the third mortgagee? Their Lordships first point out that Pingala would be entitled to the amount under a specific order of the High Court; with that part of the decision which lays down no principle, we are not concerned. Then their Lordships proceed to deal with the general law on the question, prefacing their observations by the remark, "It is therefore necessary to investigate matters a little more closely." They treat it as settled law that where a purchaser from the owner pays off an earlier charge part by part, he may treat himself as buying that charge pro tanto. There the point arose directly for decision, were the sums paid by Pingala to be held purchase moneys or redemption moneys? To express the same idea differently, were the same to be deemed as paid in reduction of the second mortgage, or, for purchase of that mortgage pro tanto? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. Giving effect to this principle, their Lordships held that Pingala must be assumed not to have extinguished the charge but to have kept it alive. On that reasoning the right claimed by Pingala to subrogation was upheld. The idea of 'pro tanto purchases' is emphasized here and this decision must be regarded as having decided once for all the vexed question of partial subrogation. Sir Dinsha Mulla, referring to this case in his valuable treatise on the Transfer of Property Act, observes: "But in that case the whole of the mortgage debt was discharged by the purchaser." But this is an accident, which does not in the slightest degree diminish the authority of the case, in view of the way the Board dealt with the question. We may note in passing, that even prior to this pronouncement of the Judicial Committee, the Madras High Court had allowed subrogation, when the charge on a distinct item of the property mortgaged was, as in this case, completely discharged: 41 M L J 399.[11] This has been followed in some later decisions. The contention that partial subrogation ought not to be allowed therefore fails.

For the plaintiff it is next contended that for the right of subrogation to accrue, there must be a payment in addition to the purchase money, not out of the purchase money. The law of subrogation for India is, as already observed, mainly a creation of the Judges. The Privy Council decisions that laid the foundation of this law lend no countenance to this theory; on the contrary, those decisions both in the letter and spirit seem to refute this view. Before 11 I A 126[12] the many times quoted, the law was uncertain in India as to the scope of this equitable doctrine. That decision refused to recognize the authority of (1816) 3 Mer 210,[13] disapproved the Calcutta

9. Mali Reddi Ayya Reddi v. Gopalakrishnayya, (1924) 11 A I R P C 86=79 I C 592=47 Mad 190=51 I A 140 (P C).

10. Rama Iyer v. Bhagavathi Muthu Pillai, (1936) 28 A I R Mad 478=163 I C 884=70 M L J 506.

11. Venkataramana Reddi v. Rangiah Chetti, (1922) 9 A I R Mad 249=70 I C 212=41 M L J 399.

12. Gokuldas Gopal Das v. Puran Mal Premsukh Das, (1884) 10 Cal 1035=11 I A 126=4 Sar 548 (P C).

13. Toulmin v. Steer, (1816) 3 Mer 210=17 R R 67.

and the Bombay judgments based upon that case and affirmed the Madras view taken in 7 M H C R 229.[14] Their Lordships then go on to point out that in (1816) 3 Mer 210[13] the first mortgage was paid off out of the purchase money, but the very opposite was the fact in the case before them; on that ground the case could be distinguished from (1816) 3 Mer 210,[13] but what follows clinches the matter :

> Their Lordships do no not think it necessary to do this, as they are not prepared to extend this doctrine to India.

The matter does not stop there. In 29 I A 9,[15] the facts were such as to afford scope for the application of this principle. There were two mortgages of 1888 and 1890 effected by the owner. On 5th October 1891 the property in question was attached and pending attachment the owner granted on 7th October 1891, i. e. two days subsequent to the attachment, a mortgage to one Mustaphi to secure the payment of Rs. 40,000 advanced by him. As a part of the arrangement between the owner and Mustaphi (to this the learned Judges draw pointed attention) the mortgages of 1888 and 1890 were, from and out of the amount borrowed, paid off. Mustaphi's mortgage would, but for subrogation, rank after the attachment, but their Lordships held that the mortgages of 1888 and 1890 were kept alive for the benefit of Mustaphi, who could use them as a shield against the claim arising under the attachment. The next Privy Council case, 39 I A 68,[16] comes again within the range of the same principle. There too the facts gave scope for its application. The owner first effected in 1874 what was styled a zarpeshgi lease to secure repayment of Rs. 12,000. Then followed five successive mortgages, the last of which was effected on 7th January 1888. On 17th February of the same year, the owner granted to a lady named Alfan a mortgage for Rs. 12,000, which sum was, by agreement with her, applied to paying off the amount due to zarpeshgidar. A suit was brought by the assignee of Alfan and the question arose whether they were entitled to priority over the five mortgages which were as shown above anterior to Alfan's mortgage. Sir John Edge, delivering the judgment of the Board, refers expressly to the fact that Rs. 12,000 were lent and were borrowed for the specific purpose of paying off the amount due under the zarpeshgi lease, and that the sum raised was in pursuance of the understanding, applied in payment of that debt. Their Lordships held that the lease was not extinguished but kept alive for the benefit of Alfan.

We have now gone to the fountain-head of authority to show that there is no warrant for the view so strongly contended for before us, that payment should always be in addition to the purchase money and never out of it. Not a single Madras case, with the exception of a recent pronouncement to which we shall advert, has been cited in support of this doctrine; indeed this theory goes against the trend of the Madras decisions. In 34 Mad 119[17] there was a first mortgage in favour of *C* and a subsequent mortgage granted to the plaintiff. The owner then sold the property to defendant 4, who undertook to pay off with the purchase money both *C* and the plaintiff. He kept his word as to *C* but failed to pay off the plaintiff. The question arose whether as against the plaintiff he was entitled to subrogation. The answer was in the negative. The learned Judges, Benson and Krishnaswami Aiyar, observe that it was clear on the facts, that the intention to keep alive the first mortgage as against the puisne encumbrancer could not be presumed, as the object of defendant 4's transaction was not to keep alive *C's* mortgage, but to discharge the plaintiff's encumbrance as well. And then they go on to add what for the present purpose is very important :

> The rule as to subrogation only applies when the purchaser has not covenanted to *discharge* the previous encumbrance. In the present case both the previous mortgages were arranged to be *discharged* by the purchaser, not merely the first mortgage.

(In the passage above we have underlined *(here italicized)* two important words). If the rule contended for is right, the simple fact that the mortgage was discharged from the purchase money would have been a conclusive answer; but the judgment rests upon the principle, that when the purchaser agrees to discharge two earlier mortgages he cannot be permitted to say that he kept alive one of them, to use it as

14. Ramu Naicken v. Subbaraya Mudali, (1874-75) 7 M H C R 229.
15. Dinobandu Shaw v. Jogmoya Dasi, (1902) 29 Cal 154=29 I A 9=6 C W N 209 (P C).
16. Mohamed Ibrahim v. Ambika Prasad Singh, (1912) 39 Cal 527=14 I C 496=39 I A 68 (P C).
17. Govindaswami Thevan v. Doraswami Pillai, (1911) 34 Mad 119=6 I C 731=20 M L J 380 =1910 M W N 390.

a protection against the other. This was followed in 53 Mad 188[18] by Ramesam and Jackson JJ. There again the law is stated in terms, which exclude the possibility of the rule now contended for being right. The learned Judges observe :

> Now it is clear that where the mortgagor sells his property to a vendee requiring the vendee to to pay off two or three prior debts of the mortgagor and if the vendee pays off only one of them, he cannot claim priority in respect of it over the others though he may claim such priority in respect of other debts the payment of which by him was not contemplated.

Here is a clear statement that when payment is made out of the purchase money the right of priority accrues (that is not doubted), although (the doctrine resting as it does on equity) not against the person whose debt the purchaser, in breach of his agreement, failed to discharge. In cases such as the above, the intention clearly is that the prior charges should be extinguished, that is the very object of the sale; it will not therefore be open to the purchaser to say that he kept alive for his benefit one mortgage as against the other. It is unnecessary to refer to the numerous cases where the proposition, as we propose to decide, has been tacitly assumed. In some cases a different view has been expressed and two of them have been particularly relied on for the plaintiff. In 59 Mad 359[8] the facts are similar to those in 34 Mad 119[17] already referred to. Before the mortgage in favour of the appellant, there were three prior mortgages which he agreed to pay off, from and out of Rs. 8000, the advance he was to make. He paid off the first two mortgages but failed to pay off the third mortgage. It was held that he had no priority as against the third mortgagee. It is upon the observation made in this case that the plaintiff's counsel relies. Were this a decision on the point now raised, it would be binding upon us, and there would be an end to the matter, whether we were disposed to agree with it or not. The case was considered from two different standpoints. First, what would be the effect if S. 92 applied? With that aspect we are not here concerned, as the present case, as already observed, is governed by the law as it stood before the amendment. Secondly, would the appellant's contention prevail under the law as unaffected by S. 92? The learned Judges held, following 34 Mad 119[17] and 53 Mad 188[18] referred to above, that he had no right of subrogation. It therefore follows that such observations as occur in this judgment, as to the state of the law previous to the amendment, on the question now raised, are obiter. We must say we find it difficult to follow the distinction adverted to, between a person with a pre-existing right and a person acquiring a right by reason of the advance he makes. Not the slightest support is to be found for this supposed distinction in any of the rulings of the Judicial Committee; on the contrary, as already shown, it finds no countenance in them.

The other case that has been strongly relied on is I L R (1937) All 880.[5] There are very strong observations in that case which support the plaintiff's contention; but with very great deference we are unable to follow it. The theory of contractual liability there developed is alien to the doctrine of subrogation as propounded in the Privy Council decisions. As pointed out in 29 I A 9[15] (already cited), when the person discharging a prior mortgage is one personally liable to pay it, as where the payment is made by the mortgagor himself, *vide* 11 I A 126[12] at p. 134, no question of subrogation arises; in all other cases, the matter is one of intention, the rule being, that when there is no express evidence, such intention should be ascribed to the person paying, as would show that he acted according to his interest. If a person buys for Rs. 10,000 properties subject to mortgages in favour of *A* and *B*, agreeing to pay out of the consideration Rupees 6000 to *A* and Rs. 4000 to *B*, it stands to reason, that if he pays off *A* alone, he cannot have priority against *B*, for the very essence of the transaction is, that he makes himself liable to pay off both *A* and *B*, and by failing to pay off *B*, he cannot be permitted to make an illegal profit of Rs. 4000. That is the ratio of 34 Mad 119[17] and 53 Mad 188[18] already referred to. Their Lordships of the Privy Council in 51 I A 140[9] after declaring that it is settled law that the purchaser may be paying off an earlier charge, treat himself as buying it and stand in the same position as his vendor, go on to add the following limitation, which gives effect to the principle abovementioned :

> This rule would not apply if the owner of the property (by which expression is meant the purchaser) had covenanted to pay the later mortgage debt.

(The words within brackets are ours.)

18. Laksmi Achi v. Narayanaswami, (1930) 17 A I R Mad 51=124 I C 497=53 Mad 188=57 M L J 746.

One word more. There has been a good deal of debate as to the effect of A I R 1932 P C 99[19] (a decision on appeal from the Oudh Chief Court.) This was relied on by the Judges in the Full Bench decision of the Allahabad Court, I L R (1937) All 880,[5] and also by Venkataramana Rao J. in the Madras Full Bench case already referred to: 59 Mad 359.[8] The supposed importance of this decision lies in the fact that it was approved by the Privy Council. But that tribunal did no more than dismiss the appeal summarily, adding, however, the remark that as to "all the points urged before the Board their Lordships agreed completely with the judgment of the Court of Oudh." What were the points urged before the Board? On this no light is thrown. Apart from this, there are only two or three sentences (somewhat cryptic) in the judgment of the learned Oudh Judges which bear on this question, and it is impossible, having regard to the trend of the authority to which we have referred, to put upon them the construction contended for on behalf of the plaintiff. We are not prepared to hold that the Privy Council intended to sweep away the principle, which the decisions of that tribunal had previously established. It may not be without interest to re-call in this connexion the pregnant words (the case being one of subrogation) quoted by Holloway Ag. C. J. and Kindersley J.:

> The law does not exist for the sake of formalism; on the contrary, formalism is to subserve legal interests: 7 M H C R 229[14] approved by the Privy Council in *Gokuldas's case*.[12]

Incidentally, we may remark that the learned Judges in this case advert to the fact that

> the subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the prior mortgagee (page 232),

which shows that the doctrine they were giving effect to dealt "fairly with the rights of the parties" (page 231). To construe Cls. (i) and (iii) of the new S. 92 is not within our purview. It is not therefore for us to say whether the construction adopted in 59 Mad 359[8] is right or not, whatever may be our own view on the matter. Lastly remains the question, what is the extent of defendant 5's right? Although he made a payment of Rs. 7000, his priority does not extend to any sum in excess of Rs. 6000, the amount which he undertook to pay, it being admitted that he got possession on the very date of his sale (24th May 1925). Nor is there force in the plaintiff's contention, that from Rs. 7000 should be deducted interest at 12 per cent. per annum for the period between the sale and the payments, and that in respect of the balance only defendant 5 is entitled to priority. In pursuance of the decree of the lower Court the suit item has been already sold and the plaintiff has become the purchaser. In view of our finding, the property should be re-sold and from the proceeds of sale, defendant 5 should be paid out Rupees 6000 along with interest thereon at 6 per cent. per annum commencing from 22nd May 1938 and the balance if any should go to the plaintiff. The property shall not be sold for three months from today, i. e. till 22nd May 1938, as the plaintiff undertakes to pay the amount before that date. Then remains the question of costs. The lower Court's order against defendant 5 as to costs is vacated. The plaintiff will not be liable to refund Rs. 250 directed to be paid to him by defendant 5 under order dated 15th February 1937. The plaintiff will pay defendant 5's costs, which are hereby fixed at the consolidated sum of Rs. 400; this amount represents the costs incurred in the lower Court in connexion with the finding inquiry and in this Court.

C.R.K./R.M. *Order accordingly.*

19. Jag Mohan Das v. Jugal Kishore, (1932) 19 A I R P C 99=137 I C 475 (P C).

A. I. R. 1938 Madras 784

HORWILL J.

Appu Goundan—Petitioner.

v.

Emperor.

Criminal Revn. No. 640 and Petition No. 603 of 1937, Decided on 31st March 1938, to revise the Judgment of Sub-Divisional First Class Magistrate, Salem, in C. A. No. 64 of 1937.

(a) Criminal Trial—Jurisdiction — Statement by accused of his having committed offence not triable by Magistrate—Magistrate is not deprived of jurisdiction unless he feels that statement was true or unless prosecution accept it.

A statement by an accused person that the offence committed by him is a more serious one, not triable by the Magistrate, does not deprive the Magistrate of jurisdiction unless the prosecution accept the truth of that statement or the Magistrate is of opinion that it is true. [P 785 C 1]

(b) Madras Abkari Act (1 of 1886), S. 55—Possession of wash — Presumption under S. 64 operates—Accused presumed guilty.

Where the accused was found in possession of wash the presumption set out in S. 64 operates

and the accused is presumed to have committed an offence punishable under S. 55. [P 785 C 1]

J. S. Vedamanickam—*for Petitioner.*

N. Somasundaram for Public Prosecutor —*for the Crown.*

Order.—I find no reason to interfere. A statement by an accused person that the offence committed by him is a more serious one, not triable by the Magistrate, does not deprive the Magistrate of jurisdiction unless the prosecution accept the truth of that statement or the Magistrate is of opinion that it is true. As the accused was found in possession of wash, the presumption set out in S. 64 operates and the accused is presumed to have committed an offence punishable under S. 55 of Act 1 of 1886. The criminal revision petition is dismissed.

C.R.K./B.D. *Petition dismissed.*

** A. I. R. 1938 Madras 785

FULL BENCH

LEACH C. J., MADHAVAN NAIR, VARADACHARIAR, LAKSHMANA RAO AND STODART JJ.

Perumal Chettiar — Petitioner.

v.

Kamakshi Ammal — Respondent.

Civil Revn. Petn. No. 883 of 1935, Decided on 10th February 1938, from decree of Court of Small Causes, Trichinopoly, D/- 18th July 1935.

*** * Pronote — Suit on — Pronote insufficiently stamped—Bar of S. 35, Stamp Act, and S. 91, Evidence Act — Instrument given as collateral security or conditional payment or not embodying all terms of contract — Suit on original debt is maintainable — Money paid contemporaneously with execution of instrument — Possibility of conditional payment or collateral security is not excluded — Circumstances determine whether suit lies on original debt :** *A I R 1926 Mad 1148=98 I C 75 and A I R 1935 Mad 206=156 I C 250=67 M L J 912, Overruled. (Per Full Bench, Stodart J. contra.)*

(Per Full Bench.) — If the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. S. 91, Evidence Act, and S. 35, Stamp Act, bar the way. But if it does not embody all the terms of the contract the true nature of the transaction can be proved; and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed : *A I R 1926 Mad 1148=98 I C 75 and A I R 1935 Mad 206=156 I C 250=67 M L J 912, Overruled; Case law discussed; English case law reviewed.* [P 788 C 1]

(Per Stodart J. contra.)—When a man gives another promissory note in satisfaction of a debt or for other consideration, he gives at the same time a warranty that the note is a good and enforceable instrument. If the note is bad for want of a proper stamp, it cannot operate as a discharge for the debt. This implied warranty is a term of the contract and such a warranty is not generally embodied in a promissory note or other negotiable instrument. When money or other valuable consideration passes and a negotiable instrument is given in exchange for that consideration, a cause of action arises on the consideration apart from the engagements evidenced by the instrument. Because the consideration is recited in the instrument, it cannot be said that no evidence can be given of it except the instrument itself. The consideration, that is to say, the loan for which the promissory note is given, is the subject-matter of the contract and not a term of the contract within the meaning of S. 91, Evidence Act. In the matter of the loan the lender consents to it only on condition that the borrower gives him a negotiable instrument in the shape of a promissory note containing certain stipulations; and the borrower for his part consents to execute a promissory note. If in the promissory note, the borrower embodies a recital that he has received the money, that is not a "term of the contract" but merely a statement of the actual circumstance which has given rise to the contract : *A I R 1918 P C 146, Applied.* [P 794 C 2 ; P 795 C 1, 2]

K. V. Sreenivasa Iyer — *for Petitioner.*

N. Suryanarayana — *for Respondent.*

Leach C. J. — The question which the Court is called upon to decide in this case is whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrower, but is inadmissible in evidence owing to a defect in the stamping. In England the right to sue on the original consideration is recognized, and the same principle has been applied by some Judges in India, but S. 91, Evidence Act says that no evidence shall be given in proof of the terms of the contract except the document itself, or secondary evidence where secondary evidence is admissible, and other Judges have held that this Section prohibits a suit on the original consideration. This Court, except in two cases to which I shall in due course refer, has held that S. 91, Evidence Act is a bar to a suit on the debt, when the loan and the instrument are contemporaneous. Before turning to examine the decisions of this Court and certain of the other authorities to which reference has been made, I should point out that the Court is not considering the case where a promissory note has been given in respect of an

antecedent debt. It is well settled, both in England and in this country, that where a negotiable instrument is given in respect of an antecedent debt the creditor may sue on the debt and ignore the note. We are merely concerned here with the case where the note has been given at the time of the loan or in pursuance of the arrangement then made and embodies in full the terms of the contract.

The earliest reported case of this Court to which our attention has been drawn is that in 7 Mad 112[1] where a promissory note had been given by two members of a joint Hindu family in consideration of a loan to the family. The instrument was improperly stamped, but the Court held that this was no bar to the suit because the cause of action for the money lent was complete in itself before the giving of the note. The report does not set out the facts and apparently the Court was of the opinion that the instrument had been given for an antecedent debt. The question was raised before Collins C. J. and Parker J. in 10 Mad 94.[2] There the loan having been arranged and the money paid, a promissory note specifying the terms of the contract was executed later in the day. The note was not duly stamped and the Court held that the suit was not maintainable. It was recognized that there might be circumstances under which the loan could be recovered apart from the note, but the Court was firmly of the opinion that when the contract is reduced to writing, the instrument itself is the only evidence of the transaction. This decision was followed by Boddam and Sankaran Nair JJ. in 29 Mad 111,[3] by Sadasiva Iyer and Spencer JJ. in 38 Mad 660[4] and by Varadachariar and Burn JJ., in 58 Mad 261=67 M L J 595.[5] The same principle was applied by Madhavan Nair J. in 20 M L W 943,[6] by Reilly and Anantha-krishna Iyer JJ. in 36 M L W 432,[7] by Krishnan Pandalai J. in 37 M L W 723[8] and again by Ananthakrishna Iyer J. in 63 M L J 303.[9] In 59 Mad 268[10] a Full Bench consisting of Beasley C. J., Cornish and Pandrang Row JJ. had to consider a promissory note which was expressed in these terms :

> We have taken from you on credit this day 10 kalams of Kuruvai paddy at Rs. 3 a kalam for Rs. 30 and we have executed this hand letter promising to pay the sum of Rs. 30 with interest thereon at 3 pies per rupee per mensem to you or to your order.

The document was unstamped and it was conceded that it was inadmissible in evidence. It had not been given in respect of an antecedent debt, but was a contemporaneous document executed at the time of the sale of the paddy. The Court held that the suit was maintainable on the debt. In the course of his judgment, Beasley C. J. recognized that where a promissory note is in consideration of a loan, the debt cannot be proved aliunde. The learned Chief Justice and Pandrang Row J. were of opinion that in all such cases the Courts must be guided by what appears on the face of the promissory note. If it is expressed in such a way as to leave what was intended by the parties in any way in doubt, then the facts must settle the question. If it is clear on the face of the promissory note that it is the contract, then no further evidence can be permitted. The Court held that the suit was maintainable because it considered that the promissory note was merely given as a conditional payment for the paddy. Cornish J. reserved his opinion on the question whether the payee of a note given for a contemporaneous loan has or has not a right of action on the debt. In 34 I C 417,[11] Coutts-Trotter and Srinivasa Iyengar JJ. expressed the opinion that the giving of an instrument in recognition of a pre-existing debt does not extinguish but merely suspends the cause of action on the original debt. The giving of an instrument is merely conditional to its discharge. I do not regard this judgment as questioning the correctness of the decision in 10 Mad

1. Krishnaswami Pillai v. Rangaswami Chetty, (1884) 7 Mad 112.
2. Pothi Reddi v. Velayudasivam, (1887) 10 Mad 94.
3. Yarlagadda Veera Raghavaya v. Gorantla Ramayya, (1906) 29 Mad 111=15 M L J 484.
4. Muthu Sastrigal v. Viswanatha Pandarasannadhi, (1914) 1 A I R Mad 657=21 I C 864=38 Mad 660=26 M L J 19.
5. Chockalingam Chettiar v. Palaniappa Chettiar, (1935) 22 A I R Mad 23=155 I C 184=58 Mad 261=67 M L J 595.
6. Somaraju v. Venkatasubbarayudu, (1925) 12 A I R Mad 351=85 I C 389=20 M L W 943.
7. Gura Sahu v. Krishnamma, (1932) 19 A I R Mad 687=139 I C 361=36 M L W 432.
8. Chendrasekharan Pillai v. Srinivasa Pillai, (1933) 20 A I R Mad 71=140 I C 193=37 M L W 723.
9. Alimane Sahiba v. Subbarayudu, (1932) 19 A I R Mad 693=139 I C 486=63 M L J 303.
10. Ramaswami Pillai v. Murugiah Padayachi, (1936) 23 A I R Mad 179=161 I C 273=59 Mad 268=70 M L J 267 (F B).
11. Chockalingam Chetty v. Annamalai Chetty, (1917) 4 A I R Mad 460=34 I C 417.

94.[2] Stone J. in 67 M L J 30[12] held that where the cause of action is complete before the giving of the promissory note, the creditor may sue on the debt. This is another case in which the promissory note was given in respect of an antecedent debt.

The two cases which conflict with 10 Mad 94[2] are A I R 1926 Mad 1148[13] and 67 M L J 912.[14] In A I R 1926 Mad 1148[13] Wallace J. stated that when a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the instrument does not discharge the debt, but only suspends the remedy on the debt. I am unable to agree that this is the balance of judicial opinion in India. The learned Judge made no reference to the decision in 10 Mad 94[2] or to that in 38 Mad 660.[4] In 67 M L J 912,[14] Venkatasubba Rao J. expressly held that where the loan and the giving of the promissory note are contemporaneous the lender may fall back on the original contract. This decision is therefore in direct conflict with 10 Mad 94[2] and the cases which followed it. The learned Judge, in the course of his judgment, referred to a marked conflict of judicial opinion in this High Court. He regarded the decision of Stone J. in 67 M L J 30[12] as being in conflict with the judgment of Varadachariar and Burn JJ. in 58 Mad 261.[5] With great respect I do not look upon these decisions as being in conflict and until the judgment of Venkatasubba Rao J., the only previous departure from the general trend of decisions of this Court was to be found in the judgment of Wallace J. The correctness of the decision in 10 Mad 94[2] has however now been called in question and in view of the importance of the matter the present case has been placed before a Bench of five Judges.

The question under discussion was considered by a Full Bench of the Rangoon High Court of which I was a member in 12 Rang 500[15] and there all the important decisions, both Indian and English, were discussed in the course of the arguments. The judgment of the Court was delivered by Page C. J. who deduced the following propositions of law from the authorities :

(1) When a loan is contracted it is an implied term of the agreement that it shall be repaid. (2) When a promissory note is given by the borrower either at the time when the loan is contracted or afterwards, the terms upon which it is given and taken is a question of fact and not of law. (3) The giving of a negotiable security by a debtor to his creditor operates prima facie as a conditional payment only, and not as a satisfaction of the debt unless the parties so regard it. (4) If the promissory note is itself the consideration for the loan, or if it is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the instrument. (5) The lender is entitled to sue on the original consideration if the instrument is given merely as a collateral security. (6) If the terms of the agreement under which the loan was made have been embodied in an instrument, no evidence can be adduced in proof of the terms of the contract except the document itself and if the document is not admissible in evidence as the result of its being improperly stamped, the suit must fail.

I concurred in this judgment and subject to one qualification I still consider that it correctly states the law. The qualification which I would now make has reference to the statement that the giving of a negotiable instrument operates prima facie as a conditional payment of the debt. On further consideration, I have come to the conclusion that this must depend on the facts of the particular case and that there is no presumption that the instrument has been given as conditional payment. Therefore, in my opinion, when the lender wishes to sue on the original contract on the ground that the instrument was given by way of conditional payment, he must prove facts which warrant the inference. I am in agreement with the observations of Sulaiman and Kendall JJ. in 51 All 530.[16] The learned Judges there said :

It is true that in considering this point we cannot be solely guided by the equitable considerations which are given effect to in English cases. The express provisions of S. 91, Evidence Act, cannot be ignored. Under that Section, where the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of the terms of such contract except the document itself or secondary evidence of its contents where it is admissible. If therefore the hundis are the embodiment of the whole contract between the parties and those hundis are not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, the plaintiffs cannot be allowed to adduce other evidence to prove the terms of such contract. It is conceivable that in special cases a bill of exchange or a promissory

12. Murugappa Chetty v. Nachiappa Chetty, (1934) 21 A I R Mad 503=155 I C 164=67 M L J 80.
13. Gopala Padayachi v. Rajagopal Naidu, (1926) 13 A I R Mad 1148=98 I C 75.
14. Chinnayya Naidu v. Shrinivasa Naidu, (1935) 22 A I R Mad 206=156 I C 250=67 M L J 912.
15. Maung Chit v. Roshan N. M. A. Kareem Oomer & Co., (1934) 21 A I R Rang 389=152 I C 1038=12 Rang 500 (F B).
16. Kundan Lal v. Bhikari Das Iswar Das, (1929) 16 A I R All 254=116 I C 293=51 All 530=1929 A L J 333.

note may be the only document containing the terms of the contract between the parties, and in such a case if that document cannot be adduced in evidence, the creditor may be prevented from recovering the amount. This is clear from Illus. (c) to S. 91. On the other hand, from the mere fact that a bill of exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. A hundi is principally a written promise to pay a fixed amount on or after a certain date. It does not necessarily contain all the terms of the agreement between the parties, as a bond, for instance, would do. In many cases a promissory note or a hundi may merely be a written security taken for the loan. The promise to pay the amount may be only a part of the whole contract between the parties, in which case it cannot be said that that contract has been reduced to the form of a hundi. In such cases it would be impossible to hold that the provisions of S. 91 would exclude evidence showing the terms of the whole contract which cannot be determined from the hundi alone.

A decision to the same effect was given by this Court in 40 Mad 585,[17] an appeal heard by Oldfield and Krishnan JJ. Oldfield J. said :

The second question referred to us is whether the lender can be given a decree apart from the note for the money lent upon the note. It is not possible to answer this question without further knowledge of the facts.

Krishnan J. observed :

If there is an obligation apart from the one under the note itself, it may clearly be enforced. The fact that the 'loan and the note are contemporaneous' is not conclusive of the non-existence of such obligation.

In my opinion the law may be stated shortly in this way. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. S. 91, Evidence Act, and S. 35, Stamp Act, bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed. It has been stressed in argument that the English rules of evidence do not run counter to S. 91, Evidence Act, and therefore it is said that the Section cannot be regarded as a bar to the application of the principle accepted in England that a suit lies on the debt apart from the instrument. This argument ignores two important factors. In the first place, the English rules of evidence are not statutory, but judge-made, and in the second place the tendency in England has always been to ignore as far as possible stamp objections, as is pointed out in Taylor on Evidence, Vol. 1, p. 276, (Edn. 12). In India the law is statutory and the Courts are given no latitude in matters of this nature. S. 35, Stamp Act, absolutely prohibits a negotiable instrument improperly stamped being put in evidence, and S. 91, Evidence Act, insists that where a contract has been reduced to writing the document alone shall be looked at.

The suit out of which the present petition arises was for the recovery of a sum of Rs. 400 lent on a promissory note on 17th June 1928. The plaintiff's case was that there had been payments to account and that these payments had been endorsed on the instrument. The defences were : (1) the promissory note was not supported by consideration ; (2) there had been no payments to account and the endorsements were false ; (3) the suit was barred by limitation, and (4) it was not maintainable as the promissory note was insufficiently stamped. The promissory note was insufficiently stamped but the trial Judge found against the defendant on the facts and granted a decree on the ground that the plaintiff was entitled to sue on the original consideration, because the promissory note had been executed one and a half hour after the lending of the money. The learned trial Judge did not consider the question whether the promissory note embodied the whole of the terms of the contract between the parties. The case should therefore be remanded to the trial Court for further consideration and decision in the light of this judgment. The petitioner is entitled to his costs in this Court.

Madhavan Nair J.—I agree.

Varadachariar J.—I agree. In deference however to the decisions which have laid down a different rule, I feel bound to explain my inability to follow them, especially when that rule has the attraction of avoiding apparent injustice while the conclusion stated in the judgment just deli-

17. Chidambaram Chettiar v. Ayyaswami Tevan, (1917) 4 A I R Mad 201=36 I C 741=40 Mad 585=31 M L J 401.

vered has been described as "needlessly technical" by an eminent Judge (Jenkins C. J. in 24 Bom 360[18] at p. 362). As indicated by me in the order of reference, the question for consideration is what is the purpose and effect of the prohibition contained in S. 35, Stamp Act ? It seems to me there can be little doubt that in enacting that prohibition, the Legislature expected that it would be made effective by the combined operation of that Section and S. 91, Evidence Act. The possible hardship to the lender was noted by Sir Richard Couch as early as in 21 W R 1;[19] the learned Chief Justice observed that the law has to be so, for the reason that 'if the consequence of not stamping a document of this kind was not serious the stamp laws would very frequently be disregarded.' If I am right in my interpretation of these provisions of the Statute law, I venture to think that it is not for the Court to attempt to circumvent the law, even for the laudable purpose of advancing substantial justice. There has been little or no controversy as to the effect of S. 35, Stamp Act. The divergence of opinion disclosed in the decided cases relates to the bearing and effect of S. 91, Evidence Act. Even on this point, the general principle underlying the Section hardly admits of any doubt. In the words of Sir Richard Couch[19a] (quoted by the Judicial Committee in 50 Cal 338[20] at p. 344) :

> The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing.

The question is, how far does this rule or the reason of the rule apply to cases in which a person borrowing money executes as part of the same transaction a promissory note in favour of the lender ? That the terms as to rate of interest, date of payment, etc. form part of the contract and cannot be proved except by proof of the note seems to be more or less admitted : *see* 17 C L J 399.[21] Is there an obligation to repay divorced from these terms and can such obligation be proved independently of the note is the point in controversy. The answer seems to me to depend on, whether it is not true even in this case that the writing, namely the promissory note, is "tacitly considered by the parties as the only repository and the appropriate evidence of their agreement": per Sir Richard Couch in the case already quoted from.[19a] The course of decisions in the Indian High Courts may be briefly stated. The Allahabad and Lahore High Courts have after some fluctuation of opinion adopted the stricter view in their latest Full Bench pronouncements. The Madras decisions have been dealt with by my Lord who has also referred to the judgment of the Full Bench of the Rangoon High Court. In Calcutta, the stricter rule was laid down in 21 W R 1,[19] but this was virtually departed from in 3 Cal 314.[22] Judging from the statement of facts, the last mentioned case seems to have arisen out of a suit by an indorsee of the unstamped promissory note ; with all respect, it is difficult to see how the indorsee who could not even prove the note could sue on the original consideration between the maker and the payee : *see* (1808-16) 170 E R 918.[23] In 7 Cal 256[24] Garth C. J. re-affirmed the stricter rule, but in 23 Cal 851[25] his statement of the law was interpreted in a manner not easily reconcilable with the way that Garth C. J. had himself applied it in 8 Cal 721.[26] Later decisions of the Calcutta High Court seem to have alternated between the two views: *cf.* 61 Cal 433,[27] A I R 1936 Cal 127[28] and A I R 1935 Cal 658;[29] but 23 Cal 851[25] was followed by the Bombay High Court in 24 Bom 360.[18] In 29 Bom L R 432[30] the learned Judge seems to be adopting the view of Page C. J.

18. Krishnaji v. Rajmal, (1900) 24 Bom 360 = 2 Bom L R 25.
19. Ankur Chunder Roy v. Madhub Chunder Ghose, (1874) 21 W R 1.
19a Kedarnath v. Sham Loll, (1878) 11 Beng L R 405 at p. 412.
20. Subramanian v. Lutchman, (1923) 10 A I R P C 50=71 I C 650=50 I A 77=50 Cal 338 =1 Rang 66 (P C).
21. Ram Bhadur v. Dasuri Ram, (1913) 17 C L J 399=19 I C 840.
22. Golapchund Marwaree v. Thakurani Mohokoom Kooaree, (1877) 3 Cal 314 = 2 C L R 412*n*.
23. Waynam v. Bend, (1808-16) 1 Camp 175=170 E R 918.
24. Sheik Akbar v. Sheikh Khan, (1881) 7 Cal 256 =8 C L R 528.
25. Pramatha Nath Sandal v. Dwaraka Nath Dey, (1896) 23 Cal 851.
26. Radha Kant Shaha v. Abboy Churn Mitter, (1882) 8 Cal 721=11 C L R 310.
27. Ramendra Mehan v. Keshab Chandra, (1934) 21 A I R Cal 554=150 I C 982=61 Cal 433= 38 C W N 488.
28. Indrachandra Bag v. Hiralal Rong, (1936) 23 A I R Cal 127=167 I C 441=62 C L J 545= 40 C W N 696.
29. Tarachand Protapmal v. Tamijudin Sheik, (1935) 22 A I R Cal 658 = 159 I C 511 = 39 C W N 1241.
30. Jacob & Co. v. Vicumsey, (1927) 14 A I R Bom 437=102 I C 138=29 Bom L R 432.

in the Rangoon case. In Patna, the question can scarcely be regarded as settled: *cf.* 7 Pat 845,[31] where Macpherson J. concurred only on the ground of *stare decisis*.

As some of the Indian decisions purport to follow the English rule, it is necessary to note the exact terms of the relevant rules of the English law and the basis on which they rest, with a view to see how far they can be followed in this country; for, as pointed out by the Judicial Committee in 45 Cal 320[32] at p. 333, Courts in India cannot depart from the provisions of the Evidence Act merely on the ground that the laws of evidence in England, when similar questions came before the English Courts, permit certain facts to be established by proof at large. Though it may generally be true, to say that S. 91, Evidence Act embodies what is known as the "best evidence" rule in the English law, the terms in which the rule has been codified here do not permit to the Courts in India the latitude which English Courts enjoyed at a time when the rule was being developed and administered there substantially as a rule of caution in leaving evidence to the jury. Thus, the same learned Chief Justice (Lord Tenterden) who in (1828) M & M 257 = 173 E R 1151[33] said that he had always acted most strictly on the rule that what is in writing shall only be proved by the writing itself, observed in (1828) M & M 413 = 173 E R 1207[34]:

> So much injustice has frequently been done by rigid adherence to this rule that I should certainly be reluctant to carry it into strict execution: *see* Taylor on Evidence, Vol. 1, S. 397.

Further, rules of exclusion which had been developed mainly with a view to avoid ignorant juries being misled or confused were not scrupulously adhered to by Courts of Chancery where the Judge himself adjudicated both on law and on fact, especially when the exclusion of a writing, by reason of the prohibition arising from the Stamp laws threatened to defeat a just claim. In (1805) 11 Ves 583 at p. 596=32 E R 1215[35] at p. 1220 when pressed with an objection based on the Stamp laws, Lord Eldon stated that it was his "duty to struggle to support what has been the practice of the Court."

Bearing these considerations in mind, I proceed to deal with the relevant rules of the English law which are thus stated in Roscoe's Treatise on Evidence in Civil Actions (Edn. 20, Vol. 1, page 226):

> When the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence, if allowed by the pleadings, may be resorted to. Thus (A) where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration; (B) if a plaintiff succeeds in making out a case of implied or oral contract and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of non-suiting the plaintiff.

The proposition that I have marked (B) in the above extract need not detain us because I have never found it adopted in those terms in any Indian case and it is scarcely conceivable that the Legislature would have intended to permit an evasion of S. 91 in the manner suggested. Some of the English decisions cited in connexion with the question now before us seem however to rest on this principle: *cf.* (1840) 1 M & G 944=133 E R 615;[36] (1832) 4 B & Ad 208=110 E R 434.[37] The proposition that I have marked (A) in the above extract purports to be based on (1800) 102 E R 22[38] and *Tyte* v. *Jones*, reported as a footnote to (1800) 102 E R 22.[38] (1800) 102 E R 22[38] will on examination be found to be an action by an indorsee of a pro-note; and in view of what is taken by Lord Ellenborough in 1 Camp 175 = 170 E R 918[23] to be indisputable, that is, that the indorsee cannot recover under any of the money counts "as he was not an original party to the bill and there was no evidence of any value being received by the defendant from him" it is doubtful if the reference in the report in (1800) 102 E R 22[38] to the general counts in the declaration and to possible evidence of payment of consideration by the plaintiff to the defendant was intended to relate to the original loan between the maker and the payee. If it did, it can perhaps be explained as resting on the principle which had at one time been

31. Dhaneshwar Sahu v. Ramrup Gir, (1928) 15 A I R Pat 426=111 I C 482=7 Pat 845 = 9 P L T 471.
32. Maung Kyin v. Ma Shwe Law, (1917) 4 A I R P C 207=42 I C 642=45 Cal 320=44 I A 236 (P C).
33. Vincent v. Cole, (1828) M & M 257=173 E R 1151=3 Car & P 481=33 R R 688.
34. Reid v. Batte, (1828) M & M 413 = 173 E R 1207.
35. Huddleston v. Briscoe, (1805) 11 Ves 583=32 E R 1215.
36. Magnay v. Knight, (1840) 1 M & G 944 = 2 Scott N R 64=1 Drink 13=133 E R 615 = 4 Jur 1083=56 R R 571.
37. The King v. Inhabitants of Padstow, (1832) 4 B & Ad 208=110 E R 434.
38. Farr v. Price, (1800) 1 East 55 = 102 E R 22.

enunciated in England that an unstamped document was a mere paper which did not amount to an "agreement" and which therefore left the plaintiff's evidence where it stood: (1832) 4 B & Ad 208.[37] Such a theory is scarcely maintainable in view of later authorities: *see* (1855) 4 E & B 660;[39] Roscoe, p. 227, Evidence in Civil Actions; *see also* 17 C L J 399.[21] If, as held by the Judicial Committee in 50 Cal 338,[20] a document which was excluded from evidence under S. 49, Registration Act was nevertheless a written contract in the sense that its existence precluded oral evidence of the same being given, it is difficult to see how a different principle will apply to cases where the document is excluded by S. 35, Stamp Act.

Tyte v. *Jones* (referred to in the footnote to (1800) 102 E R 22[38]) seems to rest on another principle of the English law which the Indian Legislature has deliberately departed from in enacting S. 22, Evidence Act. The proof that was permitted in *Tyte* v. *Jones* was to the effect that when the money for which the unstamped promissory note had been given was demanded of the defendant, he acknowledged the debt. This is explicable in the light of the rule supported by some authority in England that admissions by a party, even when proved by parol evidence, constitute an exception to the "best evidence" rule: *see* (1832) 149 E R 157.[40] This view has been criticized even in England: *see* Taylor on Evidence, Ss. 410 to 412, and S. 22, Evidence Act adopted the stricter view and relegated "oral" admissions as to the contents of a document to the category of "secondary evidence." The result, in India, is that if by reason of the document being unstamped, no evidence of its contents, whether primary or secondary, is admissible, evidence of admissions by the defendant is equally inadmissible. The position may be different where admissions are made in the pleadings themselves, *cf.* 11 Ves 583[35] at p. 596 and (1814) 2 M & S 551[41] at p. 553, because by reason of S. 58, Evidence Act, it may not be necessary to prove admitted facts, and the objection under S. 91 will not arise unless the plaintiff is called upon to go into evidence: 42 Mad 41.[42] This was the position in 23 Cal 854,[43] *cf. however* 18 Bom 369,[44] where it was suggested that in a suit on an unstamped promissory note even an admission in the written statement may not avail the plaintiff, as the Court, when giving a decree on such admission, may be "acting on" the document within the meaning of S. 35, Stamp Act: *see also* 21 W R 1.[19]

It seems to me that the other English authorities which have been referred to in this connexion by text writers or in the Indian decisions do not really bear on the objection arising under S. 91, Evidence Act. (1853) 2 E & B 849=118 E R 985[45] turned on the rights and obligations of vendor and vendee, though an unstamped bill came into the picture. The defendant had sold a bill as a 'foreign' bill when in fact it was not. If it were a foreign bill, it could have been subsequently stamped; but not being a foreign bill it became worthless on account of the absence of a stamp. The claim of the vendee for money had and received was sustained on the ground that the vendor had sold as a foreign bill what in fact was not a foreign bill. It seems to me that this decision does not warrant the conclusion that a person lending money on an unstamped note can maintain an action for money had and received. I shall recur to this point later.

(1827) 108 E R 778[46] proceeded on the footing that though by reason of the alteration, the promissory note had become unenforceable, the alteration did not extinguish the debt

and that it was competent to the plaintiff to give the paper in evidence to prove the terms on which the money was deposited.

It is noteworthy that Bayley J. instanced the case of a usurious security being taken for a pre-existing debt. 170 E R 345 =1 Esp 245[47] was a case of an unstamped note given for a pre-existing debt (in lieu of an acceptance of the defendant

39. Stearn v. Mills, (1855) 4 E & B 660.
40. Singleton v. Barrett, (1832) 2 Tyr 409=2 C & J 368=1 L J Ex 134=149 E R 157.
41. Page v. Bussell, (1814) 2 M & S 551=105 E R 487.
42. Mallappa v. M. Naga Chetty, (1919) 6 A I R Mad 833=48 I C 158=42 Mad 41=35 M L J 555 (F B).
43. Samsar Khan v. Lochin Dass, (1896) 23 Cal 854.
44. Chenbasapa v. Lakshman Ramchandra, (1894) 18 Bom 369.
45. H. Gompertz v. Bartlett, (1853) 2 E & B 849 =2 C L R 395=23 L J Q B 65=18 Jur 266 =2 W R 43=118 E R 985.
46. Sutton v. Toower, (1827) 7 B & C 416=1 Man & Ry 125=108 E R 778.
47. Wilson v. Kennedy, (1793-1807) 1 Esp 245= 170 E R 345.

which was due when the note was given) and the language of Lord Kenyon is almost identical in terms with the first rule stated by Garth C. J. in 7 Cal 256.[24] The same remark applied to (1808) 1 Taunt 353[48] and to (1831) 1 B & Ad 696,[49] which was a case of a bill given for goods sold: *see also* (1835) 2 Bing (N C) 249=132 E R 98.[50] It may be convenient to refer next to those of the Indian decisions which when dealing with claims for money lent under unstamped notes invoke the principle that the giving of a negotiable instrument only operates as a 'conditional discharge' or merely suspends the plaintiff's remedy and that the plaintiff's right to sue is revived if the instrument turns out to be worthless or is not discharged by payment in due course. I see no difficulty in applying this principle to cases where money is already due to a person—as for goods sold or for a pre-existing debt—and the debtor gives his own note to the creditor or draws a bill or cheque in his favour. It is legitimate to presume in such cases that the creditor is not accepting the instrument in satisfaction of his existing claim but only as a security or as means of obtaining satisfaction from the drawee of the bill or cheque. Even in cases where money is lent contemporaneously with the giving of a cheque by the borrower or the drawing of a bill on a third party, it may be reasonable to treat the bill or cheque as an attempt at payment and to presume that it was only a "conditional" payment. The difficulty created by S. 91, Evidence Act, will not arise in this case because the cheque, bill or hundi does not embody a promise to pay by the promisor but only a direction to another person and the lender can fall back on the 'implied' promise in the absence of a promise 'in writing.' But where the borrower gives his own promissory note as part of the loan transaction, it seems to me artificial to treat that very 'promise to pay' obtained in that note as amounting to a payment, and then to seek to import the theory of 'conditional' payment.

So far as I have been able to examine the English cases which enunciate the doctrine of 'conditional payment,' I do not find that any of them relates to a proper promissory note executed as part of the loan transaction itself. I am therefore with all respect unable to concur in the proposition stated by Page C. J. as proposition No. 3 in 12 Rang 500[15] at p. 504 and statements to the same effect in other reported decisions: *see* for instance 54 I C 84[51] at p. 91. With the like respect I must add that my experience does not coincide with what the learned Chief Justice states on p. 508 to be his experience that

> it rarely, if ever, happens that the whole of the terms of the agreement under which a loan is made are embodied in a promissory note given to the lender by the borrower except in cases in which the parties contract that the negotiable instrument shall itself be the consideration for the loan,

if, as later observations in the judgment imply, a promissory note cannot, according to the learned Judge, be reasonably presumed to have been taken as 'consideration' for the loan. I am free to confess to some difficulty in understanding what the learned Chief Justice had in mind when he postulated the possibility of a promissory-note by the borrower being 'consideration' for the loan as distinguished from the 'contract' of loan. I can understand the position taken in 51 All 530[16] that from the mere execution of a note it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document (*see* 40 Mad 585)[17] and I respectfully agree that in this sense it will be a question of fact in each case whether or not the note represents the whole contract between the parties. I am unable to hold that there is any presumption that a promissory note taken from the borrower as part of the loan transaction is taken merely as 'collateral security'; but in particular cases the evidence may lead to that conclusion: *see* per Pratt J. in 54 I C 84[51] at page 94.

The theory propounded by Ormond J. in 54 I C 84[51] at p. 92 that in every case of a promissory note loan "there are two distinct promises made by the borrower, (1) that he will pay the amount borrowed to the lender and (2) that he will pay the amount due on promissory note to the holder of the note," that each promise is a distinct cause of action and that S. 91 applies only to the second promise, seems

48. Brown v. Watts, (1808) 1 Taunt 353=127 E R 870.

49. Cundy v. Marriot, (1831) 1 B & Ad 696=9 L J K B (O S) 70=109 E R 945.

50. Plimley v. Westley, (1835) 2 Bing (N C) 249 =2 Scott 423=5 L J C P 51=1 Hodges 324 =132 E R 98.

51. Maung Kyi v. Ma Ma Gale, (1920) 7 A I R L B 1=54 I C 84=10 L B R 55 (F B).

to me, with all respect, equally artificial, if the learned Judge meant to hold that even promise No. 1 was an express promise. If on the other hand, it is only an implied promise, the question arises, whether the principle enunciated by Lord Cairns in (1872) 5 H L 321[52] at p. 341 and applied by the Judicial Committee in 50 Cal 338[20] would not preclude the lender from falling back on the implied promise when the contract between the parties had been reduced to writing. It has been asked why a man should be put in a worse position when he takes a worthless document than when he does not take any. Lord Cairns said:

> Any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed.

This principle was applied by Sir Richard Couch to a claim for money due under an unstamped note. The learned Chief Justice observed:

> The plaintiff cannot .... say that from the deposit there arose a contract on the part of the defendant to repay it, because here the parties have made an express contract which has been put in writing. The plaintiff cannot resort to any implied contract; if he recovers at all, it must be on the contract actually made and he must prove that, if it is denied. And he must do it by the production of the writing which, not being stamped, cannot be seen in evidence: 21 W R 1.[19]

This case has sometimes been explained away on the ground that the suit was there laid on the note and not on the consideration: *see* 3 Cal 314[22] and 24 Bom 360.[18] This distinction wholly ignores the principle on which the decision was avowedly based. It has been suggested that this principle of the 'implied promise' being superseded by the 'express' promise in writing should be limited to cases where the writing can be proved and enforced but where it is not admissible in evidence, the paper may be treated as non-existent and the objection based on S. 91 will not arise: *see* Mulla and Pratt, Commentaries on the Stamp Act, Edn. 3, p. 134. The decision in 50 Cal 338[20] furnishes the answer even to this suggestion. In the absence of a document embodying the terms of the security created by the deposit of title deeds, the lender could have proved the deposit by oral evidence and obtained the benefit of the security; but when the transaction was accompanied by an unregistered document their Lordships held that the creditor could not establish his security by oral evidence as to the deposit, even though the document was inadmissible by reason of non-registration: *see also* 17 C L J 399.[21] The same decision of the Judicial Committee answers the argument that though the contract between the lender and the borrower cannot be proved without the document, the fact of loan could be proved. Under the law, the mere deposit of title deeds (with intent to create a security) would suffice but in the case referred to, their Lordships declined to allow even the fact of such deposit to be proved when the document turned out to be inadmissible. It is obvious that when the creditor is asking for permission to prove the fact of the loan, he is only seeking to invoke the theory of an implied promise to pay. In 7 Mad 112[1] the learned Judge held that "the defendant's request and the payment by plaintiff which constitute the cause of action can be proved independently of the note." With great respect, I cannot help thinking that this is merely the theory of 'implied' promise stated in other words.

The theory of 'failure of consideration' has sometimes been invoked as also the formula of 'money had and received': *cf.* 16 I C 33.[53] The appeal to the theory of failure of consideration in a case like the present seems to me, with all respect, to ignore the distinction between the 'contract' and the 'consideration' for the contract. We only fall back on the question whether the promissory note represents the contract or the consideration for some other contract. In view of the judgments delivered in (1914) A C 398[54] it seems to me, that neither the theory of failure of consideration nor the formula of money had and received is available in the case before us. Both these causes of action rest on a 'notional or imputed promise to repay,' (1914) A C 398[54] at p. 452, see also p. 440, and the consideration above adverted to in connexion with the theory of "implied promise" equally apply to this way of supporting the lenders' claim. In the case of a loan transaction, the principal contract itself consists of the promise to repay and it cannot be said that "the implied promise on which the action for money had and received depends" forms no part of but is merely collateral to the main con-

52. Shaw v. Foster, (1872) 5 H L 321=42 L J Ch 49=27 L T 281=20 W R 907.

53. Baijnath Das v. Salig Ram, (1912) 16 I C 33.

54. Sinclair v. Brougham, (1914) A C 398=83 L J Ch 465=111 L T 1=58 S J 302=30 T L R 315.

tract : per Lord Parker in (1914) A C 398[54] at p. 440. The claim for "failure of consideration" can arise only when the contract has been proved and the very question for decision is whether or not S. 91, Evidence Act, prevents the contract being proved without the production of the note.

The observations of Bowen L. J. in (1882) 23 Ch D 440[55] at p. 470 quoted by Lord Sumner in (1914) A C 398[54] at page 452 seem equally to apply to the argument of "failure of consideration" in the present case. The unstamped promissory note has all along been unenforceable and inadmissible and both parties must be presumed to have known the law on the point. It is sometimes assumed that it is the debtor's duty to affix the proper stamp; but the statute with a view to safeguard the interests of the revenue, expects the creditor also to make sure that the document is duly stamped—though according to several decisions, he may not incur the penalty prescribed by S. 62, Stamp Act, by taking an unstamped document. It only remains to add that S. 70, Contract Act, which has sometimes been appealed to, is scarcely appropriate to a case of money lent to the defendant. There is no possibility in such a case or even a contemplation of the "thing delivered" being restored —which obviously means in specie; and lending money to the defendant cannot be described as something done for the defendant.

Lakshmana Rao J.—I agree with my Lord and have nothing to add.

Stodart J. — Section 91, Evidence Act, so far as material is :

> When the terms of a contract have been reduced to a form of a document no evidence shall be given in proof of the terms of such contract except the document itself.

The document now in question is a promissory note which is inadmissible in evidence because it is improperly stamped. Assuming that the promissory note contains a recital of the consideration for which it was executed, is the promisee debarred from proving the fact that consideration passed and must he therefore fail in a suit to recover the consideration ? All the High Courts in India appear to be agreed that when the consideration passed prior to the execution of the note — as when the note is executed for money due on account — or when the consideration arises out of a transaction which can be separated from the execution of the promissory note—as when the note is executed for the price of goods sold—then a separate cause of action arises in the consideration and the consideration can be proved. But in cases where the note is executed for money or other consideration which passes at the time of the execution of the note, there is a conflict of decisions. For my part, I must confess that I see no difference in principle between the two cases. The promissory note may be in the form "for money which I owe you on account I promise to pay you, etc." or "for money received from you to-day I promise to pay you, etc." Then, if the recital of consideration is a term of the contract, it cannot on a strict interpretation of S. 91 be proved at all except by proof of the promissory note. *See* the similar opinions expressed by Phillips and Reilly JJ. in A I R 1930 Mad 168.[56]

The question for decision as formulated by my Lord is :

> Whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrower but is inadmissible in evidence owing to a defect in the stamping.

My answer to this question is first that the existence of the debt is not a term of the contract, and even if it is recited in the promissory note, it can be proved by other evidence; and secondly that the terms of the contract between the promisor and the promisee can never be wholly embodied in the promissory note. One of the terms of the contract is that the promisee agrees to accept the promissory note in satisfaction of the debt due to him by the promisor. What he agrees to accept is a valuable security and not a worthless piece of paper—which is all that the note is, if it is not properly stamped. If then the note is valueless the promisor has not done that which he contracted to do. The promisee has not got what he bargained for. The promisor therefore is bound to restore to the promisee the advantage which he the promisor, has obtained from the transaction. To me it appears that when a man gives another promissory note in satisfaction of a debt or for other consideration, he gives at the same time a warranty that the note is a good and enforceable instru-

55. In re Guardian Permanent Building Society, (1882) 23 Ch D 440=52 L J Ch 857=48 L T 134=32 W R 73.

56. Venkatachalapathy v. Ramakrishnayya, (1930) 17 A I R Mad 168=123 I C 358.

ment. If the note is bad for want of a proper stamp it is difficult to see how it can operate as a discharge of the debt any more than the giving of a counterfeit currency note could so operate. This implied warranty is in my opinion a term of the contract and such a warranty is in my experience not generally embodied in a promissory note or other negotiable instrument.

Reverting to the first proposition, which I have stated namely that the recital in a promissory note of the existence of the debt is not a term of the contract, it is permissible, I think, to refer to the opinion of the learned and distinguished authors of the Commentary on the Indian Stamp Act Mulla and Pratt, Edn. 3, 1935, at p. 134 :

> The fact of the loan is not a term of the contract and proof of that fact is outside the scope of S. 91, Evidence Act.

And again :

> If the loan was made at the debtor's request, the request implies a promise to repay. If the express provision in the promissory note could be proved it would exclude the implied promise. But as the express promise cannot be proved the lender may rely on the implied promise. If the loan was not made at the request of the debtor, there is a liability to make compensation under S. 70, Contract Act.

In spite of the conflict of decisions in Indian Courts on the question whether a separate cause of action arises on the consideration in the case where consideration passes at the same time as the promissory note, I think that it is possible to interpret the decision of the Judicial Committee in *Sadasuk Janki Das* v. *Kishan Pershad*,[57] as answering that question in the affirmative. *Sadasuk Janki Das* v. *Kishan Pershad*,[57] was a case where the consideration passed at the same time as the execution of the hundis on which the suit was brought. It was sought to make the Maharajah liable on the hundis which were drawn and accepted by an officer of his Treasury on the ground that the money was borrowed on his behalf. The Judicial Committee held that the Maharajah could not be made liable on the hundis but that the plaintiffs could in the alternative have based their suit on the consideration :

> It would have been open to the plaintiffs had they thought fit to have framed their case in an alternative form and to have sued both on the hundis and alternatively upon the consideration.

In A I R 1930 Mad 168,[56] already cited in another connexion, the principle of this decision was applied to the case of a claim on a promissory note executed by one partner in a firm on which it was sought to make the other partners liable. It was held that the plaintiff's suit as framed must fail but that he might be allowed to amend his plaint so as to make it clear that he was alternatively suing all the defendants as members of a firm on loans made to that firm. Reilly J., as he then was, said :

> If the firm is to be made liable the lender must not only allege and prove that the loan was really taken for his firm by the partner who made the promissory note, but must base the suit on the loan to the firm.

A I R 1918 P C 146[57] makes it clear in my opinion that when money or other valuable consideration passes and a negotiable instrument is given in exchange for that consideration a cause of action arises on the consideration, apart from the engagements evidenced by the instrument. I am not able to subscribe to the view that because the consideration is recited in the instrument no evidence can be given of it except the instrument itself. The consideration, that is to say, the loan for which the promissory note is given, is the subject-matter of the contract and not a term of the contract within the meaning of S. 91, Evidence Act. In the matter of the loan the lender consents to it only on condition that the borrower gives him a negotiable instrument in the shape of a promissory note containing certain stipulations; and the borrower for his part consents to execute a promissory note. If in the promissory note, the borrower embodies a recital that he has received the money, that in my opinion is not a "term of the contract" but merely a statement of the actual circumstance which has given rise to the contract. In this view, I hold that the decision of the learned District Munsif may be allowed to stand.

C.R.K./B.D. *Case remanded.*

57. (1918) 5 A I R P C 146 = 50 I C 216 = 46 Cal 668 = 46 I A 33 (P C).

A. I. R. 1938 Madras 795

HORWILL J.

In re Balian, Accused.

Criminal Revn. Case No. 993 and Case Ref. No. 54 of 1937, Decided on 31st March 1938, referred by Sess. Judge, East Tanjore at Negapatam, D/- 6th December 1937.

Madras Towns Nuisance Act (3 of 1889), S. 3 (12)—Offence under—Binding over under S. 106, Criminal P. C., whether desirable

discussed — S. 106, Criminal P. C., should be sparingly used when offence is petty one.

It is ordinarily objectionable, when the accused is convicted only of some petty offence under the Towns Nuisance Act, that he should also be bound over for a considerable time under S. 106; for, this binding over would involve a far more serious punishment than the main sentence. Those guilty of disorderly and riotous conduct are usually poor men who may not be able to find security, in which case they would be liable to be imprisoned for a substantial period, although the maximum punishment awarded under S. 3 (12), Towns Nuisance Act is only one month's rigorous imprisonment. On the other hand, binding over an accused for only 2 or 3 months would not serve the purpose for which the order was passed. S. 106, Criminal P. C., should therefore be very sparingly invoked where the offence committed is a petty one: *1933 M W N 548, Rel. on; 1937 M Cr C 316, Explained.* [P 796 C 1, 2]

Public Prosecutor — *for the Crown.*

Order.—The First Class Bench of Magistrates, Negapatam, convicted one Balian under S. 3 (12), Towns Nuisance Act, and sentenced him to pay a fine of Rs. 10 and further bound him over under S. 106, Criminal P. C., for six months. The case has been referred to this Court by the Sessions Judge of East Tanjore on the ground that the judgment of the Bench Court does not disclose any reason for the order binding over the accused to keep the peace. The accused was charged with causing disturbance by using abusive language and by behaving in a riotous and disorderly manner. Prima facie, behaving in a riotous and disorderly manner amounts to a breach of the peace; and as the Bench of Magistrates accepted the evidence and found the accused guilty of behaving in a riotous and disorderly manner, I do not see why anyone should doubt that the accused committed a breach of the peace. Newsam J. in 1937 M Cr C 316[1] seemed to be of the opinion that an offence under S. 3 (12), Towns Nuisance Act would not involve a breach of the peace; but I do not think that he intended to lay down a general principle that no offence punishable under S. 3 (12), Towns Nuisance Act, would involve a breach of the peace. If he did, it would be in direct opposition to the finding of a Bench of this Court in 1933 M W N 548.[2]

I am however of opinion that it is ordinarily objectionable, when the accused is convicted only of some petty offence under the Towns Nuisance Act, that he should also be bound over for a considerable time under S. 106; for, this binding over would involve a far more serious punishment than the main sentence. Those guilty of disorderly and riotous conduct are usually poor men who may not be able to find security, in which case they would be liable to be imprisoned for a substantial period, although the maximum punishment awarded under S. 3 (12), Towns Nuisance Act, is only one month's rigorous imprisonment. On the other hand, binding over an accused for only 2 or 3 months would not serve the purpose for which the order was passed. S. 106, Criminal P. C., should therefore be very sparingly invoked where the offence committed is a petty one. However, I do not know what public policy lies behind the order of the Bench Court, and as long as this Court has no reason to believe that Bench Courts are abusing their powers to bind over the accused under S. 106, Criminal P. C., this Court will not readily interfere. I do not therefore find sufficient reason for cancelling the order calling upon the accused to find security for keeping the peace for a period of six months. The reference is accordingly returned.

C.R.K./B.D. *Reference returned.*

1. Appachi Goundan In re, (1937) M Cr C 316.
2. District Magistrate of Coimbatore v. Dasappa Naicken, (1933) M W N 548.

A. I. R. 1938 Madras 796

FULL BENCH

LEACH C. J., MADHAVAN NAIR AND VARADACHARIAR JJ.

Mathukumalli Ramayya — Petitioner.

v.

Vuppalapatti Lakshmayya — Respdt.

Civil Misc. Petn. No. 1439 of 1938, Decided on 12th April 1938.

Civil P. C. (1908), O. 45, R. 7 — High Court has power under R. 9 of Privy Council Rules to extend time prescribed for security and deposit: *A I R 1924 Mad 44=74 I C 703=18 M L W 29 and 55 Mad 835=A I R 1932 Mad 484=138 I C 663, Overruled.*

The High Court has power under Rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and the making of the deposit required by O. 45, R. 7, Civil P. C., beyond the periods mentioned therein, but the power should not be exercised without cogent reason: *55 Mad 835=A I R 1932 Mad 484=138 I C 663 and A I R 1924 Mad 44=74 I C 703=18 M L W 29*, **Overruled**; *Case law referred.* [P 793 C 2; P 799 C 1]

K. Kameswara Rao — *for Petitioner.*

B. Somayya and M. S. Ramachandra Rao — *for Respondent.*

Opinion of the Full Bench

Leach C. J.—The question which has been referred to is whether in an appeal to His Majesty in Council the Court has

power to extend the time for furnishing the security and making the deposit required by O. 45, R. 7, Civil P. C., beyond the periods mentioned therein. The rule provides that where the certificate permitting the appeal is granted, the applicant shall furnish the security and make the deposit within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date. The words "within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow" were substituted for the words "within six months" by Act 26 of 1920. The amendment was made in order to expedite appeals to the Privy Council by restricting the Court's discretion to extend the time. Up to then it had been the uniform practice in the Courts in India to grant extensions of time and it would appear that the impression had been created that they had been too lenient when dealing with such applications. The rule as it stood before the amendment was regarded by the Privy Council itself as being merely directory, although it had intimated that it should not be departed from without cogent reasons: 11 I A 7.[1]

Since the amendment, there has been a conflict of judicial opinion on the question whether the amended rule has the effect which the Legislature intended it to have. The conflict has arisen by reason of the provisions of Rule 9 of the rules framed by the Privy Council and S. 112, Civil P. C. Rule 9 reads as follows:

> Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires.

Section 112 (1) (b), Civil P. C., states that nothing in the Code shall be deemed to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

1. Burjore and Bhavani Pershad v. Mt. Bhavana (1884) 10 Cal 557=11 I A 7=4 Sar 498 (P C).

Stated broadly the conflict is this: Some Judges have regarded the amendment of O. 45, R. 7, Civil P. C., as constituting an overriding statutory prohibition of extension beyond sixty days after the initial period of ninety days, while other Judges have considered that Rule 9 of the Privy Council Rules governs the situation by reason of S. 112 of the Code and still leaves the granting of time a matter of discretion. In 51 Bom 430,[2] a Full Bench of the Bombay High Court expressed itself strongly in favour of the view that Rule 9 has left the Court a discretion in the matter. The question was referred to a Full Bench as Shah and Fawcett JJ. had disagreed, Shah J. being of the opinion that the Court had still power to extend the time for cogent reasons, while Fawcett J. considered that the amendment of O. 45, R. 7 in 1920 restricted any extension beyond sixty days after the ninety days had expired. The Full Bench consisted of Marten C. J. and Crump and Patkar JJ. and they were unanimous in adopting the opinion of Shah J. After pointing out that there was no express penalty provided by O. 45, R. 7, for failure to furnish the security and to make the required deposit, Marten C. J. observed that as there was an inconsistency between O. 45, R. 7, and Rule 9 of the Privy Council Rules, the Privy Council Rule must prevail by virtue of the provisions of S. 112. On this basis the Court granted an extension beyond the additional period of sixty days. The appeal was in due course heard by the Privy Council and the judgment of their Lordships is reported in 54 Bom 495.[3] The judgment however makes no reference to the action of the Bombay High Court in extending the time.

51 Bom 430[2] was considered by Beasley C. J. and Curgenven J. in 55 Mad 835,[4] but they found themselves unable to share the opinion of the Bombay High Court. Beasley C. J. considered that Rule 9 of the Privy Council Rules gave nothing more than the right to cancel the certificate, but if it could be read as giving the Court power to extend the time, the extension

2. Nilkant Balwant v. Vidya Narasimha Bharathi, (1927) 14 A I R Bom 217=101 I C 555=51 Bom 430=29 Bom L R 352 (F B).
3. Nilkanth Balwant v. Vidya Narasimha Bharathi, (1930) 17 A I R P C 188=126 I C 417=54 Bom 495=57 I A 194 (P C).
4. Poornananthachi v. Gopalaswami Odayar, (1932) 19 A I R Mad 484=138 I C 663=55 Mad 835=62 M L J 665.

could not exceed the sixty days provided by O. 45, R. 7. The learned Chief Justice did not imagine that Rule 9 was to have a different effect from O. 45, R. 7, as Rule 9 and the amendment to O. 45, R. 7 came into effect on the same date (1st January 1921). Curgenven J. delivered a separate judgment to the same effect. In 18 M L W 29[5] Oldfield and Ramesam JJ. also held that the Court had no power to extend the time beyond the sixty days, but this decision was before the decision in 51 Bom 430[2] and Ramesam J. later changed his opinion. In C M P No. 3644 of 1931[6] Reilly and Ananthakrishna Iyer JJ. followed 51 Bom 430[2] and their decision was accepted by Ramesam J. sitting with Madhavan Nair J. in C M P No. 4993 of 1931.[7]

The only decision of the Calcutta High Court to which we have been referred to is that of 39 C W N 651[8] where Rankin C. J. and Ghose J. expressed the opinion that R. 9 of the Privy Council Rules did not empower the High Court to grant an extension beyond sixty days. The Bombay decision is not referred to in the judgment and presumably was not considered. The Allahabad High Court has also decided that there is no power of extension beyond the sixty days : 44 All 216[9] and 55 All 432.[10] The latter case was decided by a Full Bench consisting of Mukerji Ag. C. J., King and Niamatullah JJ., Mukerji Ag. C. J. and King J. were of the opinion that there was no discretion left in the Court after the expiration of the sixty days, while Niamatullah J. held that there was. King J. considered that Rule 9 could be read as applying to a failure to comply with an order falling within the maximum period allowed by O. 45, R. 7 and Mukerji Ag. C. J. agreed with him. Niamatullah J. did not consider that O. 45, R. 7 necessarily implied that the Court had no power to grant an extension for more than 60 days, but assuming that it did conflict with R. 9 he agreed with the opinion of the Bombay High Court that the latter rule prevailed. The Patna and the Lahore High Courts have also held that there is no power to extend the time beyond the 60 days : A I R 1929 Pat 431[11] and A I R 1935 Lah 733.[12] The Lahore High Court considers that the words "make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires" are intended to cover merely incidental orders necessitated by the cancellation of the certificate.

I have already pointed out that in amending O. 45, Rule 7, the Legislature intended to limit the discretion of the Court in granting further time to a maximum period of 60 days beyond the 90 days which the applicant has of right—there would be no reason for the amendment otherwise — and I am of the opinion that the words of amendment effect their object so far as the Code is concerned. Therefore if O. 45, R. 7 stood alone, I should have no hesitation in holding that the Court had no discretion to grant time beyond the further period of 60 days. But if there is conflict between the Code and the Privy Council Rules, the Rules must prevail. S. 112 of the Code says so in very plain language. Consequently the question is reduced to this : Does R. 9 of the Privy Council Rules give a discretion to the Court to extend the time ? If it does, nothing in O. 45, R. 7 can take away that discretion. In my opinion R. 9 does leave a discretion in the Court and therefore must prevail over O. 45, R. 7. I read R. 9 in this way. On failure by the applicant for leave to appeal to the Privy Council to furnish the security or make the deposit, the Court has two courses open to it. It may cancel the certificate and pass consequential orders, or it may, instead of cancelling the certificate, make such "other" order as it considers requisite. If it does not cancel the certificate, the only other order it can pass is to extend the time for furnishing security or making the deposit, or doing both, as the case may be. The furnishing of security and the making of the deposit are conditions which must be complied with before the appeal can be lodged in the Privy Council. It must be cancellation or extension.

We have been asked to hold that the words "make such further or other order in the

5. Kachi Reddi Nagi Reddi v. Saki Reddi, (1924) 11 A I R Mad 44=74 I C 703=18 M L W 29.
6. Ramkrishna Iyer v. Parameswara Iyer, C M P No. 3644 of 1931.
7. Kileru Rama Kottiah v. Dharmabotla Subramanyam, C M P No. 4993 of 1931.
8. Raj Kumar Govinda Narain Singh v. Shamlal Singh, (1926) 39 C W N 651.
9. Ram Dhar v. Prag Narain, (1922) 9 A I R All 43=65 I C 249=44 All 216=20 A L J 13.
10. Bahadur Lal v. Judges of High Court, Allahabad, (1933) 20 A I R All 241=143 I C 559=55 All 432=1933 A L J 207 (F B).
11. Kamala Kanta Singh v. Bindhumukhi Dassi, (1929) 16 A I R Pat 431=123 I C 769.
12. Munnalal v. Gajraj Singh, (1935) 22 A I R Lah 733=159 I C 232.

premises, as in the opinion of the Court the justice of the case requires," are to be read with the words "may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit," but with respect to the judicial opinion which has supported this construction, I consider its acceptance would mean violating the plain meaning of the Rule. It is very desirable to guard against delay in the prosecution of appeals to the Privy Council and it is unfortunate that there should be this conflict between O. 45, R. 7 and R. 9 of the Privy Council Rules, but at the same time I do not think that it is of much practical importance. With the amendment of O. 45, R. 7 before it, the Court is not likely to grant more than 60 days beyond the initial 90 days, unless the circumstances are very exceptional.

For the reasons indicated, I would answer the reference in this way. The Court has power under R. 9 of the Privy Council Rules to extend the period allowed for furnishing the security and the making of the deposit required by O. 45, R. 7 beyond the periods mentioned therein, but the power should not be exercised without cogent reason.

Madhavan Nair J. — I agree.

Varadachariar J. — I agree.

Final Order

The Full Bench have laid down that the Court can grant an extension of time but it must be for cogent reason. A number of affidavits, counter-affidavits and reply affidavits have been filed before us. They disclose a certain amount of conflict but certain main facts are beyond dispute. The learned counsel for the petitioners has told us that he received intimation by trunk phone from his clients in the mofussil on 10th March 1938, that they were in a position to make the deposit but as the time had expired by that date, he was asked for advice as to what they ought to do. He replied to them to come over to Madras immediately. This they did but it was too late on the 11th when they arrived to file the petition for extension that day. This petition was accordingly filed on 12th March 1938. We accept these statements made by the petitioners' counsel and according to them the real delay is only of four days. There is also the fact that the petitioners are a large number, who, in different sets, are interested in small portions of the subject-matter of the appeal. It is not unreasonable that they should come to some arrangements between themselves in the matter of the deposit. The mere fact that one or some of them could have made the deposit is not the reasonable test to be applied.

In view of the special circumstances of the case, we excuse the delay. As it is late to-day and tomorrow is a holiday, we extend time till Thursday, the 14th instant. The petitioners will however pay to the respondent the costs of this petition.

C.R.K./N.S. *Order accordingly.*

A. I. R. 1938 Madras 799

VENKATASUBBA RAO J.

K. K. Abdul Rahiman Rowther — Petitioner.

v.

M. J. Jamalluddin Sahib and Co. — Respondents.

Civil Revn. Petn. No. 338 of 1936, Decided on 31st March 1938, against the decree of Sub-Judge (Addl.), Madura, in S. C. S. No. 286 of 1933.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 31—Suit for accounts—Essence of action—Where relief cannot be granted without taking account, suit is one for accounts.

It is not every suit by a principal against an agent and vice versa that is excluded from the cognizance of a Small Cause Court. Whoever figures as the plaintiff (principal or agent, it makes no difference), where the essence of the action is that no relief can be granted without accounts being taken, the suit must be deemed one "for an account." But the bare fact that some sort of arithmetical process is involved in the decision, does not render the suit a suit for account: *A I R 1918 Cal 1037, Expl.; 10 I C 883; 24 M L J 693 and 28 Mad 394, Ref.* [P 800 C 1, 2]

C. S. Swaminathan — *for Petitioner.*

G. Rajagopalan and T. A. Rangachari — *for Respondents.*

Order. — The question I have to decide is, whether the suit which has given rise to this petition, is exempted from the cognizance of a Provincial Small Cause Court. That turns upon the meaning of the words "suit for an account" occurring in Art. 31 of Sch. 2 to that Act. The course of dealings was as follows: The plaintiff's firm would advance moneys to the defendant and the latter would consign goods for sale on commission. The defendant would be credited with the sale proceeds and debited with the commission and various kinds of charges. The plaintiff's firm thus held a dual character of crditor and agent, the defendant's position being that of debtor and principal. The question that has to be determined is, whether the plaintiff's suit, brought professedly for a specific amount, is cognizable by a Provincial Small Cause

Court. It is difficult, as has been observed in one of the cases cited before me, to reconcile the decisions on the point; nor is it possible to deduce therefrom a rule of general application. The present suit having been brought by an agent, Mr. Narasaraju for the plaintiff contends that actions by agents stand on a different footing from actions by principals. His contention is that where an agent sues, there can be no question of the defendant being required to render an account, whereas if the action is by the principal, the suit becomes one "for an account." There is an observation of Mookerjee J. which lends apparent support to this contention. The learned Judge observes:

> There cannot in essence be a suit for accounts by the plaintiff against the defendant unless the defendant is under a liability to render accounts to the plaintiff : 27 C L J 96.[1]

Although the statement seems general, it is difficult to believe that it was intended to embody an infallible test. The actual point decided in the case was, that a suit for the recovery of a specific sum of money, does not assume the character of a suit for accounts, merely because for the deciding of the question in controversy, accounts may have to be examined. Indeed, that Mookerjee J. did not intend to lay down any general or universal test, appears clearly from observations made in an earlier case by a Bench of which the learned Judge was a member: 10 I C 883.[2] "If in order to grant relief to the plaintiff," the Bench observes:

> it is necessary to take accounts, the suit is one for account within the meaning of Art. 31, although the plaintiff may have chosen to put a definite money value upon the claim.

Then the learned Judges go on to express the same idea even more clearly:

> Whether the suit is one for account. . . . . .must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff.

These observations are quoted with approval by Benson and Sundara Ayyar JJ. in 24 M L J 693.[3] True, it is not every suit by principal against agent and vice versa that is excluded from the cognizance of a Small Cause Court, for, if such general exclusion had been intended, nothing would have been easier for the Legislature than to have said so in direct terms. For instance, if the accounts had been settled and the account-taking in the technical sense would not become necessary, the Small Cause Court would be competent to deal with the matter. But whoever figures as the plaintiff (principal or agent, it makes no difference), where the essence of the action is that no relief can be granted without accounts being taken, the suit must be deemed one "for an account." What is known as a suit for an account is a special form of suit—a special process being required to take an account. The expression "suit for account" is used in the well-known technical sense of the term: 28 Mad 394[4] and 27 C L J 96[1] already referred to. The bare fact that some sort of arithmetical process is involved in the decision, does not render the suit a suit for account. While this is undoubtedly true, care must be taken to distinguish this class of suits from those where account-taking in the strict sense is of the very essence of the claim. Judged by this test, the present suit is, as Mr. Swaminathan contends, excluded from the jurisdiction of the Small Cause Court. Though the suit is by the agent, is it not obligatory upon him to render an account in the action itself if called on to do so? If the bona fides of the sales were questioned, would not the agent be under a duty to render an account? Again, would it not be open to the defendant to challenge in this very suit the expenses debited against him? These are matters to be gone into in suits for account and it makes no difference whether the agent brings the suit or the principal does so. The distinction contended for is therefore unsound in principle and I am not prepared to accept it.

In the result, I make an order directing the plaint to be returned for presentation to the proper Court. Each party will bear his costs throughout. One word more. The parties reside in two different places; the plaintiff at Madura, the defendant at Alathur. The defendant has filed, I understand, a counter-suit in the Alathur Munsif's Court. One or the other of the parties, it is stated, intends to move the High Court for an order that both suits should be tried by the same Court. If such an application is made it may be posted before me.

C.R.K./B.D. *Order accordingly.*

1. Kshetranath Bhuiya v. Kalidasi Dasi, (1918) 5 A I R Cal 1037=41 I C 929=27 C L J 96=21 C W N 784.
2. Kailaschandra v. Kiranenda Ghosh, (1911) 10 I C 883.
3. Varadarajulu Chetty v. Narayanaswami Chetti, (1913) 24 M L J 693=20 I C 518=1913 M W N 879.
4. Runga Reddi v. Subblah Setty, (1905) 28 Mad 394.

*** A. I. R. 1938 Madras 801**

MADHAVAN NAIR AND STODART JJ.

Venkadari Somappa — Appellant.

v.

Official Receiver, Bellary —

Respondent.

Appeal No. 72 of 1936 and Letters Patent Appeal No. 96 of 1936, Decided on 25th November 1937, against order of Dist. Court, Bellary, D/- 20th December 1935 and against order of Menon J. D/- 1st September 1936 respectively.

(a) Insolvency — Transfers after insolvency petition are void.

Transfers effected after the insolvency petition has been filed are, if the transferor is ultimately adjudicated insolvent, void as against the Official Receiver. [P 801 C 2]

(b) Insolvency — Existence of contract to mortgage entered into more than three months before insolvency petition—Official Receiver is not barred from selling property.

The existence of a contract to mortgage entered into more than three months before an insolvency petition would be no bar to the Official Receiver selling the property, though it might furnish a cause of action in a suit for specific performance. The existence of such a contract does not constitute a danger which the Official Receiver is bound to forestall by an application under S. 54, Provincial Insolvency Act. [P 802 C 2]

(c) Registration—Unregistered document of transfer is not of itself sufficient to support suit for specific performance of agreement to transfer.

It is well-settled law in the Madras Presidency that an unregistered document of transfer is not of itself sufficient to support a suit for specific performance of an agreement to transfer. If an instrument is executed in a person's favour which is, in terms, and is intended to be, a transfer of immovable property then, provided it is a document which is required to be registered, the person must in order to give it validity get it registered by employing the procedure laid down in the Registration Act. It is not open to him to ignore the provisions of the Registration Act and, treating the instrument as a contract to transfer—which it is not—compel the transferor to execute a formal transfer, which he has already done: *16 Mad 341 and A I R 1926 Mad 530, Rel. on.* [P 802 C 2]

*** (d) Provincial Insolvency Act (1920), S. 54 —For purpose of S. 54 date of transfer is date of its registration—Deed of transfer executed more than but registered within three months before filing of insolvency petition — Such transfer can be impeached under S. 54.**

For the purpose of S. 54, Provincial Insolvency Act, the date of the transfer is the date of registration and the transfer cannot be antedated by the operation of S. 47, Registration Act. Hence a deed of transfer can be impeached under S. 54, if the registration is effected within the three months next preceding the presentation of the insolvency petition, even though the execution was more than three months before presentation of insolvency petition: *A I R 1933 Mad 185 and A I R 1934 Mad 637, Rel. on; A I R 1935 Mad 857 (F B), Disting.* [P 803 C 2; P 804 C 1]

B. Somayya — *for Appellant.*

V. S. Narasimhachar — *for Respondent.*

Judgment.—The appeal is against the order of the learned District Judge of Bellary, passed in insolvency declaring void a mortgage executed by the insolvent in favour of the appellant. The Official Receiver attacked this mortgage both under Ss. 53 and 54, Provincial Insolvency Act. The learned District Judge however declared it void on another ground, namely that it was completed after the insolvency petition had been presented and after the appellant had come to know of that fact. On the face of it the mortgage deed was executed on 5th March 1933. It was presented for registration on 27th June in the office of the Sub-Registrar. The mortgagors denied registration and the Sub-Registrar held an enquiry and finally refused to admit the document to registration. On appeal to the District Registrar, the latter directed the document to be registered and this was finally done on 11th December 1933 under the provisions of S. 75, Registration Act (16 of 1908). Meanwhile on 28th August 1933, the mortgagors had presented their insolvency petition and they were adjudicated on 11th January 1934. Admittedly, the appellant knew of the presentation of the insolvency petition when he was conducting proceedings under Ss. 73 to 75, Registration Act, to get the document registered. The learned District Judge held that this mortgage was effected between the date of the presentation of the petition and the date of adjudication, that it was in favour of a man who at the time knew of the filing of the petition and that it was therefore liable to be set aside. It is hardly necessary for us to say that on the facts assumed by the learned District Judge he was clearly right. Transfers effected after the petition has been filed are if the transferor is ultimately adjudicated insolvent void as against the Official Receiver. That is the effect of S. 28, sub-ss. 2 and 7, Provincial Insolvency Act. And it would obviously be absurd if an insolvent could effectively transfer his property after he had filed his petition, and thus deprive the Court of its power to administer the property for the benefit of the whole body of creditors. S. 55 of the Act protects a transferee for valuable consideration who takes

the transfer without knowledge of the pendency of the insolvency petition—which was not the case here. But the learned District Judge as the basis of his finding assumed that the date of registration was 11th December 1933, the date when the document was registered under S. 75 (2), Registration Act. We think however that he should have applied the provisions of S. 75 (3) to the case. That sub-section is :

> Such registration (that is, registration effected by the order of the District Registrar under S. 75 (2) shall take effect as if the document had been registered when it was first duly presented for registration.

The mortgage in this case must therefore be deemed to have been registered on 27th June. And on 27th June no insolvency petition had been presented. The insolvency petition was, as we have said, presented on 28th August. On this footing the case is merely an example of the case where the Official Receiver prays for the annulment of a transfer effected before the filing of the insolvency petition. Now, since the transfer cannot be regarded as void for the reasons stated by the learned District Judge, it remains to be considered whether it can be avoided under S. 53 or S. 54, Provincial Insolvency Act. It so happens that the learned District Judge has, viewing the transaction as a contract to mortgage, taken up for consideration the question whether it was entered into with the intention of preferring the mortgagee over the other creditors of the insolvent. He has come to the conclusion that it was so intended. There is therefore sufficient material before us to enable us to come to a conclusion on the point namely whether this transfer should be decreed fraudulent and void as against the receiver. The two points we have to consider are : (1) was the mortgage effected with the intention of giving the mortgagee a preference over the other creditors, and (2) was it effected within the three months next preceding the presentation of the insolvency petition. Before examining these points however, it should first be explained why the learned District Judge, having found that there was no mortgage prior to the insolvency petition, thought it necessary to adjudicate the case under S. 54. He did so because he thought that the document executed on 5th March 1933, even if it had never been registered, could have been put forward by the appellant as against the Official Receiver as the basis of a motion to compel the Official Receiver to complete a contract to mortgage. The learned District Judge says in para. 5 of his judgment :

> If the mortgage was set aside for the reasons given above (that is, because it was effected during the pendency of the insolvency petition) it would still be open to the counter petitioner to apply to the Court to instruct the Official Receiver to complete the contract to mortgage. Evidence has therefore been let in in order to avoid further proceedings, etc.

Now the learned District Judge in the first place appears to have overlooked the fact that regarded as a contract to mortgage, the document executed on 5th March 1933 was immune from attack under S. 54. The insolvency petition was as we have said presented on 28th August. The only transactions that could have been avoided under S. 54 were transactions effected on or after 28th May, that is, within the three months next preceding the filing of the petition. But apart from that we wish to observe that in our opinion it was not open to the appellant to set up the document of the 5th March as a contract to mortgage. We note in passing that the appellant in his formal answer to the Official Receiver's petition never raised this question nor has he done so in his grounds of appeal to this Court. We would also note that the existence of such a contract would be no bar to the Official Receiver selling the property though it might furnish a cause of action in a suit for specific performance. The existence of such a contract does not constitute a danger which the Official Receiver is bound to forestall by an application under S. 54.

Was the document executed on 5th March a contract to mortgage which the mortgagee could enforce? The learned District Judge has, as we have said, held that it was, and we think that he was wrong. It is well settled law in this Presidency that an unregistered document of transfer is not of itself sufficient to support a suit for specific performance of an agreement to transfer. If an instrument is executed in my favour, which is, in terms, and is intended to be, a transfer of immovable property, then, provided it is a document which is required to be registered, I must in order to give it validity get it registered by employing the procedure laid down in the Registration Act. It is not open to me to ignore the provisions of the Registration Act and, treating the instrument as a contract to transfer — which it is not — compel the transferor to execute a formal transfer — which he has already done. That is the

effect of 16 Mad 341,[1] which was recently followed and affirmed in 49 Mad 302.[2] In the latter case Coutts-Trotter C. J. said:

> I should have thought it very vicious method of construction to say that a document which purports to be one thing is to be allowed to be treated as a valid document of a different order altogether.

Mr. Somayya for the appellant contends that the new Proviso to S. 49, Registration Act has changed all that. S. 49 (c) is:

> No document required to be registered shall be received as evidence of any transaction affecting any immovable property comprised therein unless it has been registered.

And the new Proviso is:

> Provided that an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of S. 53-A, T. P. Act.

But that is not the same thing as saying that the unregistered instrument is itself the contract. In the present case it is not established that any separate agreement to mortgage was entered into prior to the execution of the mortgage deed, to prove which the mortgage deed might have been tendered in evidence. We are now ready to examine the substantive question which we think arises for decision, namely whether this mortgage is one which should be annulled under S. 54, Provincial Insolvency Act. Two points, as we have said, arise, (1) was it, as the learned District Judge has held, a preference of the appellant over the other creditors and executed with that intention, and (2) was it effected within three months next preceding the presentation of the insolvency petition. The second point presents some difficulty. The date of execution was 5th March 1933 and the date of registration was 27th June. If the former date is taken, as the date of the transfer, then the transfer cannot be impugned under S. 54. And Mr. Somayya contends that by the operation of S. 47, Registration Act, it is the date of execution which must be taken as the date of the transfer. That Section is:

> A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

Applying this principle to alienations of property made by dishonest debtors in anticipation of insolvency, we get the somewhat anomalous position that the debtor can register such transfers of his property to-day and file his petition to be adjudicated insolvent to-morrow and the alienations however fraudulent they may be within the meaning of S. 54, cannot be attacked under that Section if they were executed more than three months ago. For the respondent, it is argued that prior to registration there was no transfer and nothing for the Court to annul. To which however the learned counsel for the appellant replies that a person who has obtained an executed document from the debtor is justified in believing that it cannot be set aside when three months have elapsed and no insolvency petition has been filed; and in that belief can proceed to have it validated by registration.

The short question is, for the purpose of S. 54, Provincial Insolvency Act, is the transfer to be regarded as having been made on the date of execution of the document or on the date of its registration. After mature consideration, we have come to the conclusion that the date of the transfer is the date of registration and that for the purpose of this Section the transfer cannot be antedated by the operation of S. 47, Registration Act. By the definition in S. 5, T. P. Act, a "transfer of property" is "an act by which a living person conveys property." And by S. 59 when the transfer is a mortgage securing Rs. 100 and upwards, it can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Using the words of S. 54, Provincial Insolvency Act, when we say that a transfer by way of mortgage is "deemed fraudulent and void" we must mean that it is the act of conveyance constituted by the registration of a duly executed instrument, which is void. But if the registration is void, there is no question of S. 47, Registration Act, operating to validate the document as from the date of execution. The matter we think is clear if it is remembered that it is the act of the transferor which is liable to be deemed fraudulent and void under S. 54, Provincial Insolvency Act, and that that act includes the registration of the instrument either by the transferor presenting it for registration himself or delivering to a person who is competent to present it under S. 32, Registration Act. If he does so and the instrument is registered, he is doing something which is void if an insolvency petition is presented within three months, provided, that is to

1. Venkatasami v. Krishtayya, (1893) 16 Mad 341=3 M L J 169.
2. Satyanarayana v. Chinna Venkata Rao, (1926) 13 A I R Mad 530=100 I C 385=49 Mad 302 =50 M L J 674.

say, the transfer is intended to prefer the transferee over other creditors. And if the registration goes, there is no transfer. It follows we think that such instruments of transfer can be impeached under S. 54, Provincial Insolvency Act if the Registration is effected within the three months next preceding the presentation of the insolvency petition.

As against this position, Mr. Somayya for the appellant advances the argument that in the facts of this particular case the act of registration is not the act of the transferor. Here it will be remembered the transferors denied execution and the document was finally registered under S. 75, Registration Act. We do not think however that this makes any difference. Let us look again at the definition of transfer in S. 5, T. P. Act. Transfer means "an act by which a living person conveys property." Can it be said that the transferor does not convey the property when the registration which is an essential part of the conveyance is effected against his will? We think not. But if the transferor conveys the property he must be held to have done everything necessary to the conveyance. The registration therefore is in effect the act of the transferor. Practically speaking, when he has duly executed the document and with the intention that it should be registered has delivered it to the transferee—who is entitled to present it for registration—he has irrevocably consented to the registration, and when on account of his subsequent denial of execution the document is ultimately registered under S. 75, Registration Act, that registration must be held to have been effected on his behalf and with his consent.

We must add that the view we have taken of the application of S. 54 to transfers of this kind, namely where the date of execution is more, and the date of registration is less than three months before the presentation of the insolvency petition is not without authority. One of us sitting as a single Judge came to the same conclusion as we have come to now in 64 M L J 382.[3] The finding on this point is as follows :

> In a case like the present up to the date of registration there can be no valid transfer. . . . . under S. 59, T. P. Act. If the time was to run from the date of execution of the document the object of S. 54 (of the Provincial Insolvency Act) could easily be frustrated. A dishonest insolvent has only to date such fraudulent transfers with a date more than three months prior to the filing of the petition and then they cannot be avoided under Section 54.

Then a similar point was decided by a Bench of this Court in 67 M L J 380.[4] There the question was whether an insolvency petition presented by a creditor could be founded on a transfer which had been executed more than, but registered less than, three months before the presentation of the petition. That judgment also was delivered by one of us, the same Judge who decided the case previously cited. The finding is :

> Exhibit C in the present case cannot be considered an act of insolvency unless a valid transfer of property was made by that document and such a valid transfer could be said to have been made only when the document was registered. In our opinion therefore, the act of insolvency can be considered to have taken place on 13th February 1930 (the date of registration of the document).

Mr. Somayya contends that these decisions have been overruled in the Full Bench case, 58 Mad 794.[5] But that case dealt with quite a different point. The question there was whether an insolvency petition presented by a creditor on the opening day after the recess of the Court could be founded on a transfer which had become more than three months old during the recess. There was no question there of a conflict between the date of execution and the date of registration as constituting the date of the transfer for the purpose of S. 9 (1) (c), Provincial Insolvency Act. On the contrary the learned Chief Justice in stating the facts of the case said :

> This act of insolvency admittedly occurred more than three months before the date of the presentation of the petition. (Page 795).

Lastly we have to consider whether the learned District Judge's finding on the merits of the case can be supported. It is true as we have explained that he treated the transaction not as a valid mortgage but as a contract to mortgage which could be enforced against the Receiver. But his findings of fact apply equally to the transaction considered as a completed mortgage. The learned Dist. Judge has very fairly summed up the evidence on the point in paras. 6 and 7 of his judgment. In January 1933 a creditor of the insolvents had filed suits and attached their property. The insolvents saw that their property was going to be

3. Muthiah Chettiar v. Official Receiver, Tinnevelly, (1933) 20 A I R Mad 185=141 I C 101 =64 M L J 382.

4. Iswarayya v. Subbanna, (1934) 21 A I R Mad 637=151 I C 1054=58 Mad 166=67 M L J 380.

5. Chenchuramana v. Arunachalam, (1935) 22 A I R Mad 857=158 I C 1=58 Mad 794=69 M L J 283 (F B).

brought to sale and that there were many other creditors whom they could not hope to pay. It was in these circumstances that the mortgage was executed to the appellant in March for Rs. 10,000 of which Rs. 9201 represented money already due or alleged to be due to the appellant. The learned counsel for the appellant points out that the property mortgaged was by no means all the property of the insolvent and that there was other property which has realized Rs. 12,000. This is true. But the debts admitted to proof amounted to Rs. 51,240. Besides the Rs. 9200 odd alleged to be due to the appellant, claims to the extent of Rs. 42,000 had to be satisfied. It has not been suggested that the value of the unmortgaged property, namely Rupees 12,000 plus the value of the equity of redemption of the mortgaged property consisting of lands and a house comes to anything like Rs. 42,000. On the contrary, it is in evidence that at the Official Receiver's sale the price fetched per acre of land was between Rs. 35 and Rs. 40. At the higher figure the value of the lands alone which were comprised in the mortgage would be only Rs. 4860, and it is not likely that the house which was also included in the mortgage would be worth more than Rs. 6000. Little if anything therefore remained out of the equity of redemption of the mortgaged property to meet the claims of the other creditors. The mortgage did in fact operate to the substantial detriment of the latter.

Mr. Somayya however contends that there is nothing to show that it was intended by the insolvents to have this effect, but that on the contrary it was executed to stave off a suit which the appellant threatened to file against the insolvents, and a notice of suit dated 9th February 1933 (Ex. 7) is relied on to show that the appellant was pressing the insolvents to pay their debts. On the other hand it is in evidence that the appellant is a friend of the insolvents. Why should the insolvents execute a mortgage to this appellant merely on the threat of a suit rather than to the creditor (P. W. 2) who had already filed suits against them and who had actually secured an attachment of some of their properties? It appears to us that the motive behind the mortgage was to give the appellant a preference over the other creditors. So far therefore we are in agreement with the learned District Judge. There are sufficient materials on the record for us to find that for the reasons stated by the learned District Judge this mortgage is under Sec. 54, Provincial Insolvency Act, void and must be annulled.

This finding, we think, is sufficient to dispose of this appeal which is accordingly dismissed with costs. We observe however that the Receiver had moved the Court to annul the mortgage not only under S. 54, Provincial Insolvency Act, but also under S. 53, namely as being a voluntary transfer voidable under that Section. Para. 4 of his petition is :

> The insolvents with a view to defraud the creditors and shield the property .... have executed a mortgage for Rs. 10,000 in favour of the counter petitioner .... The mortgage is nominal and not supported by consideration.

And again in para. 5 :

> Even if the recitals about the consideration are true, the mortgage is void as it was intended to show fraudulent preference to one creditor.

The Receiver therefore asked the Court to annul the mortgage on the alternative ground that it was not a transfer made in favour of an incumbrancer in good faith and for valuable consideration. The Court did not take up this question for consideration, namely the question of the reality of the consideration. It left it to be decided by the Receiver, when the counter-petitioner came in with proof of his debts under S. 33 of the Act. See the direction at the end of the learned Judge's judgment : "The counter-petitioner may prove before the Receiver whatever may be due to him."

We do not think it necessary, considering that it is nearly two years since this order was passed, to send the case back to the District Court for the point to be tried and decided there, nor is there in the appellant's memorandom of appeal any indication of a desire that we should do so. Appellant merely states therein that the case should have been considered as falling under S. 53 only and since there was no evidence to prove a case under that Section the transaction should be upheld. But we think that if the learned District Judge had not allowed the Receiver's petition on other grounds he would have required the Receiver to proceed with his proof on this part of the case, namely that the recitals of consideration in the document were false. It appears to have been agreed at the trial that this question should be left to be decided at a later stage when the counter petitioner tendered his proof of the alleged debts which form the bulk of the consideration. We do not think that this

procedure has prejudiced the appellant and we do not therefore remit the case. The Letters Patent appeal is against an order of our learned brother Menon J. refusing to stay the sale by the Receiver of the mortgaged property. In the light of our substantive decision that appeal also must fail. It is dismissed.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1938 Madras 806

BURN AND STODART JJ.

Public Prosecutor — Appellant.

v.

Raju Naicken — Respondent.

Criminal Appeal No. 682 of 1937, Decided on 29th March 1938, against acquittal by Sess. Judge, North Arcot Division, Vellore, in Sess. Case No. 30 of 1937.

Penal Code (1860), S. 302—Accused charged with murder of woman, making voluntary confession of having committed it and also producing jewels worn by woman at the time of her death—Confession sufficiently corroborated by other evidence—Accused acquitted by Sessions Judge by reason of certain discrepancies in evidence—Acquittal held to be miscarriage of justice.

The accused who was charged with the murder of a woman made a voluntary confession that he had committed the murder, and also produced within a short time after the murder, certain jewels, which he said he had removed from the corpse. The confession, though subsequently retracted, was sufficiently corroborated by the production of the jewels and certain other evidence. The Sessions Judge however relying on certain discrepancies in the evidence acquitted the accused :

Held that the evidence proved beyond the possibility of any reasonable doubt that the accused was guilty of murder and his acquittal was a clear miscarriage of justice. [P 807 C 2]

Appellant *in person.*

G. Chandrasekhara Sastry for C. V. Subramania Iyer — *for Respondent.*

Burn J.—This is an appeal by the Provincial Government from the judgment of the learned Sessions Judge of North Arcot in S. C. No. 30 of 1937. The respondent Raju Naicken was charged with the murder of a woman named Angammal, said to have been committed by him on the afternoon of 27th March 1937. The learned Sessions Judge agreeing with the assessors, found the respondent not guilty and acquitted him. Angammal was a young woman somewhat distantly related to the respondent. They were said to be on terms of illicit intimacy and they lived close together. On the afternoon of 27th March 1937, Angammal left home and failed to return in the evening. A search was made and about 8 P. M. her brother P. W. 3 and others found a dead body in a well belonging to one Kanda Goundan about half a mile away from her home. A report was made to the Village Munsif, and in that it was mentioned that the respondent was suspected. It so happened that about 11 o'clock that night, the Sub-Inspector P. W. 14 happened to pass by the well and hearing a sound of lamentation, he stopped to enquire what it was. He found the corpse of Angammal in the well with a rope of cocoanut fibre tied round the neck. He says that he questioned P. W. 3 and Angammal's mother P. W. 6 and both of them told him that they suspected Raju Naicken. An inquest was held the next morning and after that inquest was over, the police went to the house of the accused and searched it but nothing was found in the house. The respondent was questioned after the search and the prosecution case is that he then confessed to the murder of Angammal and said that he had taken the jewels from her corpse and concealed them in his cattle shed in a chatty. He went to the cattle shed and produced an earthern chatty in which were seven pieces of jewellery M. Os. 3, 3-a, 4, 4-a, 5, 6 and 6-a. Of these M. O. 5 is described as a "High Court screw" and the corresponding jewel M. O. 5-a was found on the corpse. It is a kind of stud, inserted into the ear and fastened with a screw. The respondent was sent to the Magistrate at once on 28th March and on 13th April, he made a confession, Ex. F before the Taluk Magistrate, P. W. 11.

There is some evidence that the respondent had been seen in the company of the deceased woman on the afternoon of 27th March 1937. The learned Sessions Judge found this evidence unsatisfactory and in many respects it is unsatisfactory. It is not fit to be relied upon. The more important evidence is that which deals with the production of the dead woman's jewels and the confession made by the respondent before the Taluk Magistrate. The discovery of the jewels was spoken to by four witnesses of whom two, P. Ws. 14 and 15, are police officers ; P. W. 13 is the Village Munsif and P. W. 10 a disinterested witness living in the village. All these witnesses say that the respondent when questioned admitted that he had killed Angammal and said that he would produce her jewels. A

mahazar Ex. C was prepared which was signed by P. Ws. 10 and 13 and by two other witnesses, who have not been examined. The learned Sessions Judge has discarded the evidence regarding the recovery of the jewels. He points out that the statements in Ex. C attributed to the respondent did not agree entirely with his statements in his confession Ex. F before the Taluk Magistrate. They are also inconsistent with the statements which he is said to have made to the Inspector of Police, P. W. 15, and which were recorded by the Inspector in the case diary, Court Ex. I. We do not think that these discrepancies are sufficient reasons for rejecting the evidence regarding the recovery of the jewels. The discrepancies are in the narration by the respondent of what happened before he murdered Angammal. In Ex. C, he said that he had solicited the woman for sexual intercourse and that as she did not consent, he tied the rope of fibre round her neck. In his confession Ex. F, he does not say that he solicited the woman for sexual intercourse but that he reproached her for taking up with an oilmonger named Balasundara Chetti. To the Inspector of Police, in Court Ex. I, the respondent seems to have said that he had an accomplice in the murder of the woman. The accomplice was his friend Vettakara Vellai who had come to the scene of murder by previous arrangement with the respondent. The respondent told the Inspector that this Shikari pushed the woman flat on the ground in a pit near the well and that he (the respondent) then had intercourse with her and that it was to prevent her from shouting that he and the Shikari tied the coir rope round her neck. These discrepancies are found in the documents but it is to be noticed that they are discrepancies created by the respondent himself — not discrepancies created by the prosecution witnesses. We cannot think that these are grounds for rejecting the evidence of the Police Officers and of P. Ws. 10 and 13 which shows that the respondent said he had hidden the jewels, knew where they were to be found, and produced them within 24 hours after the woman was murdered.

If the evidence regarding the production of the jewels is accepted, as we think it must be, the confession Ex. F must also be accepted. The Taluk Magistrate P. W. 11 stated that he took the necessary precautions to ensure that the respondent would not make a confession, unless he wanted voluntarily to do so. The Taluk Magistrate thought that he was speaking voluntarily and we are satisfied that he was. In the committing Magistrate's Court and in the Sessions Court, the respondent alleged when questioned that he had been induced to make this confession by a promise that he would be let off on the occasion of the King's coronation. It is however noticeable that neither of the Police Officers was asked any question regarding this alleged inducement. The confession though retracted is sufficiently corroborated by the production of the jewels and it is also corroborated by the evidence of the doctor in a small but not an important point. In Ex. F the respondent said that he had induced the woman to come to the mango tope of which he was the watchman by promising to cut and give her mangoes. The doctor who made the post mortem examination found partly digested mango in the woman's stomach. Even apart from the confession, the evidence that the respondent produced the jewels within such a short time after the murder of the woman is sufficient to show that he must have been concerned in her murder. The evidence of P. W. 13 and P. W. 10 in particular, has not, we think, received proper consideration at the hands of the learned Sessions Judge. He discredits P. W. 10 because P. W. 10 said that he did not know of the recovery of any material objects at the scene of the crime, although he attested the mahazars prepared with reference to them. This is very unfair to the witness. P. W. 10 was asked if he had signed the mahazars for the recovery of the material objects at the scene of the crime and he said that he had. He also was present when the jewels were recovered and after being questioned about these and the clothes worn by the accused, he said that "so far as I remember nothing else was discovered. I am not aware of the discovery of anything else." In the context, it is obvious that the witness was referring only to what was found at the house and cattle shed of the accused. He was not cross-examined in any way with regard to the objects that were found at the scene of the crime. The acquittal of the respondent is, we think, a clear miscarriage of justice. The evidence proves beyond the possibility of any reasonable doubt that he was guilty of the murder of Angammal. We convict him accordingly. The only possible sentence

in this case is the sentence of death and we accordingly sentence the respondent Raju Naicken to be hanged by the neck until he be dead.

C.R.K./R.M. *Accused convicted.*

A. I. R. 1938 Madras 808

PANDRANG ROW J.

Gaddipati Venkayya — Petitioner.

v.

Chunduru Sambayya and others — Respondents.

Civil Revn. Petn. No. 938 of 1937, Decided on 3rd February 1938, to revise order of Sub-Judge, Tenali, D/- 3rd August 1937.

Madras Debt Conciliation Act (11 of 1936), S. 25 — Application by creditor against person who had applied for insolvency — Leave of Insolvency Court not obtained—Application to stay insolvency proceedings cannot be granted.

The application contemplated in S. 25 is an application which is not prohibited by law or in contravention of any statutory provision. [P 808 C 2]

Therefore, where a creditor applies to the Debt Conciliation Board for conciliation of debts of a person who has applied for adjudication as an insolvent, without obtaining leave of the Insolvency Court to do so, such person cannot then approach the Insolvency Court and demand stay of the insolvency proceedings by reason of such an application. [P 808 C 2]

S. Rajarama Iyer for Ch. Raghava Rao — *for Petitioner.*

V. Subramanian — *for Respondents.*

Order. — The petitioner is one of the creditors in the insolvency of one Chunduru Sambayya, (I. P. No. 77 of 1931 on the file of the Subordinate Judge's Court, Tenali). He applied on 9th July 1937 under S. 25, Madras Debt Conciliation Act, 1936, praying that all further proceedings in the insolvency may be stayed pending disposal of his application to the Debt Conciliation Board. The application was dismissed by the Sub-Judge on the ground that the application of the petitioner to the Conciliation Board was itself prohibited by S. 28 (2), Provincial Insolvency Act and therefore his application for stay of the insolvency proceedings was incompetent. It is argued that this view of the Subordinate Judge is not according to law; but I am not satisfied that the objections to that view are well founded. S. 25, Debt Conciliation Act says:

When an application has been made to a Board under S. 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application.

It may be mentioned in this connection that the application made by the petitioner to the Board has since been dismissed, and that the petitioner has filed an application for the restoration of his previous application which is still pending. I am of opinion that the application contemplated in S. 25 is an application which is not prohibited by law or in contravention of any statutory provision. In this case there can be no doubt that the application was in contravention of S. 28 (2), Provincial Insolvency Act which declares that no creditor to whom an insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. It is admitted that the leave of the Insolvency Court was not obtained for making the application to the Debt Conciliation Board. It must therefore be held that the application to the Debt Conciliation Board was one made in contravention of a statutory provision and it is impossible to accept the view that an application which is in direct contravention of a statutory provision gives a right to the very person who made such an application without the leave of the Insolvency Court to approach the Insolvency Court and demand that the insolvency proceedings should be stayed by reason of such an application. The Legislature must be deemed to have meant only an application not otherwise contrary to law in S. 25, Debt Conciliation Act. I do not think it can be said that the application to a Board is not a legal proceeding. The scheme of the Act shows that it is a legal proceeding or at least the initiation of a legal proceeding. Applications under Sec. 25, Debt Conciliation Act come within the mischief provided against in S. 28 (2), Provincial Insolvency Act. The object of the provision in S. 28 (2), Provincial Insolvency Act, is that once a person has been adjudged insolvent and his property is vested in the Official Receiver, all claims of creditors in respect of debts provable under the Insolvency Act should be decided by the Insolvency Court itself, except in exceptional cases where for special reasons, the Insolvency Court gives leave to carry on legal proceedings elsewhere in respect of such

debts. I am of opinion in these circumstances that the order sought to be revised is not open to any legal objection. The petition therefore fails and is dismissed with costs.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1938 Madras 809

HORWILL J.

Villupuram Urban Co-operative Bank — Appellant.

v.

Balasubramania Mudali—Respondent.

Appeal No. 151 of 1934, Decided on 5th January 1938, against order of Sub-Judge, Cuddalore, D/- 9th April 1938.

(a) Execution — Decree binding — Court cannot go behind — Exception — Decree not showing minor as not properly served—Decree must be executed.

An executing Court cannot go behind a decree unless some illegality is apparent on the face of the record. Therefore unless there is anything on the face of the decree to show that a minor was not properly served, it cannot presume that the decree was not proper. It must execute it : *A I R 1937 Mad 509, Rel. on.* [P 809 C 2]

(b) Co-operative Societies Act (2 of 1912), S. 2 (c) — Joint family can be member of Co-operative Society *(Obiter)*

A corporation, and therefore a joint family, could be member of the Co-operative Society : *A I R 1931 Nag 48 and A I R 1933 Nag 211, Rel. on.* [P 809 C 2]

M. S. Venkatarama Aiyar — *for Appellant.*

V. Krishnamachari — *for Respondent.*

Judgment.—In a dispute between the Secretary of the Villupuram Urban Co-operative Bank and member No. 719 of that company, an award was passed by the arbitrator under Rule 14 of the rules framed under S. 43, Co-operative Societies Act, in which one Vaithilinga Mudaliar and two undivided minors of his family were ordered to pay Rs. 281-6-9 to the Society, with interest and costs; and upon failure to do so the property was ordered to be brought to sale. This award was sent to the District Munsif of Villupuram for execution; and he held, after enquiry, that defendant 3 had not been served in the proceedings before the arbitrator ; and he therefore refused to execute the decree against the share of defendant 3 in the family property. In appeal the Additional Subordinate Judge of Cuddalore confirmed this decision, not only on the ground that defendant 3 was not served, but also on the ground that defendant 3, because he was a minor, could not be a member of the Society and because the rules relating to arbitration provide for the decision of disputes to which members only were parties. It has been made clear by this Court in a series of decisions, and the decision in Appeal No. 146 of 1933[1] is one of the latest that it is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited recognized cases, conduct enquiries to ascertain whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed, the executing Court can refuse to execute.

The question that has to be decided is whether there is anything in the award passed by the arbitrator in this case that shows that it is illegal. Clearly there is nothing in the decree which shows that the minor was not served; and the executing Court therefore had to presume that the decree was properly passed against the minor. Whether a joint family can be a member of the Co-operative Society is a question that may be open to discussion, although I think with due respect that the learned Judges who decided A I R 1933 Nag 211[2] were right in holding that a corporation, and therefore a joint family, could be a member of the Co-operative Society. That in certain circumstances a family can be a member of the Society is also recognized in an earlier case of the same Court, A I R 1931 Nag 48,[3] which has been referred to by the learned advocate for defendant 3 in this Court. It is argued that there is nothing in the decree which shows that the whole family was a member of the Society; but the question is not whether the decree shows that the whole family was a member of the Society, but whether there is anything in the decree which shows that the whole family was not a member. On the contrary, the award sets out the names of all the members of the family; and therefore it would seem that all the members of the family were liable, because the family and not

---

1. Sethurajan v. Guruswami Pathar, *reported in* (1937) 24 A I R Mad 509=170 I C 86=I L R (1937) Mad 834=(1937) 2 M L J 37.
2. Laxman v. Dhamori Co-operative Credit Society, (1933) 20 A I R Nag 211 = 142 I C 487.
3. Koyal v. Bhondal, (1931) 18 A I R Nag 48 = 130 I C 820.

only the manager was a member of the Society.

I am therefore of opinion that there is nothing in the award which indicates that it is incorrect and ought not to be executed. If in fact defendant 3 was not liable, either because he was not served or otherwise properly represented before the arbitrator, he is not without a remedy; but the executing Court must take the decree as it stands and allow the Society to execute. If a minor is not properly represented in a suit, he is not a party to the suit, although his name may appear in the records and in the decree. That being so, the executing Court is given no jurisdiction under S. 47, Civil P. C. The appeal is therefore allowed with costs throughout. (Leave refused).

C.R.K./B.D. *Appeal allowed.*

A. I. R. 1938 Madras 810

LEACH C. J. AND MADHAVAN NAIR J.

Matam Nadipudi Koti Veerayya and others—Appellants.

v.

Board of Commissioners for Hindu Religious Endowments, Madras and another—Respondents.

Appeal No. 144 of 1932 and Civil Revn. Petn. No. 1218 of 1933, Decided on 24th September 1937, against decree of Sub-Judge, Guntur, in O. S. No. 71 of 1928.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (7)—Mutt should be public endowment—Property given for private use of head is not public endowment (Per *Leach C. J.*).

A mutt does not fall within the purview of the Act unless it can be regarded as being a public religious endowment. There can be private mutts and where the property is given to the head of a mutt for his personal benefit, it cannot constitute a public religious endowment : *33 Mad 265, Rel. on.* [P 811 C 1, 2]

(b) Hindu Law—Religious endowment—Mutt —Nature of, how should be determined (Per *Madhavan Nair J.*).

The question whether a particular mutt forms a public religious endowment or is a private institution must be judged in the light of the evidence in each case. The origin of the mutt, if it is known, its antiquity, the nature of the gifts of property made to it, the way how these have been treated by its head, the long established usage and custom of the institution, all these throw valuable light on the question whether the mutt is a public religious endowment or a private institution : *10 Mad 375 and 2 Mad 175, Ref.* [P 813 C 2]

S. Srinivasa Iyengar — *for Appellants.*

P. V. Rajamannar and V. Rangachari — *for Respondents.*

Leach C. J.—*(Appeal No. 144 of 1932.)* In this appeal the Court is called upon to decide whether a mutt in the village of Chebrole, Guntur District, is a mutt within the purview of the Madras Hindu Religious Endowments Act, 1927, and as such is liable to make an annual contribution to the funds of the Board of Commissioners appointed under the Act. The appellants claim that the mutt does not constitute a public religious endowment. They say that it is entirely private in its nature and therefore it cannot be called upon in law to make any contribution. The Board having decided that the mutt is liable to make an annual payment, the suit out of which this appeal arises was filed by the appellants in the Court of the Subordinate Judge of Guntur for a declaration to the effect that the Board has no right to make a levy. The learned Judge agreed with the Board and dismissed the suit.

The appellants are brothers and are members of the sect known as Jangams or Vira Saivas. They worship the Lingam or symbol of Shiva which they wear suspended round the neck. According to "The Manual of the Nellore District" compiled by John A. C. Boswell, Collector of Kistna District in 1873, there are five seats of the principal priests of this sect, namely (1) Gokarna Matam at Nizampatam; (2) Vibhuti Matam at Bangalore; (3) Saranga Matam at Srisailam; (4) Tota Matam in Hyderabad and (5) Chebrole Matam at Chebrole. The Chebrole Matam is the mutt with which the suit is concerned. When it was founded is not known, but the evidence in this case shows that it was in existence in 1775, since when the members of the appellants' family have been entirely responsible for its management. It has been the custom for the head of the family for the time being or its members to choose a male member to be the head of the mutt. The person so chosen is required to take a vow of celibacy and is known as the Sambhu Devara. The Sambhu Devara receives the veneration not only of the members of his family, but of a large number of disciples to whom he gives religious instruction. The disciples do not live with him in the mutt but in their own villages, many of them, of course, visiting the mutt from time to time. It is the custom for the Sambhu Devara to pay visits to his disciples periodically. In these visitations he is usually assisted by the male members of his family, who themselves at times visit the disciples without

him. The mutt is divided into three parts. In one part, the Sambhu Devara lives and receives his disciples. In the second part are the residential quarters of the other members of the family and the kitchen. The third part consists of a court-yard in which there are the tombs of ancestors of the appellants who have held the office of Sambhu Devara. These tombs are ten in number and are regarded as shrines. Within the mutt premises the daily worship of the Lingam takes place and from time to time religious rites are performed at the tombs of the departed Sambhu Devaras. It is not suggested that these religious observances are confined to appellant 1 and the members of his family. They are, in fact, participated in by members of the sect generally. Plaintiff 1 is the present Sambhu Devara. The mutt is maintained out of the income of lands situate in the villages of Koilmudi and Penumudi. The appellants claim that these properties do not constitute endowments of the mutt, but are in fact properties privately owned by the family. The appellants' case turns on the answer to this question. S. 9 (7) of the Act defines the word "mutt". It means :

> An institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage ; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution.

Section 69 states that every mutt and every specific endowment attached to a mutt shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per centum of its income as the Board determine. The appellants contend that this Section can have no application as the Act only applies to mutts of a public character, and in this connexion point to S. 2 which says :

> This Act extends to the whole of the Presidency of Madras except the Presidency town and applies, save as hereinafter provided, to all Hindu public religious endowments.

For the Board it is argued that every mutt which falls within the definition of S. 9 (7) must be deemed to be a public mutt, but I think that this statement is too wide, and I am of the opinion that a mutt does not fall within the purview of the Act unless it can be regarded as being a public religious endowment. That there can be private mutts cannot be disputed, and where the property is given to the head of a mutt for his personal benefit it cannot constitute a public religious endowment. Some very apposite observations in this connexion were made by Wallis J. in 33 Mad 265[1] at p. 279 :

> Further in my opinion where gifts were given to heads of mutts without any specific trust, the inference suggested by the circumstances of the case and by usage is that it was not intended to fetter the donees by any trusts in dealing with the gifts or to make them accountable in a Court of law for their manner of dealing with them. The ascetic character of the donees and the great reverence in which they were held would, I think, have rendered such restrictions in the eyes of the donors both unnecessary and unbecoming. The fact that the heads of mutts have more or less frequently abused their position is not of itself a sufficient reason for treating them as trustees of the mutt endowments. This is the only question in my opinion which arises ; and my answer is that heads of mutts cannot be regarded as trustees of mutt endowments except in so far as it may be shown that any particular endowment was granted to them on trust.

But where the property has not been given to the head of the mutt for his own use, but has been given, for instance, for the purpose of defraying the cost of religious observances or the performances of pujas within the mutt, the position is very different. It is therefore necessary to ascertain the terms on which the lands were given. I will deal first with the Koilmudi lands. These lands were granted in the year 1775 by the zamindar of the day to the then Sambhu Devara. The grant is in the following terms :

> We have granted 2 (two) kuchalas of Beedu Polam manyam (waste land) to Sambhu Devara Garu among the fields of the aforesaid village, 1185 Fasli (1775-76). You should understand that you should get the said land separated and the boundaries fixed. (Exhibit A.)

The grant was confirmed in 1791 by another document, which reads as follows :

> We have granted two kuchalas of land in the fields of the aforesaid village to Sambhu Devara Garu. You should understand that the said land should be (separated) (torn) Vaisakha Bahula 7 of Paridhavi year. (Exhibit C.)

It will be observed that while the grant is to the Sambhu Devara it is not stated whether he is to hold the lands in his own right or on behalf of the mutt which was then in existence. If the matter remained there it might well be argued that this grant should be construed as a personal grant. But when we examine the Inam Register of 1862 and the statement which was filed by the Sambhu Devara of the

1. Kailasam Pillai v. Nataraja Thambiran, (1910) 33 Mad 265=5 I C 4=19 M L J 778.

time, it is clear that these lands were given for the purpose of defraying the cost of lighting of lamps and performance of pujas at the shrines then within the mutt. In col. 6 of the statement prepared by the Sambhu Devara and filed in the settlement proceedings there is this entry :

> It was granted permanently by Rajah Vasireddi Ramana Garu, the then zamindar of Koilmudi, to the mutt for meeting the expenses of performing deeparadhana and other items.

Column 6 contains particulars as to how the grant was obtained and its conditions. In col. 11 which requires particulars of the enjoyment of the grant, there is this statement :

> It is being enjoyed through Sambhuswamivaru for expenses for nitya deeparadhana and other items.

Now it is important to remember this is not a statement prepared by an official on information received which might be erroneous. It is a statement prepared and submitted for the purpose of the settlement by the Sambhu Devara himself. The entries in the settlement register are to the same effect. In col. 8 of the register which requires particulars of the service for which the grant is held are the words: "for the Sambhu Devara Mattam at Chebrole for lighting lamps and making pujas to the shrine." It has been suggested that the Court should disregard these entries and have regard merely to the terms of the grant itself. The learned advocate for the appellants has here laid great stress on the decision in 44 Mad 421,[2] where their Lordships disregarded the entries in the inam register and decided the case on the terms of the grant itself. In that case however the grant showed that the entries in the register were erroneous. In the present case the grant does not state that the Sambhu Devara was to hold the property in his own right; it is silent in this respect. But we know the purposes for which the lands were given, because the grantee's successor stated them in 1862, and his statement put the matter beyond real dispute.

The learned advocate for the appellants has relied on a number of documents to show that the appellants' ancestors treated these lands as being their private property. One of these documents is a tenancy agreement of the year 1847 which was executed by a tenant for a term of ten years in favour of the brother of the Sambhu Devara of that day. In 1852 the Sambhu Devara and a brother borrowed money on the security of the property and in 1854 the Sambhu Devara allowed his two brothers to partition it between themselves. But all these transactions took place before the settlement of 1862 when the same Sambhu Devara disclosed to the Settlement Commissioner the terms on which these lands were held. The fact that some of the appellants' ancestors did deal with this property as their own would not change the character of the grant. If it did constitute a religious endowment, a religious endowment it would remain. With regard to the partition it is to be observed that it did not deprive the mutt of the benefit of the lands permanently. That they came back into the possession of the Sambhu Devara is shown by the fact that in 1898 a tenancy agreement was executed in favour of appellant 1, the present Sambhu Devara. For the reasons indicated we hold that the Koilmudi lands did and do constitute an endowment of the mutt. The original grant of the Penumudi lands has not been put in evidence. It is said that it was destroyed in a fire. The inam register however clearly shows that these lands also constitute a religious endowment. The entry in col. 8 states that the lands are held for the maintenance of worship in the mutt and this in the circumstances must be regarded as conclusive. The position then is this : The lands in both the villages were granted to the mutt for religious purposes; the mutt has been in existence for at least a century and a half and is an institution which is venerated and visited by a large number of people; public worship takes place within its precincts and it provides religious instructions for members of the Vira Shiva sect. It is impossible, in these circumstances, for the appellants to maintain their contention that it is not a mutt of the character contemplated by the Madras Hindu Religious Endowments Act, 1927. Being a mutt governed by the provisions of the Act, the Board has the right to call upon those in charge of it to make the contribution required by S. 69. The appeal consequently fails and must be dismissed with costs, which will be paid out of the mutt's funds. The appellants will also be allowed their costs out of those funds.

C. R. P. No. 1218 of 1933. — The petition is allowed. O. P. No. 91 of 1928 on

2. Secy. of State v. Srinivasachariar, (1921) 8 A I R P C 1=60 I C 230=44 Mad 421=48 I A 56 (P C).

the file of the District Court, Guntur, will be dismissed. No order as to costs.

Madhavan Nair J. — I entirely agree. I add a few words only because of the insistence with which Mr. Krishnaswami Aiyangar argued that the Chibrolu mutt is a private mutt. If the origin of the mutt is unknown, the history of the property of the mutt and the manner how it has been dealt with by the matadhipathi will often afford an answer to the question whether the mutt is a private institution or a public endowment. In this case the mutt in question is, in my opinion, a public religious endowment, though the properties of the mutt were for some time treated as if they were the private properties of the family of the appellants. It is clear from the inam statement that the head of the matam himself treated the property mentioned in it as having been given for public purposes. In its origin and narrow sense the term 'mutt' signifies the residence of an ascetic, or a sanyasi or a paradesi : *see* 10 Mad 375[3] at page 386. As pointed out in 2 Mad 175[4]

a preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of his order and instructs his religious tenets.

Gradually, pious persons endow the preceptor with properties and in course of time we have associations of sanyasis devoted to divine worship who give updesam or instruction to deserving candidates. It is in this manner that mutts come into existence. But there are many cases where mutts have been deliberately established from the very commencement as public institutions in order to maintain and strengthen the doctrines of particular systems of religious philosophy. The history of this class of what may be called "endowed mutts" which came into existence in the nature of monastic institutions presided over by ascetics and sanyasis are mentioned in 10 Mad 375[3] already referred to. It is possible to conceive of gifts of properties by pious followers to the head of a mutt personally for his own use. These he may administer as properties of his own but over other properties which appertain to the mutt, his responsibility is that of a trustee. Ordinarily properties though given to the head of a mutt will also be used as properties of the mutt as an ascetic is prevented from owning property for personal enjoyment. The question whether a particular mutt forms a public religious endowment or is a private institution must be judged in the light of the evidence in each case. The origin of the mutt if it is known, its antiquity, the nature of the gifts of property made to it, the way how these have been treated by its head, the long established usage and custom of the institution, all these throw valuable light on the question whether the mutt is a public religious endowment or a private institution. The mutt in the present case did not, in my opinion, come into existence as an "endowed mutt" at its inception, but the sanctity of the life of the matam people—the appellants' ancestors — attracted grants of property from pious donors and gradually the matam came to be treated as a public religious endowment. If we did not have the inam statement made by the then head of the Chibrolu Matam or the inam entries in the register to help us, it might have been a matter of some difficulty to hold with confidence that the matam in this case is a public religious endowment. It may be argued with great force as has been done by Mr. Krishnaswamy Aiyangar that the grants A and C show that the property referred to in them were granted to the Chibrolu Matam people for their enjoyment and not as trustees to hold them for a public purpose; the treatment of the property by them may also be said to support this argument; but that the properties were to be used for a public purpose becomes clear from the other evidence in the case. I would therefore hold that mutt in this particular case is a public mutt and comes within the description of "a Hindu Public Religious Endowment" to which the Hindu Religious Endowments Act would apply.

I agree with the orders passed by my Lord both in the appeal and in the civil revision petition.

C.R.K./B.D. *Appeal dismissed.*
Petition allowed.

---

3. Giyana Sambhanda Pandrasannadhi v. Kandaswami Thambiran, (1887) 10 Mad 375.
4. Sammantha Pandara v. Sellappa Chettiar, (1878-80) 2 Mad 175.

A. I. R. 1938 Madras 814

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Sankaralingam Pillai and others — Petitioners.

v.

Arumugam Pillai and another — Respondents.

Civil Revn. Petn. No. 1126 of 1933, Decided on 22nd April 1938, from order of Sub-Judge, Tuticorin, D/- 1st March 1933.

Civil P. C. (1908), O. 21, R. 16—*P* assignee of promissory note obtaining decree against defendants 1 to 6, executants thereof, and defendant 7, payee and assignor—Defendant 7 dying and *P* and defendants 8 to 10 succeeding her as heirs — Held that O. 21, R. 16 did not in terms apply — That decree did not become inexecutable in entirety but only to extent of one-fourth.

P as the assignee of a promissory note obtained a decree against defendants 1 to 6, the executants of the note and defendant 7, the payee and the assignor, a Hindu female. Defendant 7 died and *P* and defendants 8 to 10 her reversionary heirs, became entitled each to a fourth share of the property held by her. *P* then transferred the decree to one *S* who took out execution of the decree. A question arose as to whether the decree became inexecutable by virtue of the doctrine of merger :

Held that O. 21, R. 16 did not in terms apply. There was only a partial and not complete merger and the decree did not become inexecutable in its entirety but only to the extent of one-fourth. Defendants 8 to 10 could be proceeded against for the three-fourths of the amount of the decree : *A I R 1927 Mad 937, Foll.; A I R 1926 Mad 1141, held overruled by A I R 1927 Mad 937 ; A I R 1932 All 704, Rel. on.* [P 814 C 2, P 815 C 2]

B. C. Seshachala Iyer and V. K. Mahadeva Sastry — *for Petitioners.*

S. Thayagaraja Iyer and A. Swaminatha Iyer — *for Respondents.*

Venkatasubba Rao J. — This revision petition has been referred to a Bench as it raises an important question of law. The plaintiff, as the assignee of a promissory note, obtained a decree against defendants 1 to 6, the executants of the note (with whom we are not concerned), and defendant 7, the payee and the assignor, a Hindu female. Defendant 7 died and the plaintiff and defendants 8 to 10, her reversionary heirs, became entitled each to a fourth share of the property held by her. The plaintiff then transferred the decree to the petitioner in the lower Court, who applied for execution; but nothing turns upon the transfer, as the transferee stands in the shoes of the plaintiff. The question to decide is, has the decree become inexecutable in virtue of the doctrine of merger? The Court below has allowed execution and its order is challenged here by defendants 8 to 10.

Order 21, R. 16, Civil P. C. has been relied upon by their learned counsel, but there can be no doubt that the provision does not in terms apply. It enacts that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. True, this rule applies, whether the transfer has been effected by operation of law or by act of parties. To give an example of the former class of transfer, let us suppose that *A* obtains a decree against *X* and *Y*. *A* dies and *X* as his heir becomes under the law the assignee of the decree. The rule enacts that the decree should be deemed extinguished and that *X* should not be permitted to execute it as against *Y*. But the case in hand is the converse of the illustration just put. If in the example given above *X* dies and *A* as his heir becomes liable under the decree (which is very different from becoming entitled to rights under the decree), the Rule in terms, it is obvious, does not apply. Here there has been no transfer of the decree and what is equally patent, there has been no transfer in favour of one the judgment-debtors — that being what the Rule cited above contemplates. But apart from the letter of the Rule, there is a principle which it embodies, namely where the decree-holder's right and the judgment-debtor's liability become united in one and the same individual, it stands to reason that the decree should be treated as satisfied. The question then is, whether there has been such a merger in the case as to render the decree inexecutable. As has been pointed out by Sulaiman C. J. and Young J. complete merger involves the co-extensiveness of the right and the liability: 54 All 448[1] at p. 450. Let us now look at the position that has resulted from the death of defendant 7. The plaintiff has remained the judgment-creditor, but who are those that have become the judgment-debtors ? The plaintiff himself and defendants 8 to 10. In other words, the plaintiff holds a decree against himself and the three other persons. To the extent to which the plaintiff has become partially liable under the decree, to that extent there has undoubtedly been a merger. But the consequences of a partial

1. Asia Bibi v. Azir Ahmad, (1932) 19 A I R All 704 = 137 I C 50 = 54 All 448 = 1932 A L J 230.

merger are totally different from those of a complete merger. Let us again take an example. *A* obtains a decree against *X* for Rs. 300; *X* dies, leaving *A*, *B* and *C* as his heirs, each being entitled to an equal third of his estate. The true position then is, that *A* has a decree against *A*, *B* and *C*; the decree is extinguished to the extent of *A's* share, but he can execute it against *B* and *C* to the remaining extent of Rs. 200. This is in consonance with reason and justice, but the learned counsel for defendants 8 to 10 contends on the authority in A I R 1926 Mad 1141 = 51 M L J 443,[2] decided by Madhavan Nair J. that the decree has become inexecutable in its entirety. That is a decision we are unable to follow, as it ignores the distinction between a partial and a complete merger. Indeed, this case must be treated as having been overruled by a later Bench decision, A I R 1927 Mad 937,[3] to which Madhavan Nair J. was a party. The learned Judges there purport to distinguish the earlier case; but as has been pointed out in 54 All 448[1] already referred to, it is difficult to discover on what basis the decision has been distinguished. The later ruling is clearly opposed to the earlier one and in our opinion lays down the correct principle. The Allahabad High Court in the decision already cited has discussed the matter clearly and adopted the same view.

But adopting the same principle, the Allahabad case and the Madras Bench case have applied it differently. In the former, the decree has been treated as having become satisfied *pro tanto*; in the latter, the judgment-creditor has been directed to execute his decree in its entirety against the entire property both in his possession and in the possession of the other heirs. In our opinion, the more logical course is that adopted in the Allahabad case. In so far as the judgment-creditor and the judgment-debtor happen to be the same person, to that extent, it is reasonable and correct on principle, to hold that the decree is satisfied. In the ultimate result it makes no difference or, to be more accurate, it ought to make no difference, which of these two methods in the process of execution is adopted, for, it must be noted that the real rights of parties can be worked out only in a suit for contribution. Let us suppose, for instance, that *A* obtains a decree against *B*, the principal debtor, and *C*, the surety. *A* transfers the decree to *C*, which thereupon must be treated as having become satisfied for the purpose of execution. But that does not prevent *C* from pursuing his remedy against *B* by a suit for contribution. In the result, we must hold that the decree has become inexecutable to the extent of the one-fourth share of the plaintiff. Defendants 8 to 10 can be proceeded against for the three-fourths of the amount of the decree that has been passed. The execution petition will therefore be remitted to the lower Court for being dealt with in the light of our judgment. We direct that each party shall bear his costs both here and in the Court below.

C.R.K./R.M. *Order accordingly.*

2. Mohammad Abdul Khader Sahib v. Syed Abdul Khader, (1926) 13 A I R Mad 1141 = 98 I C 26=51 M L J 443.
3. Subramanian Chetty v. Kasi Chetty, (1927) 14 A I R Mad 937=106 I C 911.

A. I. R. 1938 Madras 815

BURN J.

In re K. V. Venkata Ramanier and others — Accused.

Criminal Revn. No. 994, Case Referred No. 55 of 1937 and Criminal Revn. No. 3 and Petn. No. 3 of 1938, Decided on 14th April 1938, referred by Dist. Magistrate, Salem, D/- 9th December 1937.

Criminal P. C. (1898), S. 190 (1) (c)—Magistrate trying case as summons case subsequently finding it to be warrant case—He can proceed with trial but must apply warrant case procedure thenceforward.

Section 190 (1) (c) is concerned with extra-judicial information, knowledge or suspicion and it has nothing to do with knowledge gathered by a Magistrate in open Court from the evidence of witnesses given during a trial. If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thenceforward; he is not in any way disqualified from proceeding with the trial: *A I R 1936 Mad 341, Dissent.*

[P 816 C 1]

T. Krishnaswami Aiyangar — *for Accused.*

K. Narasimha Aiyangar — *for Complainant.*

Public Prosecutor — *for the Crown.*

Order.—I am unable to accept this reference. With all respect to King J., I am unable to follow the reasoning in 59 Mad 442.[1] S. 190 (i) (c), Criminal P. C., is

1. In re Rajaratanam Pillai, (1936) 23 A I R Mad 341=1936 Cr C 884=161 I C 846=37 Cr L J 501=59 Mad 442=70 M L J 340.

concerned with extra-judicial information, knowledge or suspicion and it has nothing (in my opinion) to do with knowledge gathered by a Magistrate in open Court from the evidence of witnesses given during a trial. If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is I think bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial. Let the papers be returned and the case proceed.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 816

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Sree Rajah Venkatadri Appa Rao Bahadur Zamindar Garu and others — Appellants.

v.

Morivineni Seetharamayya and others — Respondents.

Appeal No. 563 of 1931, Decided on 16th February 1938, against decree of Sub-Judge Ellore, D/- 17th November 1930.

Riparian Owners—Riparian rights—Nature of riparian rights explained — Rights of riparian owners enunciated.

A riparian right arises from the right of access to the stream which land owners on its bank have by the law of nature. In other words, it is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream. Even if the portion of the bank be a narrow strip, the back lands enjoy riparian rights, if they be in the same ownership as the bank. [P 817 C 2]

The zamindars are to be considered as the proprietors for deciding the question of the contact with the stream. But although the ownership of the zamindar as distinguished from that of the ryot is the decisive factor, still the whole of the land is not a riparian estate on the ground that it belongs to a single owner. A riparian tenement connotes, in addition to contact with the river, a reasonable proximity to the river bank. What is a riparian tenement does not depend upon any arbitrary rule but must in each case be a question depending upon circumstances: *A I R 1918 Mad 516; A I R 1919 Mad 1152 and (1926) 1 Ch 444, Rel. on.* [P 817 C 2; P 818 C 1]

Each riparian proprietor has a right to the water flowing past his land, and the enjoyment of it subject to the similar rights of all the proprietors on the bank of each side to the reasonable enjoyment of it. A riparian proprietor may use water (a) for ordinary or primary purposes, (b) for extraordinary or secondary purposes and (c) for purposes foreign to and unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not: *(1851) 6 Ex 353; (1904) A C 301 and (1876) 7 H L 697, Rel. on.* [P 818 C 1]

Irrigation is a secondary purpose. The rule of English law that water should be restored, after the object of irrigation is answered, in a volume, substantially equal to that in which it passed before, has a modified application in India when only a part of the stream is taken and that for the purposes of irrigation; the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished: *A I R 1932 P C 46, Rel. on.* [P 818 C 1, 2]

The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement and is not capable of being lost by non-user. When a riparian owner taking advantage of his position uses the water for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party. This is put upon the ground that the wrongdoer, if not prevented, will at the end of the statutory period, gain a prescriptive right to continue the unlawful use for ever: *(1904) A C 301, Rel. on.* [P 818 C 2]

Y. Govindarajulu and B. Lakshminarayana — *for Appellants.*

P. V. Rajamannar and K. Subba Rao — *for Respondents.*

Venkatasubba Rao J.—Once the facts of this somewhat difficult case are found, the principles governing it seem well settled by authority. After having heard the matter fully argued on both sides, we have come to the conclusion that the findings of the Court below are right and should be accepted. We are concerned here with two villages, Nadupalli and Velupucherla. Defendant 1, the zamindar owning the Medur estate, is the overlord in respect of both the villages. The plaintiffs are the mokhasadars of Velupucherla and defendants 2 to 5 of Nadupalli. It may be mentioned that the zamindar has made common cause with the mokhasadars of Nadupalli and as the real contest is by the latter, defendants 1 to 5 will be referred to as the defendants. The dispute relates to the waters of a natural stream known as Tammileru. As the lower Court points out, excepting in rainy season when the current is swift, there is scanty flow; during period of scarcity, a witness deposes, there is a general scramble, each man being anxious to abstract as much water as he can. Nadupalli is bounded on the west by the river Tammileru and lower down the stream is Velupucherla, but the plaintiffs' lands in it do not abut on the stream so that the

position is shortly this : whereas the defendants are upper riparian proprietors, the plaintiffs for the purpose of this case do not answer the description of lower heritors. But the plaintiffs have long been using the water of a channel (Balive Velupucherla Irrigation Channel) taking off from Tammileru, for irrigating Velupucherla lands, admittedly not in contact, as stated above, with the flow of the stream. The lower Court has however found that this is an ancient channel and that the plaintiffs' rights must be "referred to a lawful origin."

To make the point at issue clear, we must here state that there is in Nadupalli a tank shown in the map (the Commissioner's plan, Ex. 3) as "Ura Tank," which has been receiving water through a "supply channel" (so called in the map) from various sources with which we are not concerned. What gave occasion to the present suit was the excavation by the defendants of a new channel 1650 feet long (called the "suit channel" in the map) which was made to connect Tammileru with the "supply channel" already referred to. It will be manifest from what has been stated that the defendants dug the new channel with the object of drawing off water from Tammileru into the Ura Tank. That they have succeeded in producing the desired result has not been denied. There was a good deal of contest in the case whether the channel was newly dug or was, as alleged by the defence, an ancient one. The lower Court has found, and quite rightly, that this is a new excavation. It is with a view to get this new channel closed up that this suit has been brought, and the Court below has decided in favour of the plaintiffs. The defendants who are the appellants here question the correctness of its decision. The plaintiffs' "immemorial user" (to quote the words of the lower Court) of the water in the manner alleged by them has been admitted by the defendants. The learned Judge, as already observed, says that their user must be referred to a "lawful origin." That statement seems sufficient for the present purpose, as it is unnecessary to enquire how this undisputed right originated. But to clarify the position, it may be stated that the plaintiffs do not claim as against Nadupalli owners i. e., those higher up the stream that they acquired a right by prescription. At any rate, that position has been made clear by Mr. Rajamannar, their learned counsel, in his lucid argument, Prescription involves the idea that the right acquired is in derogation of another person's right. But the plaintiffs do not suggest here that the right they acquired any way impaired the fulness of the defendants' legal right. The simple question then is, did the defendants by making the new excavation and drawing off water into their Ura Tank, infringe the plaintiffs' admitted rights? The lower Court has in effect decided (and we think correctly) that while the plaintiffs are entitled to relief, their acquired right has however no operation as against the natural rights of the Nadupalli mokhasadars.

This raises the question, is the abstracting of the water by the new excavation in excess of the defendants' natural riparian rights? The channel having been found to be a new excavation, the Subordinate Judge, it may be mentioned, has negatived the prescriptive right set up by the defendants to divert the water into the Ura tank. Then the question, as already stated is, what is the user justified by the defendants' natural rights?

This question must be answered with reference to the following considerations.

(1) A riparian right arises from the right of access to the stream which landowners on its banks have by the law of nature. In other words, it is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream (Coulson and Forbes on Waters, Edn. 5, p. 81). Even if the portion on the bank be a narrow strip, the back lands enjoy riparian rights if they be in the same ownership as the bank (ibid p. 111).

(2) In the case of zamindars and similar proprietors, are they to be considered the owners or the ryots for deciding the question of the contact with the stream? The contention in this respect of Mr. P. Satyanarayana Rao, the appellants' learned counsel, must prevail. It seems consonant to reason to hold that a zamindar should be treated as a proprietor for this purpose. The rights possessed by the tenants may be very valuable, such as permanent occupancy rights, but that does not justify the view that zamindars are not the proprietors of the soil. The Permanent Settlement Regulation (Madras Act 25 of 1802) declares that the British Government has resolved to grant to zamindars and other

land-holders a permanent property in their land and the sanad granted to them is styled a deed of permanent property and they are called proprietors of land. If 1914 M W N 481[1] is to be understood as laying down a different rule, we must, with all respect, express our dissent from it.

(3) The ownership of the zamindar as distinguished from that of the ryot being then the decisive factor, is the whole of the land a riparian estate on the ground that it belongs to a single owner? The proposition that every piece of land in the same occupation which includes a portion of the river bank and therefore affords access to the river, is a riparian tenement, is, as Lawrence J. observes, far too wide.

> Nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the river Thames by a strip of land many miles long : (1926) 1 Ch 444[2] at p. 459 : *see also* Coulson and Forbes on Waters, Edn. 5, p. 111.

A riparian tenement, as the learned Judge points out, connotes, in addition to contact with the river, a reasonable proximity to the river bank: *vide* the observations of Abdur Rahim J. in 33 M L J 415[3] at p. 424 and of Sadasiva Aiyar J. in 34 M L J 223[4] at p. 226. What is a riparian tenement does not depend upon any arbitrary rule (the depth of half a furlong suggested by Sadasiva Aiyar J. was not intended to be absolute), but must in each case be a question depending upon circumstances.

(4) Each riparian proprietor has a right to the water flowing past his land; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it: (1851) 6 Ex 353=155 E R 579[5] at p. 586. As observed by Lord Macnaghten (citing Lord Cairns) in (1876) 7 H L 697,[6] a riparian proprietor may use the water (a) for ordinary or primary purposes, (b) for extraordinary or secondary purposes and (c) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not: (1904) A C 301[7] at p. 306.

(5) Irrigation is a secondary purpose and the English law seems to be that the water should be restored after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before: *see* Lord Cairns in (1876) 7 H L 697[6] at p. 704 and Lord Macnaghten in (1904) A C 301[7] at p. 306. The rule has been somewhat modified in its application to India. The Judicial Committee observed:

> Now in speaking of the returning of the water, it must be remembered that both Lord Cairns and Lord Macnaghten were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for the purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished : 59 I A 56.[8]

(6) The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement and is not capable of being lost by non-user (ibid).

(7) When a riparian owner taking advantage of his position uses the water (as here) for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party. This is put upon the ground that the wrongdoer, if not prevented, will at the end of the statutory period, gain a prescriptive right to continue the unlawful use for ever. (Per Lord Macnaghten at p. 309 and Lord Lindley at p. 313 in (1904) A C 301[7] above cited.)

These are the principles touching riparian rights which become applicable to the facts as found by the lower Court. Its findings are: (a) that the channel is a new excavation recently dug, (b) that a large quantity of water is impounded in the Ura tank, (c) that the water is used not only for irrigating some distant lands stretching

---

1. Narayanaswami v. Venkanna, (1915) 2 A I R Mad 571=24 I C 685=1914 M W N 481.
2. Attwood v. Llay Main Collieries, (1926) 1 Ch 444=95 L J Ch 221=134 L T 268=70 S J 265.
3. Secretary of State v. Ambalavana Pandarasannadhi, (1918) 5 A I R Mad 516=42 I C 697=33 M L J 415.
4. Lakshminarasu Avadhanulu v. Secretary of State, (1919) 6 A I R Mad 1152=43 I C 113 =34 M L J 223.
5. Emberey v. Oven, (1851) 6 Ex 353=20 L J Ex 212=15 Jur 633=155 E R 579.
6. Swindon Waterworks Co. v. Wills & Berks Canal Co., (1876) 7 H L 697=45 L J Ch 638 =33 L T 513=24 W R 284.
7. MacCartney v. Londonderry and Loughswilly Railway Co., (1904) A C 301=73 L J P C 73 =91 L T 105=53 W R 385.
8. Secretary of State v. Subbarayudu, (1932) 19 A I R P C 46=136 I C 413=55 Mad 268=59 I A 56 (P C).

far away from the river bank, in Nadupalli, but also other lands totally unconnected with the riparian tenement and (d) that the plaintiffs have not succeeded in proving that they sustained any actual injury. On these findings the question is, to what reliefs will the plaintiffs be entitled? The lower Court has granted an injunction restraining the defendants "from taking the water of Tammileru through the suit channel (the new excavation) to Nadupalli Ura tank." To this extent the lower Court's decree is right, but the learned Judge has, unnecessarily, in our opinion, added two further directions and that in the defendants' favour: firstly, that they may store water in a separate tank "to be used for irrigating lands within a distance of half a furlong from the river bund"; secondly, that they are entitled to use the new excavation for taking Tammileru water into the tank to be newly dug. The making of these declarations does not fall within the purview of the suit, which was brought simply with a view to get the new channel filled up. The Judge has attempted to define the limit of the defendants' riparian right, although there was no material before him which could enable him to do so. The only question before him was, whether or not the defendants' alleged act was wrongful and he was not called upon to define the extent of their natural rights. That the lower Court's decree is apt to lead to confusion and complications is obvious enough. At what distance from the river bank is the new tank to be built and what are its dimensions to be? Is the water to be permanently impounded in the proposed tank? As regards the impounding of the water, some argument has been addressed to us, but we do not think that is a question that arises here. We may in this connexion refer usefully to the observations of Lord Watson in 24 I A 60[9] at p. 69. His Lordship points out that the pleadings in that case were silent in regard to the size and character of the dam in question or, as to the quantity of water which it had the effect of diverting, and goes on to say that "without an investigation into facts which have neither been averred nor made the subject of proof," it would be most unsatisfactory to proceed to give a decision. These observations apply here with very great force.

There is one other matter to which we may refer. The learned Subordinate Judge observes that the defendants may go higher up the stream for the purpose of putting up Kongarakutta (sand bunds). This obviously affects interests of parties not before us and in view of what we have said that the extent of the defendants' riparian rights does not fall to be determined here, it is unnecessary to enquire how far the learned Subordinate Judge's view on this matter is right. It seems to us that the decree to be passed here may be modelled on the decree passed in (1876) 7 H L 697.[6] It is declared that the plaintiffs are entitled to use Tammileru and its waters as the same have been accustomed (before the interference therewith complained of) to flow down to and into their channel (the Balive Velupucherla Irrigation channel), so far as the said stream and waters are required for the supply of their said channel, but subject to such reasonable use by the defendants as riparian owners higher up the stream, and it is ordered that an injunction be awarded restraining the defendants from diverting into their Ura tank, the said stream and waters. To this must be added, having regard to the circumstances here, a mandatory injunction directing the defendants to fill up the newly excavated channel. The appeal fails and is dismissed with costs. It is unnecessary, in view of the decree we have made, to make any special order upon the memorandum of objections. There will be no order as to costs in the memorandum of objections.

C.R.K./R.M. *Appeal dismissed.*

9. Debi Pershad Singh v. Joynath Singh, (1897) 24 Cal 866=24 I A 60=7 Sar 209=1 C W N 401 (P C).

A. I. R. 1938 Madras 819

LAKSHMANA RAO J.

Pichandhi Murugappa Mudali and another—Appellants.

v.

Kuppuswami Mudali and others — Respondents.

Second Appeal No. 281 of 1934, Decided on 6th April 1938, against decree of Sub-Judge, Chingleput, in A. S. No. 16 of 1932.

Highway — Religious festival—Right of performing it on public street is recognized by law — Such right is subject to direction of Magistrate and rights of public.

In India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not inter-

fere with the ordinary use of the street and subject to lawful directions by the Magistrate. The right to perform a religious festival on public street before a temple does not stand on a different footing and such a right is recognized by law. The right is of course subject to the directions of the Magistrate and the rights of the public, and it is for the Magistrate to regulate the order and manner of performance of the festival : *A I R 1925 P C 36, Rel. on.* [P 820 C 1, 2]

K. V. Ramachandra Iyer — *for Appellants.*

A. Viswanatha Iyer and A. Ramaswamy Iyer — *for Respondents.*

Judgment. — The appellants are residents of Kandappar Koil Street in Ayyampet village and the suit out of which the second appeal and memorandum of objections arise was instituted by them on behalf of the residents of that street for a declaration of their right to perform the Surasmaharam festival of the Subramaniaswami of Kandappar Koil in front of the Mokambari Amman Temple on the Shashti day in Arpasi month and an injunction restraining the defendants from interfering with the performance of the festival. Their right to perform the festival in the public highway in front of the Mokambari Amman Temple was declared by the District Munsif without specifying that it is subject to the directions of the Magistrate and the rights of the public, and the defendants were restrained from interfering with the performance of the festival. An appeal was taken and the suit was dismissed by the Subordinate Judge on the ground that the right to perform festivals in the public highway was not claimed in the plaint and that even otherwise such a right is not recognized by law.

The plaint is comprehensive enough to include the public highway which is in front of the Mokambari Amman Temple and the Privy Council has laid down in 47 All 151[1] that in India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street and subject to lawful directions by the Magistrates. A religious festival does not stand on a different footing and the view of the Subordinate Judge that such a right is not recognized by law is untenable. The right is of course subject to the directions of the Magistrate and the rights of the public, and it is for the Magistrate to regulate the order and manner of performance of the festival, though it is found by the Courts below that the festival of Subramaniaswami of Kandappar Koil used to be celebrated before the festival of Balasubramaniaswami of the temple of the defendants. The decree of the Subordinate Judge is therefore set aside and the decree of the District Munsif is restored with the modification that the right of the appellants to perform the festival will be declared to be subject to the directions of the Magistrate and the rights of the public. The order of the District Munsif regarding costs will stand and the parties bear their respective costs in the lower Appellate Court and here.

C.R.K./D.S. *Decree set aside.*

1. Manzur Hasan v. Mahommad Zaman, (1925) 12 A I R P C 36=86 I C 236 = 47 All 151= 52 I A 61 (P C).

A. I. R. 1938 Madras 820

PANDRANG ROW J.

Kotakonda Venkatesulu Naidu — Petitioner.

v.

Golla Chittappa — Complainant.

Criminal Revn. Case No. 970 and Petn. No. 909 of 1937, Decided on 6th May 1938, from order of Sub-Divisional Magistrate, Gooty, D/- 4th September 1937.

Cattle Trespass Act (1871), Sec. 22 — Even Forest Officer responsible for illegal detention can be ordered to pay compensation— In compensation, fees paid by complainant to pleader for prosecution of case cannot be included.

It does not make much difference to the jurisdiction of the Magistrate to order compensation if the person who is responsible for the wrongful or illegal detention happens to be a Forest Officer who claims to act under colour of the Forest Act, if as a matter of fact, the seizure and detention had nothing to do with any forest. However, in the compensation payable under S. 22 of the Act, the fees paid by the complainant to the pleader employed by him for the purpose of prosecution of the case cannot be included. [P 821 C 1]

K. S. Jayarama Iyer and G. Gopalaswami — *for Petitioner.*

K. Venkataraghavachari for Public Prosecutor — *for the Crown.*

C. Vasudevan — *for Complainant.*

Order. — I see no sufficient reason to think that the order of compensation made by the Taluk Magistrate in this case under Sec. 22, Cattle Trespass Act, is not just. In view of the concurrent finding of the Courts below, it must be held that the seizure and detention of the sheep and goats belonging

to the complainant and his party were wrongful and illegal and I do not think it makes much difference to the jurisdiction of the Magistrate if the person who is responsible for the wrongful or illegal detention happens to be a Forest Officer who claims to act under colour of the Forest Act, if, as a matter of fact, the seizure and detention had nothing to do with any forest. It is however contended that the amount of compensation awarded, namely Rs. 75, is excessive and that this excessive amount was arrived at as a result of a misconception of the Magistrate that he was at liberty to include in the compensation payable under S. 22 of the Act the fees paid by the complainant to the pleader employed by him for the purpose of the prosecution of this case. This certainly is a misconception and there is little doubt that the Magistrate must have allowed this to weigh in his mind in assessing the amount of compensation, because just before making the order of compensation, he observes that the complainant engaged a vakil and must have incurred a good deal of expenditure for the prosecution of the case against the accused. It is impossible now to ascertain exactly what the amount of the fee was and it is impossible to say that the Magistrate himself had any clear idea of the amount of the fee. He must have made some addition to the amount of compensation on this account and all that can be done in a case like this is to make some substantial reduction so that the compensation may be fixed on a legal basis. It is suggested by the learned Public Prosecutor that Rs. 25 may be regarded as the fee of the lawyer and that the amount of compensation fixed by the Taluk Magistrate may be reduced by Rs. 25. This suggestion appears to be reasonable and I therefore vary the order of the Taluk Magistrate by reducing the amount of compensation, viz. Rs. 75, to Rupees 50. In other respects, the petition is dismissed.

C.R.K./D.S. *Order varied.*

*** A. I. R. 1938 Madras 821**

PANDRANG ROW J.

In re A. S. Pandian — Petitioner.

Criminal Revn. Case No. 972 and Petn. No. 911 of 1937, Decided on 6th May 1938, from Judgment of Sess. Judge, West Tanjore Division at Tanjore, in C. A. No. 28 of 1937.

*** (a) Telegraph Act (1885), S. 20 — Use of wireless receiving set without license is not offence under S. 20.**

It is extremely doubtful whether the use of a wireless receiving set without a license would amount to an offence under S. 20 which in view of S. 4 could not have been intended to include wireless receiving sets used ordinarily to receive broadcast programmes. There is therefore no justification for a separate conviction under S. 20 or for a separate sentence under that Section. [P 821 C 2]

*** (b) Wireless Telegraphy Act (1933), Ss. 3 and 6 — Possession of wireless receiving set without license — Postmaster by subsequently issuing license to take effect from date previous to possession cannot convert offence into non-offence.**

It is not possible to say that the license issued subsequently by the Postmaster has the effect of converting what was possession without a license into possession with license, or in other words gives a sort of a pardon in respect of an offence already committed. It is not in accordance with the spirit of the law that any official should have the power to convert what is an offence into what is not an offence by the mere issue of a license subsequent to the event. The conviction under Ss. 3 and 6 cannot therefore be objected to. [P 822 C 1]

Where however the delay in paying the license fee was due to the fact that the accused was not quite satisfied with the wireless set which he had purchased and wanted either to get it put right or to exchange it for another set, it is sufficient to impose a nominal fine. [P 822 C 1]

K. S. Jayarama Ayyar and K. Venkataramani — *for Petitioner.*

K. Venkataraghavachari—*for the Crown.*

Order. — The petitioner was convicted of being in possession of a wireless receiving set without a license under Ss. 3 and 6 of Act 17 of 1933 and also of working the same without a license under S. 20 of Act 13 of 1885 and sentenced to pay a fine of Rs. 60 under the Wireless Telegraphy Act and a fine of Rs. 75 under the Telegraph Act in respect of the same wireless receiving set. These fines were reduced on appeal by the Sessions Judge to Rs. 20 and Rupees 25 respectively; it will thus be seen that even in the Appellate Court separate sentences were retained. It is, to say the least, extremely doubtful whether the use of a wireless receiving set without a license would amount to an offence under S. 20, Telegraph Act, which in view of S. 4 of that Act could not have been intended to include wireless receiving sets used ordinarily to receive broadcast programmes. In my opinion there is no justification for a separate conviction under S. 20, Telegraph Act or for a separate sentence under that Section. The conviction and sentence under S. 20, Telegraph Act, are therefore set aside.

It is argued that even the conviction under Ss. 3 and 6, Wireless Telegraphy Act, cannot stand because actually a license had been issued by the Postmaster to take effect from a date earlier than the date on which the petitioner is said to have been in possession without a license. It is not however possible to say that the license issued subsequently by the Postmaster has the effect of converting what was possession without a license into possession with license, or in other words gives a sort of a pardon in respect of an offence already committed. It is not in accordance with the spirit of the law that any official should have the power to convert what is an offence into what is not an offence by the mere issue of a license subsequent to the event. I am therefore of opinion that this conviction cannot be objected to successfully. At the same time there is justification for the complaint that even the reduced fine of Rs. 20 is excessive in the circumstances of the case. The offence was trivial and technical. The petitioner is apparently a respectable man who has been taking out license for some years before the offence and it would appear that the delay in paying the license fee was due to the fact that he was not quite satisfied with the wireless set which he had purchased and wanted either to get it put right or to exchange it for another set. It was in these circumstances, viz. because he had not made up his mind which set he should have permanently, that he did not pay the license fee in time. The learned Judge also says that there could have been no intention in this case to evade payment of the fee or defraud the revenue. In these circumstances it would have been quite sufficient to impose only a nominal fine. I therefore reduce the fine from Rs. 20 to Re. 1. The excess fine, if paid, must be refunded.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1938 Madras 822

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Sivanmalai Goundan — Appellant.

v.

Arunachala Goundan and others — Respondents.

Second Appeal No. 591 of 1937, Decided on 7th April 1938, against decree of Sub-Judge, Coimbatore, in A. S. No. 271 of 1936.

(a) Guardians and Wards Act (1890), Ss. 29 and 30—Prohibition under S. 29 incorporated in order appointing guardian—Assignment of mortgage by guardian is still voidable and not void.

Even if the statutory prohibition under S. 29 is incorporated in the order appointing the guardian, assignment of a mortgage to which the minor is entitled, by the guardian is nevertheless voidable and not void altogether, because the mere copying of the rule laid down in S. 29 cannot have the effect of producing a different legal effect.

[P 822 C 2; P 823 C 1]

(b) Minor—Minor on attaining majority can repudiate transfer by guardian without filing suit under Art. 44, Limitation Act.

It is far from correct to say that a minor who has attained majority cannot repudiate transfer made by guardian without filing a suit under Art. 44, Limitation Act: *A I R 1915 Mad 296, Rel. on.* [P 823 C 1]

N. Sivarama Krishna Iyer — *for Appellant.*

M. Krishna Bharathi, T. K. Subramania Pillai, M. Chockalingam and S. Murugesa Mudaliar — *for Respondents.*

Venkatasubba Rao J.—The suit has been brought by the assignee of a mortgage bond. The assignment was made by the guardian appointed under the Guardians and Wards Act of the minor who became entitled to the mortgage. The question raised in the appeal is, whether the assignment is void or voidable. S. 29 of the Act, which imposes a limitation on the powers of a guardian of the property enacts inter alia that he shall not transfer any immovable property of his ward without the previous sanction of the Court. Then Sec. 30 goes on to say that a disposal by the guardian in contravention of this provision is voidable "at the instance of any other person affected thereby." This Section renders the transaction voidable and not void ab initio. Does the fact that the statutory prohibition has been incorporated in the order appointing the guardian, clothe the prohibition with a quality which it does not otherwise possess? In other words, is the lower Appellate Court right in holding that though the statute says that the transaction shall be voidable, it is nevertheless void as what has been infringed is the prohibition specially imposed by the order? The order must be taken to have done nothing more than embody the rule laid down in the Section, for, that is the most effective way of bringing the rule to the notice of the guardian. When the statute says that the transaction shall be voidable, it is difficult to hold that merely because the rule is copied in the order of the

Court, it can have the effect of producing a different legal result. We must therefore hold, differing from the lower Court, that the transaction is voidable and not void.

But does this advance the plaintiff's case? It is unnecessary to decide whether the words of S. 30 quoted above contemplate the avoiding of the transaction by a person other than the minor. There are certain matters which have since transpired, of which we think we are bound to take notice. The ward in question has attained majority and has avoided the transaction in the most unequitable way; he has repudiated his guardian's act and has filed a suit himself for the recovery of the mortgage money. Art. 44, Limitation Act, provides that a suit to set aside a transfer of this sort by a ward who has attained majority, should be brought within a certain period. If the ward should allow this period to elapse without bringing the suit, what would be the legal consequence? Taking the present case, would the plaintiff acquire, after the expiry of the period mentioned, an indefeasible right to the mortgage in virtue of S. 28, Limitation Act? In the circumstances that have happened, this question does not arise for decision. Here, that the transaction has been repudiated, is beyond controversy. It is far from correct to say that a minor cannot repudiate a transfer except by filing a suit under Art. 44: Trevelyan on Minors, Edn. 5, page 202; 38 Mad 867[1] at page 877. It will be noticed that the statute makes the transaction voidable, it being unnecessary to enquire whether it was beneficial to the minor or not.

What then is the position? There are two suits filed to enforce the mortgage; one by the assignee, i. e., the present action, and the other by the quondam minor. It is perfectly clear that both the suits cannot be decreed and it seems to us equally plain that the plaintiff cannot ask us to recognize his transfer when in fact the minor, at whose instance it is voidable, has in fact avoided it. It is said that if the minor's estate has been benefited, the benefit must be restored to the assignee before the transaction can be set aside. This is a question which arises, if at all, in the suit which has since been brought. In this connexion we cannot help remarking that the plaintiff's conduct has been most obstructive. In the present action there were two attempts made to bring the ward on the record, one of them having been after he had attained majority. Owing to the plaintiff's opposition which we must characterize as most unwise, both the attempts failed. In the result, the second appeal is dismissed with the costs of the mortgagors or their legal representatives (one set).

C.R.K./D.S. *Appeal dismissed.*

1. Muthukumara Chetty v. Anthony Udayan, (1915) 2 A I R Mad 296=24 I C 120=38 Mad 867=29 M L J 617.

---

* A. I. R. 1938 Madras 823

VENKATASUBBA RAO J.

Addepalli Venkata Gurunadha Ramseshayya — Appellant.

v.

Vissamsetti Venkatarathnam and others — Respondents.

Second Appeal No. 223 of 1934, Decided on 5th April 1938, against decree of Sub-Judge, Bezwada in A. S. No. 166 of 1932.

*** Limitation Act (1908), S. 12—"The time requisite"—Meaning explained—Day on which copy is notified to be ready should be excluded.**

What is "the time requisite" would depend upon what in the circumstances is reasonably requisite. Although the word "requisite" is a strong word and may be regarded as meaning something more than the word "required," the idea of reasonableness is inherent in the word; it means nothing more than "properly required." It is therefore consonant to reason that the day on which the copy is notified to be ready should be excluded: *A I R 1928 P C 103; 8 M L J 148 and 25 M L J 354, Rel. on; 13 Cal 104 (F B), Disting.* [P 824 C 1]

V. Satyanarayana — *for Appellant.*

K. Kameswara Rao and P. Satyanarayana — *for Respondents.*

Judgment. — I am surprised that the lower Court has been able to persuade itself that the appeal was out of time. The following statement of facts brings out the point to be decided:

In the present case application for copy was made on 26th August 1932. Copy was ready on 12th October 1932. The interval between 26th August 1932 and 12th October 1932 is 47 days. He is entitled to deduct that. Balance is 31 days. Appeal was therefore filed one day too late. Learned counsel for appellant contends that both days, 26th August 1932 when copy was applied for and 12th October when the copy was ready, should be excluded as time requisite for obtaining the copy.

Section 12, Limitation Act, says that in computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced

and the time requisite for obtaining a copy of the decree appealed therefrom shall be excluded. The simple question is, what is meant by "the time requisite for obtaining a copy of the decree?" Is the day on which the copy was notified to be ready, to be excluded or not? There is a rule promulgated by the High Court to which my attention has been drawn, which says in terms that not only the day on which the copy is applied for, but also that on which it is ready for delivery, should be excluded in the appellant's favour. (H. O. C. No. 2740 dated 9th October 1885). It is unnecessary to inquire whether this rule is ultra vires or not, as I do not propose to rest my judgment upon it, for, I am satisfied that this is a rule which accords with the reason of the thing. In the absence of such a rule, the Court would have to embark upon an inquiry, at what hour of the day was the fact that the copy was ready notified? What is "the time requisite" would depend upon what in the circumstances is reasonably requisite. Although the word "requisite" is a strong word and may be regarded as meaning something more than the word "required," the idea of reasonableness is inherent in the word; it means nothing more than "properly required" as has been held by the Judicial Committee in 6 Rang 302[1] at page 313. It therefore follows that it is consonant to reason that the day on which the copy is notified to be ready, should be excluded. There are two cases of our Court directly in point, which support the view I have taken, 8 M L J 148[2] and 25 M L J 354.[3] I fail to see how 13 Cal 104,[4] on which the lower Court professes to act, is in the least applicable. In the first place, the point that was decided there is entirely different from the one that now arises; secondly, a close perusal of the judgment will show that it mattered little whether the period excluded was reckoned as eight days or as nine days, in either event the appeal would have been in time. If the appeal were in time, it is common ground that the lower Court was bound to hear the memorandum of objections also. In the result the decision appealed against is set aside and the lower Court is directed to hear both the appeal and the memorandum of objections on their merits. In my opinion the Court was to blame and not either of the parties, I therefore make no order as to costs. The court-fee on the memorandum of appeal will be refunded.

C.R.K./D.S. *Decision set aside.*

1. Jijibhoy N. Surty v. T. S. Chettiar Firm, (1928) 15 A I R P C 103=109 I C 1=6 Rang 302=55 I A 161 (P C).
2. Ramanchetti v. Kadirvelu, (1898) 8 M L J 148.
3. Ramaswamy Chetty v. Ramanathan Chetty, (1913) 25 M L J 354=21 I C 192=1913 M W N 805.
4. Beni Madhub Mitter v. Matungini Dassi, (1886) 13 Cal 104 (F B).

A. I. R. 1938 Madras 824

VENKATARAMANA RAO J.

Chella Sodemma — Petitioner.

v.

Pullale Krishnamurthy and another — Respondents.

Civil Revn. Petn. No. 1241 of 1936, Decided on 21st March 1938, from order of Sub-Judge, Amalapuram, D/- 21st September 1936.

Court-fees Act (1870), S. 7, Cl. 4-A (as amended in Madras in 1922)—Word 'securing' — Construction — Suit by widow for cancellation of deed executed by her in favour of adopted son — Deed reciting fact of adoption and confirming his existing rights but not itself securing any property to adopted son — Deed does not come under S. 7, Cl. 4-A and does not require cancellation.

The word 'securing' cannot be construed as acknowledging a right or a liability because having regard to the scope and object of the enactment it has to be construed strictly. Again, a document which requires cancellation must be one which, if allowed to be outstanding without challenge, would operate as a bar to the enforcement of a right or remedy that one may have in regard to a property. A document wherein a person admits the right of another or acknowledges his liability will not come under this category because it may be open to a party to show that the admission or acknowledgment was made under a mistake. The document which is sought to be set aside must of itself have secured the property, that is, there must have been a conveyance of the said property or a release of rights thereunder which would operate as an extinguishment of the right of the person conveying or releasing. A document executed by a widow in favour of an adopted son not securing any property to the adopted son but only confirming his existing right to and enjoyment of it, is not a document in and by which any property is secured in favour of the adopted son within the meaning of S. 7, Cl. 4-A and it does not therefore require to be set aside : *A I R 1929 Mad 668, Expl.* [P 826 C 1, 2 ; P 827 C 1]

Ch. Raghava Rao and V. V. Sastri — *for Petitioner.*

K. Bhimasankaran and Government Pleader — *for Respondents.*

Order. — The question in this civil revision petition relates to the amount of

court-fee payable on the plaint in O. S. No. 42 of 1934 on the file of the Sub-Court of Amalapuram. From a perusal of the plaint it will be seen that the substance of the plaintiff's claim was to have it declared that defendant 1 was not adopted to her husband. She also prayed that a certain deed dated 25th August 1933 executed by her in favour of defendant 1 should be declared void and cancelled. The case of the plaintiff is that her husband died issueless in 1919, that she was in peaceful enjoyment of the properties ever since, that in 1922 she entrusted the management of all her affairs by executing a power of attorney to her own brother Bindhu Madhava Rao, defendant 2 in the suit, that taking advantage of the said power of attorney, a deed of adoption was fraudulently brought about by him purporting to have been executed by her on 12th May 1922 wherein it was falsely recited that she adopted defendant 1 in pursuance of an authority conferred on her by her husband under his last will and testament dated 16th June 1919, that she never in fact adopted defendant 1 and therefore defendant 1 could not be her adopted son and that the deed dated 12th May 1922 was of no effect. She further alleged that she filed a complaint against defendant 1 and others for their having entered into the house she was in occupation of and for depriving her of certain properties; but that case was dismissed and when she was about to file a revision petition, her brother in whose favour she gave the power of attorney, and others dissuaded her from filing the revision petition and in settlement of that dispute she was made to execute a document on the representation that that document was only a settlement of that criminal dispute, and believing in that representation she executed the same and therefore the recitals therein could not be said to be binding on her. The specific charge she made in respect of the document runs thus :

> The deed dated 25th August 1933 was executed by her on the representation of the accused in C. C. No. 15 of 1933. She did not consent to any of the recitals now found in that deed. Recitals therein regarding adoption of defendant 1 are totally false and the plaintiff was unaware of the recitals therein contrary to the representation by the accused in C. C. No. 15 of 1933. As the deed was executed owing to the fraud and misrepresentation practised on her by the accused in C. C. No. 15 of 1933, it was void in law and unenforceable and hence liable to be cancelled.

She valued her reliefs thus. In regard to the relief for a declaration that defendant 1 is not her adopted son she valued the relief at Rs. 8000 and paid a court-fee of Rs. 100 under Art. 17 (a) (iii), Court-fees Act, and in regard to her relief as to cancellation of the deed dated 25th August 1933 she valued it at Rs. 1000 and paid a court-fee of Rs. 112.7.0. The learned Subordinate Judge found that the market value of both the moveable and immovable properties which will be affected by the declaration as to the status of defendant 1 would be about Rs. 50,000 and decided that a sum of Rs. 500 should be paid for the declaration in respect of the adoption and he accordingly directed the plaintiff to pay the excess court-fee of Rs. 400. In regard to the relief of cancellation of the deed dated 25th August 1933 he came to the conclusion that as the property covered by the deed would also be over Rs. 50,000 the relief should have been valued under S. 7, Cl. 4-A, Madras Amendment Act, and he decided that a sum of Rs. 1792-7.0 should have been paid and accordingly directed that the balance of Rs. 1680 should be paid. This revision petition has been filed by the plaintiff to canvass this order of the learned Subordinate Judge.

So far as the court-fee leviable on the relief as to the status of defendant 1 is concerned, the learned Subordinate Judge's view is correct and his decision has not been seriously challenged by Mr. Raghava Rao appearing on behalf of the plaintiff. The other question remaining for decision is whether the view of the learned Subordinate Judge as regards the levy of court-fee on the relief as to the cancellation of the deed dated 25th August 1933 is correct. It is contended by Mr. Raghava Rao that S. 7, Cl. 4-A, Court-fees Amendment Act, would not apply to the case and even if it does, the court-fee paid by the plaintiff is sufficient. The said S. 7, Cl. 4-A runs thus :

> In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject matter of the suit, and such value shall be deemed to be, if the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document executed, if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property.

The question in this case is, does the deed dated 25th August 1933 secure property of the value of about Rs. 50,000 within the meaning of the said Section? The Section is not happily worded and does not

seem to have been drafted with the object of settling the conflict of decisions regarding the cancellation of deeds or clarifying the law on the point. It is unfortunate that the Legislature, whose object must be to enact provisions in as clear a language as possible, has not chosen to do so but has given room for confusion and consequent litigation. It is high time that the Legislature should intervene and remove the anomalies and difficulties in the interpretation of the several Sections of the Court-fees Act and place on the Statute book an enactment which will be a sure and certain guide both to the public and to the Courts in the matter of court-fees. What has to be determined for the purpose of deciding the case is the correct interpretation to be given to the word 'securing' occurring in the Section. The ordinary dictionary meaning of the word 'secure' is to make safe or to confirm or make certain the possession and enjoyment of rights or privileges. An acknowledgment of a right or a liability may in a sense be said to make certain or safe the right or liability acknowledged ; but it seems to me to construe the word in that wide sense would work hardship on a litigant and having regard to the scope and object of the enactment it has to be construed strictly. The prayer of cancellation under the law is obligatory only in cases where a person is a party to a document or where, even though not a party, the law would make him liable as if he were a party. Again, a document must be one which, if allowed to be outstanding without challenge, would operate as a bar to the enforcement of a right or remedy that one may have in regard to a property. A document wherein a person admits the right of another or acknowledges his liability will not come under this category because it may be open to a party to show that the admission or acknowledgment was made under a mistake, that is, documents which are of evidentiary value and might even estop a party from stating facts contrary to those alleged by him in the document, are documents which do not require to be cancelled or set aside. Therefore the documents which require to be set aside are documents whereby rights are transferred or released, such as sales, gifts, leases, mortgages, or releases.

Even releasing might sometimes require to be set aside because rights are in a way transferred thereunder and so long as the deed of release stands, it may preclude a party from setting up the right released till it is set aside. The case in A I R 1929 Mad 668,[1] decided by Venkatasubba Rao J. is a case of release. I am referring to that case because Mr. Srinivasa Iyengar on behalf of the Government Pleader relied on that decision for the interpretation of the word "secure" where the learned Judge referred to the Oxford Dictionary and stated that it might mean 'to make the tenure of a property secure to a person'. Of course the decision in that case is correct because the tenure of property was rendered secure by the deed of release and until that deed was set aside, the person who executed it was completely bound by it. It seems to me that the document which is sought to be set aside must of itself have secured the property, that is, there must have been a conveyance of the said property or a release of rights thereunder which would operate as an extinguishment of the right of the person conveying or releasing. The question is whether the document dated 25th August 1933 fulfils this description.

So far as the adoption is concerned, it is alleged to have taken place on 12th May 1922 and the deed of adoption is alleged to have been executed on the said date. Once there is an adoption, it follows that the adopted son gets all the rights in the property of the adoptive father. The document dated 25th August 1933 recites the fact of adoption and the deed of adoption. The document further recites that all the properties of the adoptive father were transferred in favour of the adopted son and he has been enjoying all the moveable and immovable properties of the adoptive father and collecting debts due to the estate and getting renewals of debt bonds in his name and leasing out the lands and collecting the rents therefrom with absolute rights without any disturbance whatsoever from any corner. It will thus be seen that no property or right is secured under this document but it merely recites the fact that all the properties of the adoptive father were already secured to the adopted son. The document further goes on to say, that it is not desirable that the mother and son should quarrel with each other but that thereafter should live peacefully in accordance with the terms of the will executed by the deceased husband of the plaintiff. The document says that defendant 1 was

1. Doraiswami Reddiar v. Thangavelu Mudaliar, (1929) 16 A I R Mad 668=119 I C 38.

the adopted son and that he can continue litigations which were hitherto being carried on by her on behalf of the estate. The only item in respect whereof any property was secured or any right to any property could be said to have been released is in regard to a house in the possession of the plaintiff. In regard thereto the document runs thus :

Sodemma Garu of us entitled to the house purchased from Rackakonda Sivaramayya of Narendrapuram and described within the boundaries hereunder in Narendrapuram, in the sub-registration District of Kottapeta, with all rights of gift, sale, etc.

Of course this is a right released by defendant 1 in favour of the plaintiff and it is not the object of the plaint to have that release cancelled, and even if it be assumed that she does require a cancellation in regard thereto, the court-fee paid would be sufficient. Any cancellation which is required must be with reference to the property other than the said house. As I have already shown, the document does not secure any property to the adopted son but only confirms his existing right to and enjoyment of it. In my opinion, it is therefore not a document in and by which any property is secured in favour of defendant 1 within the meaning of S. 7, Cl. 4-A and it does not therefore require to be set aside. I therefore set aside the order of the learned Subordinate Judge in so far as he directs the payment of an additional court-fee regarding the second prayer in the plaint. I make no order as to costs.

C.R.K./D.S. *Order partly set aside.*

A. I. R. 1938 Madras 827

VENKATASUBBA RAO AND
ABDUR RAHMAN JJ.

Sithu N. R. Kuppuswami Ayyar — Appellant.

v.

Sithu M. Subba Ayyar and others — Respondents.

Appeal No. 296 of 1933, Decided on 14th February 1938, against decree of Sub-Judge, Madura, D/- 13th March 1933.

Co-owners — Ouster — On partition among brothers house allotted to *A* and *B* — House occupied by both — *B*'s subsequent conduct held amounted to ouster of *A*, and *B* held liable to pay rent for *A*'s half-share from date of ouster till cessation of ouster.

Among three brothers there was a partial partition and the suit house was allotted to *A* who was the adopted son of one of the brothers and *B*. There were proceedings about the custody of the minor *A* and eventually his adoptive mother was appointed the minor's guardian. Both the branches of the family, i. e. *A*'s branch and *B*'s branch, were in occupation of the suit house till *A*'s mother, finding it irksome to live under the same roof as her brother-in-law *B*, left the house. Subsequently she wishing to return to the suit house applied to the Court on behalf of the minor that she should be permitted to open a new gateway, so that her portion might be quite distinct from *B*'s portion of the house. *B* opposed the application and in doing so, averred that in the house two families could not conveniently reside and went on to say that *A*'s mother ought not to be allowed to live in the suit house :

Held that *A* and *B* were co-owners and *B*'s conduct afforded clearest possible evidence of exclusion, amounting to an ouster in law. Hence *B* was liable to pay rent for *A*'s half-share in the house in question from the date of ouster to the date on which the ouster ceased. [P 828 C 1, 2]

M. Patanjali Sastri and N. R. Govindachari — *for Appellant.*

K. Rajah Ayyar for N. Rajagopala Aiyengar — *for Respondents.*

Venkatasubba Rao J.—The dispute is the result of an unseemly squabble and the question that now arises for decision is a very simple one. There were three brothers, Nagaswamier, Ramier and Subbier, of whom the last-mentioned person is the defendant. Nagaswamier died on 8th February 1919, and the plaintiff who was the natural born son of Subbier was adopted by Nagaswamier's widow Swarnammal on the day following her husband's death, i. e. 9th February 1919. At the time the plaintiff was about 13 years old and the adoption was the prelude to a protracted quarrel between Swarnammal on the one hand and her two brothers-in-law, Ramier and the defendant, on the other. The plaintiff was siding in those quarrels with his father and uncle, but that fact can and ought to have no bearing on the issue to be decided; the attitude of the minor and his likes and dislikes are matters which are irrelevant to the question. Unfortunately in the lower Court the learned Judge allowed his mind to be swayed by the plaintiff's attitude and wrote what we regard a laboured judgment. About two months after the adoption there was a partial partition and the suit house was allotted to the plaintiff and the defendant. There were proceedings about the custody of the minor plaintiff and eventually on 12th July 1920 Swarnammal was, in spite of opposition, appointed the minor's guardian. Both the branches of the family, i. e. the plaintiff's branch and the defendant's branch, were in occupation of the suit house till Swarnammal,

finding it irksome to live under the same roof as her brother-in-law, the defendant, left the house in July 1919. In November 1920 Swarnammal made an application to the District Court in the guardianship petition. The statements and counter-statements made in that petition are very important, and the question really to be considered is, what is the effect of those proceedings? Swarnammal wishing to return to the suit house applied to the Court, that she should be permitted to open a new gateway, so that her portion might be quite distinct from the defendant's portion of the house. The defendant opposed the application and in doing so averred that in the house two families could not conveniently reside and went on to say that Swarnammal ought not to be allowed to live in the suit house. There was an account relating to a certain partnership, and the defendant in the course of his statement made the following offer :

> If necessary respondent 2 (the defendant) is prepared to credit in the minor's account any reasonable rent which can be realized from his half-share in the house.

On this the petition by Swarnammal was dismissed by the Court. There are two things that here require notice : first, that Swarnammal in making the application most clearly declared that she was doing so on behalf of the minor and his estate, and secondly, that she applied to be released from the obligation of giving security before entering upon her duties, but the defendant's objection to her residing in the house had no connexion whatever with that part of her request. The position then is shortly this : The plaintiff and the defendant being co-owners, unless it can be shown that the plaintiff was excluded, the defendant cannot be made liable for rent. The defendant's conduct, to which we have referred, affords in our opinion clearest possible evidence of exclusion, amounting to an ouster in law. We must therefore hold that from 8th November 1920 (the date of Ex. D. Swarnammal's petition) the defendant is liable to pay rent, for the plaintiff's half-share in the house in question excluding room No. 4 which the plaintiff is willing to exclude; in other words room No. 4 is a part of the plaintiff's half and in computing the rent for that half, room No. 4 should be excluded.

The next question that arises is up to what date is the rent payable. Ramier died in December 1926 and in March 1927, just on the eve of the plaintiff attaining majority (completing 21 years), there was some attempt made to put an end to the quarrels. At that time according to the plaintiff there was an arrangement between him and the defendant that the latter should be in occupation of his (the plaintiff's) moiety and pay a reasonable rent. He took possession of room No. 4 which till then had been locked up, whitewashed some portions of the house and entered into the arrangement referred to above. The lower Court has found that this specific agreement of lease set up is untrue, but the fact remains, that on the plaintiff's own showing exclusion had then ceased; and according to him, after he became a major in about two months thereafter, the arrangement was ratified and continued to remain in force. We must therefore hold that the period for which the defendant is liable to pay rent for the portion already indicated, is from 8th November 1920 (the date already mentioned) to 11th May 1927 (when the plaintiff attained majority). Ouster having ceased to exist from the last mentioned date, the liability of the defendant (the co-owner) for rent comes to an end from that day.

On what would be the proper rent, the lower Court has given no finding and the case will be therefore remitted for an enquiry into that matter. The lower Court will give a finding on the point referred to above, both parties being at liberty to adduce evidence. The plaintiff will be debited with a moiety of the taxes paid in respect of the house. His counsel however suggests that the plaintiff has been debited with these taxes in the partnership account which is the subject of O. S. No. 67 of 1930 and if this be so, it goes without saying that there will be no double deduction. The defendant will not be allowed credit for any other outgoings, such as for repairs. The finding will be returned in one month; time for objections is ten days. Then remains the question of costs. Both the plaintiff and the defendant are to blame and the suit was in form a partition suit. We direct that the costs of both the parties in the Court below shall be added and one moiety of the total costs shall be borne by the plaintiff and the other by the defendant. In this Court each party will bear his costs.

C.R.K./D.S. *Case remitted.*

A. I. R. 1938 Madras 829

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

B. K. Muthurama Aiyar — Appellant·

v.

S. Krishna Aiyar and others —
Respondents.

Appeal No. 150 of 1932, Decided on 11th October 1937, against decree of Sub-Judge, Tanjore, in O. S. No. 4 of 1930.

(a) Guardians and Wards Act (1890), S. 35 — Security bond by guardian — Assignment to new guardian — Liability secured by charge of immovable property — Not only mere right to sue but charge is also assigned — Assignment is only as trustee of ward and hence assignee is bound to surrender bond to ward on attaining majority.

The assignment contemplated under S. 35 is to enforce a liability which has accrued and the assignee therefore does not get a mere right to sue and when the liability is also secured by a charge of immovable property the charge is also assigned along with the liability. The assignee under the terms of S. 35 is entitled to enforce the liability and the charge therefor as if the bond has been executed in his favour. But he does this only as a trustee for the ward; in substance the assignment is in trust for the ward who is entitled to the beneficial interest under the bond. Therefore the assignee being only a trustee for the ward is bound to surrender the property to him as soon as the office of his trusteeship ceases. [P 831 C 1, 2]

(b) Hindu Law — Debt — Liability of son for surety debt created by father.

Under the Hindu law, a son is under a pious obligation to pay a surety debt only in certain cases, namely for moneys lent for goods supplied to the principal debtor. [P 832 C 1]

(c) Hindu Law — Debts — Son's liability — Ancestral property — Mortgage or charge over antecedent debt or necessity must be proved.

Before the share of a son can be rendered liable in enforcement of a charge or mortgage executed by a father over the joint family property, it must be shown that there was a debt or obligation antecedent to the charge or mortgage or the charge was created for a valid family necessity. [P 832 C 1]

T. R. Venkatarama Sastry and K. S. Sankara Iyer — *for Appellant.*

K. S. Desikan and T. K. Subramania Pillai — *for Respondents.*

Venkataramana Rao J. — This appeal arises out of a suit instituted by the plaintiff to recover a sum of Rs. 5942 on the basis of a security bond dated 19th December 1928 executed by defendant 1 and certain other persons as sureties for him in favour of the District Judge of Tanjore for the fulfilment of his duties as guardian of the plaintiff during his minority in pursuance of an order of Court dated 10th December 1918 under the Guardians and Wards Act. Defendant 1, on his assumption of office as guardian, made an application to the Court for directions as to the investment of moneys of his ward and he was directed to invest them either in the Negapatam Branch of the Madras Bank or in the Tanjore Permanent Fund. Contrary to this express direction, defendant 1 lent a sum of Rs. 4500 on 2nd January 1921 to one Sivarama Aiyar, who is no other than the son-in-law of one of his brothers on the security of a promissory note bearing the said date. Defendant 1 was removed from his office as guardian subsequent to the date of this note and one Srinivasa Aiyar was appointed guardian of the plaintiff in his stead. He submitted a report to the Court stating that large sums of money had been lent on doubtful securities to several persons and prayed for directions in regard to the procedure that he should adopt in regard to them. The District Judge directed him to take steps to recover those doubtful debts observing at the same time, "if the said debts cannot be recovered, the question of Mr. Krishna Aiyar's (defendent 1's) liability will be considered". On going into the nature of each of these debts, Mr. Srinivasa Aiyar found that the promissory note executed by Sivarama Aiyar was not duly stamped and that there would be considerable difficulty in enforcing it. He therefore made a request to the Court that defendant 1 should be directed to account to the estate for the amount. In the course of the proceedings, defendant 1 filed an affidavit alleging that there would be no legal bar for recovery of the amount lent and enclosed with it a letter by Sivarama Aiyar to defendant 1 wherein he admitted his liability for the said debt. The learned District Judge thereupon passed an order that Srinivasa Aiyar, the guardian, might, if so advised, institute a suit to recover the amount in consultation with defendant 1 and that if the suit should be dismissed it would then be time to consider the question of the liability of defendant 1 to the estate.

In spite of this order, Srinivasa Aiyar did not think it advisable to institute a suit to recover the amount, as he found that the financial status of the executant of the note was very doubtful. He made an application to the District Court that in the circumstances mentioned by him in his affidavit dated 12th April 1923 defendant 1 might be directed to deposit the amount of the pronote into Court and defendant 1 might

take back the pronote duly endorsed in his favour. Defendant 1 declined to take the promissory note and insisted upon a suit being filed. Ultimately the learned District Judge passed an order on 4th December 1924 directing defendant 1 to deposit the money into Court within a month from the said date and in default thereof directed Srinivasa Aiyar, the then guardian, to apply for the assignment of the security bond. Defendant 1 committed default in the payment of the money. Thereupon Srinivasa Aiyar made an application to the District Court praying that the security bond might be assigned to him for recovery of the sum of Rs. 4235 with interest thereon. An order was made directing the assignment, and the bond was duly assigned in his favour, and that is Ex. L in the case. The assignment is dated 12th March 1925. Srinivasa Aiyar did not take any steps on the strength of that assignment, but as soon as the plaintiff attained majority, he assigned the said bond to him on 26th March 1929. The present suit has been instituted on the strength of that assignment for recovery of the money with interest thereon personally from the defendants and by sale of the properties secured thereunder. There are 22 defendants in the suit and defendant 21 has been exonerated on the ground that he disclaimed all interest in the suit property. Besides defendant 1, the other executants of the suit bond, who stood as surety for him, were his father Swaminathar Aiyar, his undivided brothers Subramania Aiyar, Narayanaswami Aiyar and Kothandarama Aiyar and two of his undivided nephews, namely Muthukrishna Aiyar, son of Subbarama Aiyar, a deceased brother of his and Ramachandra Aiyar, son of another deceased brother.

On the date of the suit, all the executants of the document excepting Muthukrishna Aiyar were dead but their sons and grandsons have been impleaded as parties to the suit. Defendants 6 to 9 are the sons of defendant 1. Defendant 2 is the widow of Swaminatha Aiyar. Defendant 3 is the son of Subramania Aiyar and his sons are defendants 10 and 11. Defendant 4 is the widow of Narayanaswami Aiyar and defendant 5 is the son of Kothandarama Aiyar. Defendant 12 is the son of Ramachandra Aiyar. Defendants 14 to 22 are impleaded as being the alienees of various items of the suit property subsequent to the date of the security bond. In the security bond, in addition to the personal liability, the properties belonging to the joint family of the executants were also given as security. The amount secured under the bond was a sum of Rs. 8000 and the condition in the bond was such that

> if defendant 1 shall duly account for all the moveable property and for all sums of money which he shall receive on account of the moveable and immovable properties of the minor and the rents, profits and other incomes thereof at such periods as the Judge shall appoint and shall duly pay or dispose of the balances in his hands, then the bond shall be void and of no effect. Otherwise it shall remain in full force.

Therefore the bond is conditioned for the due performance of the duties of defendant 1 as guardian. Various defences were raised by the several defendants in the suit. The one common defence is that the plaintiff is not entitled to sue on the strength of the security bond on the ground that Srinivasa Aiyar had no right to assign the bond in favour of the plaintiff. Defendant 1 contended that Srinivasa Aiyar omitted to sue Sivarama Aiyar on the promissory note and that he should be made liable for his failure to do so. Some of the defendants, who are members of the family of defendant 1, raised a defence that the security bond was not binding on them. The specific defence raised by them was that it was not executed for necessity or family benefit by the manager of the joint family or for discharge of antecedent debts: vide para. 3 of the written statement of defendants 8 and 9. They as well as the alienees further raised a plea that the executants who are sureties must be deemed to have been discharged on the ground of omission on the part of Srinivasa Aiyar and the plaintiff to sue Sivarama Aiyar on the note and also by reason of the delay in the institution of the suit which has imperilled their rights against defendant 1. Various issues were raised but they have not been raised with a true and correct appreciation of the points in controversy between the parties. The learned Subordinate Judge took the view that the plaintiff was not entitled to sustain this claim on the basis of the security bond and declined to give him any relief based on the bond; but he however gave a decree against defendant 1 and his undivided sons defendants 6 to 9 on the ground that as guardian he was liable to account for the improper disposal of the moneys which came into his hands. This appeal has been preferred by the plaintiff on the ground that on the facts as found by the learned Judge, the view taken

by him that the plaintiff has no right to sue on the security bond is wrong and that he ought to have been given a decree against all the defendants in the suit by ordering sale of the properties secured under the bond.

The learned Subordinate Judge was of the opinion that the assignment by the District Judge in favour of Srinivasa Aiyar only conferred upon him a right to sue and such a right to sue could not be transferred in favour of the plaintiff, especially after the minor attained majority and Srinivasa Aiyar ceased to be his guardian. It seems to us that this view is unsound and the learned Judge has misread the provisions of the Guardians and Wards Act and not correctly appreciated the terms of the security bond and the liability secured thereunder. Under the terms of the bond, the executants are liable in the sum of Rupees 8000 on the security of the properties described in the bond. The obligation comes into force the moment there is failure to account for the moneys received by defendant 1. The bond therefore secures a contingent liability and the executants bound themselves personally and also on the security of their property. Under the law, a property can be secured by way of a charge or mortgage for the due fulfilment of a liability to arise in future or performance of an engagement which may give rise to a pecuniary liability: vide S. 58, T. P. Act. It is immaterial to consider whether the security bond creates only a charge or a mortgage. Of course, the bond is duly attested by witnesses and satisfies the conditions necessary to constitute a simple mortgage. Similar security bonds have been construed as mortgage bonds: vide 26 Cal 246[1] and 32 Cal 494.[2] Under S. 35, Guardians and Wards Act, the Court, as soon as an application is made to it that the engagement of the bond has not been kept and that the guardian has not duly accounted for the moneys he has received, and after being satisfied that it is so, is empowered to assign the bond to some proper person for the enforcement of the liability which has come into force by reason of the failure to perform the obligation under the bond. The assignment contemplated under Section 35 is to enforce a liability which has accrued and the assignee therefore does not get a mere right to sue, and when the liability is also secured by a charge of immovable property, the charge is also assigned along with the liability. The assignee under the terms of S. 35 is entitled to enforce the liability and the charge therefor as if the bond has been executed in his favour. But he does this only as a trustee for the ward; in substance, the assignment is in trust for the ward who is entitled to the beneficial interest under the bond. Therefore the assignee being only a trustee for the ward is bound to surrender the property to him as soon as the office of his trusteeship ceases.

In this case the ward having attained majority and the office of guardianship having terminated, he is bound to surrender the bond to the beneficiary, his ward. The assignment therefore in favour of the plaintiff was only in fulfilment of the duty Srinivasa Aiyar was under to hand over all the property of his ward to him. Whether it is competent to such an assignee to assign it to a stranger is a question which does not arise in this case and it is therefore unnecessary to pronounce an opinion on that question. The assignment being in favour of the beneficiary is perfectly valid. Therefore the ground on which the learned Judge declined to give relief cannot therefore be sustained. The plaintiff is therefore entitled to sustain his claim and get relief on the basis of the security bond. But in the view that the lower Court has taken, it has not satisfactorily dealt with the other questions which relate to the liabilities of the sureties and their representatives which properly arise on the pleadings. The plea raised in the case is that the sureties are discharged by reason of certain acts or omissions on the part of the plaintiff and his late guardian Srinivasa Aiyar. Their complaint on this behalf is that there has been an omission to sue Sivarama Aiyar on the pronote and that there has been undue delay in the institution of this suit which is alleged to be deliberate. The learned Judge has found that there was a breach by defendant 1 in lending the money to Sivarama Aiyar and this finding has not been and could not be disputed before us. Therefore the question arises whether the guardian was bound to institute a suit on the promissory note and when especially he finds the security doubtful and the realization of the money uncertain, or whether he was not right in

1. Girindra Nath v. Bijoy Gopal, (1899) 26 Cal 246=3 C W N 84.
2. Tokhan Singh v. Girwar Singh, (1905) 32 Cal 494=9 C W N 372=1 C L J 118.

putting in a petition to direct defendant 1 to deposit the money into Court and the order of the Court in this behalf was not proper. On this, a further question arises whether by reason of the omission the sureties could in any way be said to be discharged.

In regard to the obligation of some of the defendants, the question also arises as to the binding nature of the liability sought to be secured under the bond. Under the Hindu law, a son is under a pious obligation to pay a surety debt only in certain cases, namely for moneys lent or for goods supplied to the principal debtor. The crucial question therefore in this case is whether the sons and grandsons of the executants can be rendered liable under the bond in question. Again, before the share of a son can be rendered liable in enforcement of a charge or mortgage executed by a father over the joint family property, it must be shown that there was a debt or obligation antecedent to the charge or mortgage or the charge was created for a valid family necessity. No issues were raised in regard to these matters and no decision given thereon. In considering this question, a question will also arise as to when the various executants died and whether the obligation did ripen under the bond before they died. So far as the alienee defendants are concerned, it has to be established that they took their transfers in their favour with notice of the charge created under the security bond. We therefore feel that for a proper and satisfactory disposal of the case these points should be considered. We accordingly set aside the decision of the learned Subordinate Judge in so far as he dismissed the suit against the other defendants or refused to give any relief to the plaintiff against defendant 1 and his sons on the basis of the security bond and remand the case for determination and decision on the following issues : (i) Whether the plaintiff's guardian Srinivasa Aiyar was bound to sue Sivarama Aiyar on the promissory note. (ii) If the question is answered in the affirmative, was the omission by Srinivasa Aiyar or by the plaintiff to sue Sivarama Aiyar such as to discharge the liability of the sureties under the bond? (iii) Did the delay in the institution of the suit operate as a release of the sureties under the bond ? (iv) Is the security bond valid and enforceable against defendants 3 to 12 ?; and pass the appropriate decree as a result of his findings thereon. The costs of this appeal will be costs in the cause and provided for in the revised decree to be passed. The plaintiff will be entitled to a refund of the court-fee paid in the appeal.

C.R.K./B.D. *Case remanded.*

---

* A. I. R. 1938 Madras 832

HORWILL J.

T. N. Borai Goudar — Petitioner.

v.

Commissioner, Ootacamund Municipality — Respondent.

Criminal Revn. Case No. 1005 and Petn. No. 940 of 1937, Decided on 4th May 1938, from order and conviction passed by Bench of Magistrates at Ootacamund, D./ 9th September 1937.

*** Criminal Trial—Transfer—Order of transfer operates from date on which it is passed—Court which continues to act after order is passed acts without jurisdiction even though order is not communicated to it—Order passed by such Court is however saved from being void by S. 531, Criminal P. C.**

The ordinary rule is that an order operates from the date on which it is passed, the rule with regard to stay proceedings and injunctions being exception to that general rule. Hence the criminal order for transfer must operate from the date on which that order is passed and any Court which continues to do any act after the order is passed, even though the order has not been communicated to it is acting without jurisdiction : *A I R 1933 Mad 627, Applied; A I R 1918 Mad 391, Disting.*

[P 833 C 1]

Nevertheless, it does not follow from the mere fact that such Court has no jurisdiction, that its order is void. S. 531, Criminal P. C., would apply to a case of this kind and so prevent the passing of this order without jurisdiction from being void unless it leads to miscarriage of justice.

[P 833 C 1, 2]

P. S. Narayanaswamy — *for Petitioner.*

N. Somasundaram for Public Prosecutor — *for the Crown.*

K. V. Muthukumaraswami for N. Gopala Menon — *for Complainant.*

Order.— The petitioner was charged before the Bench of Magistrates, Ootacamund, under Ss. 249 and 313, District Municipalities Act, for storing firewood. During the pendency of the case before the Bench, the accused put in a transfer application in the Court of the Joint Magistrate of Coonoor, who ordered the transfer of the case to the Court of the Stationary Sub-Magistrate, Coonoor. Before however that order had been communicated to the Bench Magistrates' Court, the case came

up before the Bench and on the accused's plea he was convicted and sentenced to pay a fine of Rs. 5. This petition has been filed on the ground that the Bench Court ceased to have jurisdiction after the order of the Joint Magistrate and that therefore the order of that Court is illegal.

With regard to stay applications in Civil matters it has been held by the Full Bench in 41 Mad 151[1] that the stay order operates only from the date on which the order is communicated to the Court whose proceedings are stayed. The reason seems to be that the Court having seisin of the matter in question has jurisdiction to proceed with it and that the Appellate Court in ordering stay is merely prohibiting that Court from proceeding further with the matter until further orders. But the order of prohibition does not take away the jurisdiction of the trial Court; it merely suspends it. If therefore the order has been received the Court does lose its jurisdiction because the order has been passed. It therefore follows that any act done after the order of stay is passed is still valid unless the order of the higher Court has been disobeyed. This reasoning would not however apply to an application for transfer. The ordinary rule is that an order operates from the date on which it is passed, the rule with regard to stay proceedings and injunctions being exception to that general rule. Although no authority has been quoted which deals with the date on which a criminal order of transfer operates, 56 Mad 692,[2] deals with that question with regard to civil suits. It was there held that the order for transfer must operate from the date on which that order is passed and that therefore any Court which continues to do any act after the order is passed even though a copy of the order has not been received by it, is acting without jurisdiction. The same reasoning would, I think, apply to criminal proceedings; and I am therefore of opinion that in the present case the Bench Court, when it took up the case of the accused and disposed of it had no jurisdiction to do so.

Nevertheless, it does not follow from the mere fact that the Bench Court had no jurisdiction, that its order is void. I think S. 531 Criminal P. C. would apply to a case of this kind and so prevent the passing of this order without jurisdiction from being void. The whole principle underlying the various provisions of Ch. 45 is that no order or sentence shall be void on the mere ground of some irregularity or want of jurisdiction, unless it leads to a miscarriage of justice or prejudices the accused. It seems to me in the present case that it is immaterial whether the case of the accused was considered by the Bench Court or by the Stationary Sub-Magistrate. No miscarriage of justice having occurred, this Court will not interfere in revision and set aside the order. The petition is therefore dismissed.

C.R.K./D.S. *Petition dismissed.*

1. Venkatachalapathy Rao v. Kameswaramma' (1918) 5 A I R Mad 391=43 I C 214=41 Mad 151=33 M L J 515 (F B).

2. Ademma v. Venkatasubbayya, (1933) 20 A I R Mad 627=144 I C 923=56 Mad 692=65 M L J 137.

A. I. R. 1938 Madras 833

PANDRANG ROW J.

Kista Pillai — Petitioner.

v.

Amirthammal — Respondent.

Criminal Revn. Case No. 883 and Petn. No. 827 of 1937, Decided on 28th July 1938, from order of Sub-divisional Magistrate, Ranipet, D/- 12th October 1937.

(a) Criminal P. C. (1898), S. 488—'Living in adultery' means continued adulterous conduct—It is not necessary that living in adultery must be in house of adulterer.

The clear implication from the words used by the Legislature in S. 488 is that unless the wife is actually living in adultery at or about the time of the application she is not disentitled to obtain maintenance. It is nowhere said in the Section, and there is no need to introduce additional words therein, that living in adultery must be in the house of the adulterer. The words "living in adultery" are merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by "living in adultery": *A I R 1928 Bom 59, Rel. on.*

[P 834 C 2]

(b) Criminal P. C. (1898), S. 488—Practice—Charge of "living in adultery" put forward against wife — Wife should be given opportunity of adducing rebutting evidence.

In a case of claim for maintenance, the respondent, i. e. the husband, who puts forward a charge of "living in adultery" against the petitioner i. e. wife, as his only defence to the claim for maintenance, ought to begin his case, and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence.

[P 834 C 2]

V. T. Rangaswami Ayyangar and K. A. Chakravarthi Ayyangar — *for Petitioner.*

N. Somasundaram — *for Respondent.*

Public Prosecutor — *for the Crown.*

Order.—The petitioner in this case is the husband of the respondent who has obtained an order of maintenance in her favour from the Sub-divisional Magistrate of Ranipet under S. 488, Criminal P. C. The main defence to the application for maintenance was that the petitioner was living in adultery. The learned Sub-divisional Magistrate observes on this part of the case merely that there is ample evidence that the petitioner was having illicit sexual intercourse with Chinnappa and he then goes on to quote certain observations of Newsam J. in Cri. R. C. No. 65 of 1937[1] on the file of the High Court to the effect :

> Living in adultery is something quite different from leading an unchaste life. The principle, it seems to me, is that a husband is absolved from the obligation to maintain his wife when his wife has a de facto protector with whom she lives and by whom she is being maintained as if she were his wife.

The learned Magistrate then comes to the conclusion that "under this interpretation, the sometime immoral character of the petitioner would not constitute 'living in adultery.'" The facts elicited in evidence are not merely that there was only one individual lapse or even occasional lapses from virtue but that the petitioner actually eloped with Chinnappa and lived with him in another place, viz. Wallajah, for some days, that when discovered by her husband's relations and pressed to return she refused to return and that she had to be taken by force from her paramour to her parents' house. There is also certain evidence adduced, no doubt at a late stage of the case, without giving an opportunity to the petitioner to rebut to the effect that the petitioner, even when the case was pending before the Sub-divisional Magistrate, was continuing her intrigue with Chinnappa. The learned Sub-divisional Magistrate makes no reference to this evidence, and he appears to have thought that the only evidence against the petitioner was in respect of her immoral character in the past, that is to say before the application. I am unable to say that this is a satisfactory way of disposing of a claim for maintenance either from the point of view of the petitioner or of the counter-petitioner. I am not prepared to go to the length of saying that, unless a married woman lives with the adulterer in the latter's own house and is maintained by him as a wife, the husband will be liable to pay maintenance under S. 488, Criminal P. C. Emphasis is no doubt to be laid on the words is "living in adultery". As pointed out by the Bombay High Court in 52 Bom 160,[2] the clear implication from the words used by the Legislature in this Section is that, unless the wife is actually living in adultery at or about the time of the application, she is not disentitled to obtain maintenance. It is nowhere said in the Section, and there is no need to introduce additional words therein, that living in adultery must be in the house of the adulterer. The words 'living in adultery' are, in my opinion, merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by "living in adultery." The question therefore for the Magistrate to decide in this case was whether there had been such adulterous conduct on the part of the petitioner at or about the time of the application, that is to say shortly before or shortly after the application was made, interpreting the word 'shortly' in a reasonable manner. This case has not at all been approached from this standpoint. The learned Magistrate has decided the case in a way which appears hardly to do justice to the parties. In particular, the serious allegation of subsequent adultery made in the evidence given by the last witness examined for the respondent in the Magistrate's Court should have been allowed to be contradicted or rebutted on the petitioner's side by the petitioner giving evidence on the point if she was so inclined to do or by letting in other evidence. But it does not appear that any opportunity was given to her for giving evidence on the point. My opinion is that in a case of claim for maintenance like this the respondent who puts forward a charge of 'living in adultery' against the petitioner, as his only defence to the claim for maintenance, ought to begin his case, and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence. This procedure has not been followed in this case and in my opinion the inquiry must have done prejudice to the petitioning wife.

---

1. A. T. Lakshmi Ambalam v. Andiammal, *reported in* (1938) 25 A I R Mad 66=172 I C 811=39 Cr L J 228=(1937) 2 M L J 885.

2. In re Fulchand Maganlal, (1928) 15 A I R Bom 59=108 I C 24=29 Cr L J 314=52 Bom 160=30 Bom L R 79.

In these circumstances I am of opinion that the interests of justice require that the order of the Magistrate should be set aside, and the Magistrate directed to rehear the petition after giving an opportunity to both parties to adduce additional evidence and in particular to let the petitioning wife have the last word and to dispose of the petition afresh in the light of the observations contended in this judgment.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 835

MADHAVAN NAIR AND
ABDUR RAHMAN JJ.

Naivarani Matathil Ayya Pattar — Petitioner.

v.

Krishnan and others — Respondents.

Civil Revn. Petn. No. 1695 of 1934, Decided on 25th April 1938, from order of Dist. Munsif, Payoli, D/. 17th July 1934.

(a) Madras Revenue Recovery Act (2 of 1864), S. 40—Revenue sale directed against jenmi for arrears of revenue—Sale certificate granted to purchaser—Application by purchaser under S. 40 for possession—Tenants under kanamdar claiming value of improvements—Purchaser is entitled only to symbolical possession.

Section 40 says that the purchaser shall in the circumstances mentioned therein be put in such possession as will begiven to a decree-holder under the Civil Procedure Code. [P 835 C 2]

A revenue sale was directed against a jenmi on account of arrears of revenue and it was purchased by a person. A sale certificate under S. 38, Revenue Recovery Act, was issued in his favour. It did not make any mention of kanamdar or tenants under kanamdar. When the purchaser applied for possession, tenants under kanamdar claimed the value of the improvements :

Held that the result of the sale under S. 42 was that the property became free of the encumbrance held by the kanamdar. It followed that the sale bound the jenmi and the kanamdar and not any other person directly; and therefore when the Amin went to deliver possession of the property and found that other persons were on it claiming rights he could under the Civil P. C. deliver to the purchaser only symbolical possession. Hence the purchaser was not entitled to actual possession : *1 M L J 594; 11 Mad 330 and 16 Mad 144, Expl. and Disting.* [P 836 C 1]

(b) Madras Revenue Recovery Act (2 of 1864), S. 42—Tenants under kanamdar claiming value of improvements are not holders of encumbrance.

Tenants holding under kanamdar of a property claiming a right to be paid the value of improvements made by them cannot be held to have encumbrance over the property within the meaning of Section 42. [P 836 C 1]

K. P. Ramakrishna Iyer — *for Petitioner.*

B. Pocker and A. Atchuthan Nambiar — *for Respondents.*

Madhavan Nair J. — This civil revision petition arises out of an application made by the petitioner before us under S. 40, Madras Revenue Recovery Act, for possession of the property in pursuance of a revenue sale certificate issued to him by the Collector. The facts are these. Respondent 1 is the jenmi of the property. Respondent 2 is the kanamdar. Respondents 3 to 14 are tenants under the kanamdar. The property was sold for arrears of the Government revenue due on it from respondent 1 and it was purchased by the petitioner. A sale certificate under S. 38, Revenue Recovery Act, was issued in his favour and it stated that the petitioner had purchased at a public auction the property mentioned therein when it was sold for arrears of revenue due by respondent 1. It did not make any mention of respondent 2 or of respondents 3 to 14. When the petitioner applied for possession, respondents 3 to 14 claimed the value of the improvements. The lower Court passed an order that the petitioner is entitled to symbolical possession, holding that respondents 3 to 14 are entitled to the value of the improvements.

In this civil revision petition two points are argued. The first is that the lower Court has committed an error in the exercise of its jurisdiction because it has refused to deliver actual possession to the petitioner what was delivered to him being only symbolical possession. It is contended that under S. 40, Revenue Recovery Act, under which the application was made by the petitioner for possession, the lower Court should have delivered to him actual possession. It appears to us that this argument is untenable. S. 40 says that the purchaser shall in the circumstances mentioned therein be put in possession "in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court," i. e. such possession as will be given to a decree-holder under the Civil Procedure Code will be given to the purchaser under this Section. This is the kind of possession which the purchaser is entitled to get of the property mentioned in the sale certificate. Under O. 21, R. 35, Civil P. C., actual possession will be delivered to the decree-holder by removing any person

bound by the decree who refuses to vacate the property. Under O. 21, R. 36, Civil P. C., if in execution of the decree the Amin finds that a person against whom no decree has been passed is in possession claiming right to the property, then symbolical possession only of the property will be delivered to the decree-holder. In the present case the revenue sale was directed against respondent 1 (the jenmi) and the result of the sale under S. 42, Revenue Recovery Act, was that the property became free of the encumbrance held by respondent 2. It follows that the sale bound respondents 1 and 2 and not any other person directly; and so, when the Amin went to deliver possession of the property and found that other persons were on it claiming rights he could under the Civil Procedure Code deliver to the petitioner only symbolical possession; and that is what the learned Judge in the Court below has held that the petitioner is entitled to. It follows therefore that the argument that the lower Court should in the circumstances have ordered actual possession to the petitioner is not sound in law. A few cases were cited to us in support of the petitioner's contention, viz. 1 M L J 594,[1] 11 Mad 330[2] and 16 Mad 144.[3] In none of these cases did the present question arise. In 1 M L J 594,[1] the question was simply whether the Civil Procedure Code will apply to an application under S. 40 of the Revenue Recovery Act. In 11 Mad 330[2] the question was whether the sale in that case was free of the kanamdar's rights. In 16 Mad 144[3] the question was whether a permanent lease will amount to an encumbrance or not. For the above reasons we must overrule the first point, that the lower Court should have delivered to the petitioner actual possession instead of symbolical possession.

The next point argued is that respondents 3 to 14 should be considered to be holders of encumbrance on the property since they claim the value of improvements. The argument has not been supported by any authority and we cannot, having regard to the nature of their claim which is only a right to be paid the value of improvement, hold that they have an encumbrance over the property within the meaning of S. 42, Revenue Recovery Act. In our opinion the decision of the lower Court is right and no error in jurisdiction or of irregularity in the exercise of it has been brought to our notice. The civil revision petition is dismissed with costs of respondents 7 and 8.

C.R.K./D.S. *Petition dismissed.*

1. Chidambaram v. Natesan, (1891) 1 M L J 594.
2. Kelan v. Manikam, (1888) 11 Mad 330.
3. Narasimha v. Suryanarayana, (1893) 16 Mad 144.

A. I. R. 1938 Madras 836

LEACH C. J. AND MADHAVAN NAIR J.

Puthiya Veettil Moideen's son Ahammu — Appellant.

v.

Patiyath Ayidross Haji's son Kunhu Muhammad Haji and others — Respondents.

Appeal No. 182 of 1932, Decided on 12th November 1937, against decree of Sub-Judge, South Malabar at Calicut, in O. S. No. 41 of 1929.

Limitation Act (1908), Art. 132 — Hypothecation bond making principal amount payable in annual instalments with defaulting clause — Mortgagee waiving his right on default — Limitation does not run under Art. 132 from date of default — Interest to mortgagee can be allowed only on each instalment due and not on principal amount.

The omission to include in Art. 132, Limitation Act, a provision similar to the one in Art. 75, viz., "unless the payee or pledgee waives the benefit of the provision" does not operate to prevent a plea of waiver being set up by the mortgagee. The amount becomes due on default only if the mortgagee exercised the option to call in the amount and not if he waived that right. The mortgage money under a hypothecation bond with a defaulting clause does not become due within the meaning of Article 132, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued or until the mortgagee has exercised the option reserved to him under the defaulting clause. Where therefore the mortgagee waives such right, the limitation does not run from the date when the instalment is first defaulted. But, under such circumstances, the mortgagee will be entitled to charge interest only on each instalment which is not paid, and not on the basis that the whole amount of principal became due on default of instalment : *A I R 1932 P C 207, Foll.*

[P 837 C 2 ; P 838 C 1]

Advocate-General and K. Subramaniam — *for Appellant.*

B. Sitarama Rao and B. Pocker — *for Respondents.*

Leach C. J.—The appellant was defendant 1 in the trial Court. The suit was to enforce a hypothecation bond dated 5th June 1912 which was executed by the father of the appellant, a Sunni Mahomedan, in favour of respondents 2 to 9. The

bond was assigned to respondent 1, who was the plaintiff in the suit, on 19th July 1928. The principal sum due under the mortgage was Rs. 5000 which was repayable in 15 annual instalments of Rs. 375. The first of the instalments fell due in the year 1913 and the last in 1927. The appellant's father died soon after the mortgage bond had been executed, but the instalments for the years 1913, 1914, 1915 and 1916 were paid regularly on behalf of his heirs. On 17th September 1917 the estate of the appellant's father was partitioned amongst his heirs and appellant 1 was made responsible for discharging the debt under the hypothecation bond. No question arises as to the validity of the partition or of the liability of the appellant under the bond. The instalment due for the year 1917 was not paid. It was not paid for the year 1918 and default was made also in respect of the year 1919. On 8th May 1919 the uncle of the appellant, purporting to act as the guardian of the appellant, made up an account of what was due under the hypothecation bond for these three years and set off against the amount a sum of Rs. 900, which was due to the appellant by the mortgagees in another transaction. This left Rs. 136-7-0 as the amount due to the mortgagees in respect of the instalments for these three years. This sum of Rupees 136-7-0 was sent to the representatives of the mortgagees by letter and was received by them on 24th May 1919. The mortgagees accepted payment of this money, but on 2nd July 1920 they purported to assign the mortgage to one Krishnan Nambudripad on the basis that a default had occurred in 1917 and that the amount due was the mortgage debt, less the instalments paid in respect of the years 1913, 1914, 1915 and 1916.

There appears to have been some question as to the validity of this assignment, and on 19th September 1928 a fresh assignment was executed by the mortgagees, the assignee in this instance being respondent 1. To this deed Krishnan Nambudripad was a party. In the assignment to respondent 1, the mortgagees gave credit for the sum of Rs. 136-7-0 received by them on 24th May 1919 and regarded the instalments for the years 1917, 1918 and 1919 as having also been paid. The present suit was filed on 7th October 1929 by respondent 1, who gave credit for the Rs. 900, which was due to the appellant in 1919 and shown in the accounts submitted to the mortgagees in that year and also gave him credit for the sum of Rs. 136-7-0, which was received by the mortgagees on 24th May 1919. The appellant defended the suit on the ground that the mortgage debt was time-barred. The learned trial Judge however held that it was in time. He based his finding on the fact that there had been a written acknowledgment of the debt in 1919 by the de facto guardian of the appellant. This written acknowledgment was the letter written by the appellant's uncle forwarding the sum of Rupees 136-7-0. It is clear that the learned Judge here erred. Under Mahomedan law, a de facto guardian has no right to bind his ward and this was frankly conceded by the learned advocate for respondent 1.

The learned Advocate-General supported the appeal on another ground. He said that under the terms of the deed the whole of the mortgage debt became due on default in payment of the first instalment. The first default here took place on 12th May 1917 and as the suit was not filed until 1929 it was, he said, out of time. In support of this argument he referred us to the wording of Arts. 75 and 132, Limitation Act. Art. 75 refers to a promissory note or a bond payable by instalments. The limitation here is three years from the date of the default, unless the payee or pledgee waives the benefit of the provision. Under Art. 132 the period of limitation in respect of a mortgage bond is twelve years from the time the money becomes due. No mention is made here of waiver. The question, whether the omission to include in Article 132 a provision similar to the one in Art. 75 operates to prevent a plea of waiver being set up, has been the subject of considerable discussion in the High Courts in India, but the matter has now been set at rest by the decisions of the Privy Council in 53 I A 187[1] and 59 I A 376.[2] In the first of these cases, their Lordships discussed the question whether the default in the payment of an instalment set the law of limitation in motion for the benefit of the mortgagee, but as a decision was not necessary in that case, the matter was left open for the time being. The question arose again in 59 I A 376,[2] and was there

1. Pancham v. Ansar Hussain, (1926) 13 A I R P C 85 = 99 I C 650 = 53 I A 187 = 48 All 457 (P C).
2. Lasa Din v. Gulab Kunwar, (1932) 19 A I R P C 207=138 I C 779=7 Luck 442=59 I A 376 (P C).

decided. At p. 384, Sir George Lowndes who delivered the judgment of their Lordships observed :

There can be no doubt that, as pointed out by Lord Blanesburgh, in 53 I A 187[1] a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees,' and that it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment, for the full term of the mortgage. If on the default of the mortgagor—in other words, by the breach of his contract—the mortgage money becomes immediately 'due', it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor. For if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and '*eo instanti*', as Lord Blanesburgh says, he is entitled to redeem. If the principal money is 'due' and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognized by Wazir Hassan J. in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default; they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not 'become due' within the meaning of Art. 132, Lim. Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him.

In the present case the mortgagees accepted the payment of the Rs. 136-7-0 tendered to them in 1919 and gave credit for the Rs. 900 due by them to the appellant on another account. It is obvious that in so doing they had waived their right of enforcing the default clause in the hypothecation bond. That right having been waived limitation did not run, and this being so the suit was filed within the period allowed by law. The judgment of the learned trial Judge will therefore stand. The learned Advocate-General has pointed out that the plaint does not give credit for the amount paid in respect of the 1919 instalment and that the sum claimed as being due under the hypothecation bond is worked out on the basis that the whole amount became due in 1919. The mortgagees did not exercise their right under the bond of calling in the amount and consequently are not entitled to calculate interest on the basis that the amount of the principal sum became due in 1919. They are, however, entitled to charge interest on each instalment which was not paid. The learned advocate for the respondent accepts this as being correct. The interest on the instalments will therefore be calculated from the dates on which the instalments fell due up to the date fixed for payment in the preliminary decree and the interest will be at the contract rate. The period allowed for redemption will be six months from today. After the date for redemption has passed the decretal amount will carry interest at six per cent. The learned advocates say that they will submit an agreed statement of what is due under the mortgage on this basis. Respondent 1 is entitled to his costs in the appeal.

V.B.B./R.K. *Appeal allowed.*

A. I. R. 1938 Madras 838

BURN AND STODART JJ.

Secretary of State — Appellant.

v.

Mary Ponnammal and others — Respondents.

Second Appeals Nos. 951 and 952 of 1928, Decided on 24th March 1938, against decree of Sub-Judge, Tuticorin, in A. S. No. 47 of 1927.

(a) Madras Irrigation Cess Act (7 of 1865), S. 1, Proviso — Inamdar receiving water from Government channel—Old barrier replaced by new one with Government's permission—Channel not widened — More land brought under cultivation after erection of new barrier — Inamdar held not liable to pay cess for new cultivation—Right to take water was governed by S. 1, Proviso.

An Inamdar whose water tank was supplied by a Government channel on account of a barrier of stones from time immemorial applied for permission to erect masonry dam in the channel. Thereafter he brought under cultivation 30 acres of dry land by means of irrigation. Government sought to assess him for this new area of land brought under cultivation. There was no evidence that showed that either the new dam was higher than the old one or that the channel leading to the tank was altered :

Held that anicut and the supply channel having remained virtually unaltered the Inamdar was entitled to the water which ran down the channel into his tank and was entitled to use that in any way he pleased. He was not limited to the extent of wet cultivation which he was formerly making. Moreover the extent of the Inamdar's right under Proviso 1 to S. 1, Madras Irrigation Cess Act, was governed by the physical dimensions of the supply channel and not by the actual quantity of water that might pass along the channel : *A I R 1936 Mad 794, Disting.; A I R 1918 Mad 516, Applied; A I R 1917 P C 42, Rel. on.*

[P 840 C 1]

(b) Madras Irrigation Cess Act (7 of 1865), S. 1 — Payment of cess by person under mistaken notion of liability— He is not estopped from denying his liability.

Where a person in ignorance of his rights pays water cess wrongly assessed on him, he cannot be deemed to have agreed to pay such cess, and such payment cannot estop him from refusing to pay such cess in future. [P 840 C 2]

Government Pleader — *for Appellant.*

R. Krishnaswami and R. Srinivasan — *for Respondents.*

Judgment.—These appeals have arisen out of two suits filed against the Secretary of State for India in Council for the refund of money collected in the shape of irrigation cess under the provisions of the Madras Irrigation Cess Act. There were five plaintiffs but they all belong to one family and they represent the Inamdar of Rajapudukudi. It will therefore be convenient to speak of "the plaintiff" in the singular. The plaintiff's inam village Rajapudukudi is irrigated by a tank which receives its supply from a jungle stream called Uppar. There is a supply channel from the Uppar to the tank which for three quarters of its length runs through the Government land and for the other quarter through the inam land; in order to divert the water along the channel a stone anicut has been in existence across the Uppar from time immemorial. In 1888 the Inamdar took the permission of the Government to replace the then existing anicut which is described in the documents as an anicut built of rubble stones by a permanent masonry structure. Permission was given, and the anicut was completed some time in 1888. In Faslis 1332-33 it was reported that the plaintiff had newly brought under wet cultivation about 32 acres of dry land and the revenue officials imposed a water cess at the rate of one rupee per acre on these 32 acres of punjah. The suits were filed to recover these amounts (approximately Rs. 32 per fasli) and for an injunction against the representatives of the Secretary of State forbidding them to make any such levies in the future.

The case on behalf of the Collector was that the irrigation cess had been properly levied. He alleged that by the construction of the new anicut in 1888 the supply to the plaintiff's tank had been increased. His case was that the new wet cultivation was made with the aid of the additional water supplied by means of the improved anicut. He contended also that at the time the anicut was constructed there was not indeed an express agreement, but an implied agreement between the Government and the plaintiff, that if the plaintiff should thereafter bring under wet cultivation any additional extent (over and above the immediately wet anicut under the tank) he would be liable to pay water rate. It was conceded that since the Government did not pay any contribution towards the cost of the anicut, the plaintiff would not be liable to pay the full water rate but a reduced water rate of one rupee per acre.

The issues framed by the learned District Munsif were as follows:

(1) Whether the plaintiff has been getting an appreciably larger supply of water for his inam lands from the Uppar river because of the anicut he was allowed to build across the river in the year 1888 and if so whether he cultivated the lands assessed for water rate with such increased supply ?

(2) Has plaintiff agreed to the levy of water cess now objected to by him and if so was the agreement made under mutual mistake of the parties and without consideration and is it void ?

(3) Is plaintiff estopped from contending that the levy of the water cess by defendant is illegal ?

(4) Is the levy of water cess complained of by the plaintiff legal ?

(5) Is plaintiff entitled to the injunction asked for ?

(6) What relief is plaintiff entitled to if any ?

On Issue 1 the learned District Munsif found that the plaintiff has not been getting an appreciably larger supply of water for his inam lands from Uppar river because of the anicut that he was allowed to build across the river in the year 1888. This finding is confirmed by the learned Subordinate Judge. It can only be attacked in this Court by contending, as the learned Government Pleader has contended, that the onus of proof was wrongly thrown on the Courts below. Quoting the case in 71 M L J 574,[1] the learned Government Pleader argues that the onus should have been thrown upon the plaintiff to show that he was not getting any more water supplied to him than he was entitled to by virtue of the engagement implied in the inam title deed granted to him at the time of the inam settlement in 1867. We do not think that the case in 71 M L J 574[1] has any bearing upon this case. That was a case of irrigation from a tank belonging to the Government and when it was found that the Inamdar who was entitled to irrigate certain inam lands from the tank had greatly increased the area of the land which he irrigated from the tank, it was held that the burden lay upon him to show that

1. Secretary of State v. Prayag Dosjee Varu, (1936) 23 A I R Mad 794=168 I C 933=71 M L J 574.

he was irrigating this increased extent of land without using more water. This is an entirely different case from the one with which we now have to deal. Here all the water for irrigation purposes is taken from the tank of the plaintiff. We think that this is a case in which, as was observed in 33 M L J 415[2] at p. 429, in the circumstances the burden was on the Government to show that the Inamdar had been storing in his tank more water than he was entitled to under the engagement. In our case there was no allegation on the side of the Government that the level of the anicut constructed across Uppar in 1888 by the plaintiff was any higher than the level of the rubble stone anicut which it replaced. There was also no allegation that the dimensions of the supply channel from the anicut to the tank had been in any way increased. Unless the anicut level were raised or the dimensions of the channel increased, it would be impossible for the change to make any difference in the quantity of water conveyed along the channel to the tank. The only possible improvement in the supply that could be occasioned by such a change would be the prevention of leakage, assuming that the old rubble stone dam was porous; but there is no proof in this case and no statement by anybody that the old rubble stone dam did in fact leak. In these circumstances we think it is clear that the case is governed by the principle of the *Urlam case*, 40 Mad 886.[3] The anicut and the supply channel having remained virtually unaltered the Inamdar is entitled to the water which runs down the channel into his tank and is entitled to use that in any way he pleases. He is not limited to the extent of wet cultivation which he was making at the time of the Inam Settlement (1867).

The extent of the Inamdar's right under Proviso 1 to S. 1, Madras Irrigation Cess Act, is governed by the physical dimensions of the supply channel and not by the actual quantity of water that might pass along the channel. Even if it had been shown that a greater supply of water passed along the channel, nevertheless under the Proviso the quantity would obviously be variable according to the conditions of the season from year to year.

With regard to Issue 2, it was found by the learned District Munsif and confirmed by the learned Subordinate Judge that there was no agreement between the plaintiff and the Government to the levy of water cess now objected to. This also is really a question of fact. The learned Government Pleader referred us to the correspondence which passed between the plaintiff and the Government in 1888 and subsequently and has asked us to say that it does imply an agreement. But we think it is equally possible to explain this correspondence on the assumption that both the Government and the plaintiff were under a misapprehension regarding the extent of the plaintiff's rights. It is quite clear from the correspondence that the Government thought they would be entitled to levy water rate for any increased area brought under wet cultivation after the improvement of the anicut. It is also quite clear that the plaintiff acquiesced in that view and thought that he would be liable to pay water rate for any such increased area. But this is not the same thing as saying that both the plaintiff and the Government agreed to the payment and the imposition of water cess. The learned Government Pleader was able to show that in 1891 the plaintiff paid an amount of one rupee per acre by way of water rate without protest and without taking any steps for its recovery. This however as both the lower Courts have held, cannot estop the plaintiff from denying his liability. We may quote here the judgment of the Privy Council in Appeal No. 119 of 1931=64 M L J 715.[4] Dealing with a somewhat similar case, their Lordships made the following observations:

> The action was brought, as has been said, by the trustee of the temple for a declaration that the temple was not bound to pay cess. They had been paying cess for some ten or fifteen years, but they said they had paid it under a mistake as to their rights and they claimed repayment of the amount that they had paid. It is obvious that the amount which they were entitled to claim would be affected by the Limitation Act but as to that no question arises in this particular suit, the question being whether they ought to have paid it at all.

We think the case is really concluded by the findings of fact of both the lower Courts, namely that the plaintiff was not getting an appreciably larger supply after the construction of the anicut in 1888 and

2. Secretary of State v. Ambalavana Pandara Sannadhi, (1918) 5 A I R Mad 516=42 I C 697=33 M L J 416.
3. Balasurya Prasadhu Row v. Secretary of State, (1917) 4 A I R P C 42=41 I C 98=40 Mad 886=44 I A 166 (P C).
4. Secretary of State v. Subramanya Ayyar, (1933) 20 A I R P C 169=143 I C 150=64 M L J 715 (P C).

that there was no agreement by the plaintiff to pay water cess to which he now objects. The appeals must therefore fail and are dismissed with costs.

C.R.K./B.D. *Appeals dismissed.*

A. I. R. 1938 Madras 841

MADHAVAN NAIR AND KING JJ.

C. V. Vythianatha Iyer—Appellant.

v.

C. V. Varadaraja Iyer and others — Respondents.

Appeal No. 548 of 1931, Decided on 29th September 1937, against decree of Sub-Judge, South Malabar at Palghat, in O. S. No. 50 of 1928.

Hindu Law—Joint family—Family property—Mere existence of nucleus of ancestral property will not raise presumption that subsequent acquisitions of property by member are joint family property — To raise this presumption nucleus must be such as could have led to subsequent acquisitions—There is no presumption in favour of blending.

The mere existence of nucleus of ancestral property will not by itself raise a presumption that the subsequently acquired properties of a member are joint family properties and hence will not shift the burden of proving that the properties are separate properties on the person alleging it to be so. To shift this burden on him, it must be proved that the nucleus was of such a character, as, taking into consideration the surrounding circumstances, could have led to the subsequent acquisitions with its help. The presumption is against blending and it is only natural for a person to keep his self-acquired properties separate from the joint family property, meeting the expenses of the joint family from the joint family property. This being so, the mere failure of a member to keep separate accounts of his earning will not raise a presumption in favour of blending : *Case law discussed.*

[P 846 C 1, 2; P 847 C 1]

T. M. Krishnaswamy Iyer and P. S. Ramachandra Iyer—*for Appellant.*

P. S. Narayanaswamy Iyer — *for Respondents.*

Madhavan Nair J. — One Varadaraja Iyer died on 7th February 1925 leaving moveable and immovable properties worth about Rs. 20,000. Defendant-appellant 1 is his son, and the plaintiff is the son of defendant 1. Varadaraja Ayyar executed two wills, Ex. LX in 1912 and Ex. B in 1922. By the second will he revoked the first one. Under the first will his properties, described as his self-acquisitions and additions therefrom, were given to defendant 1. Under the second, a life interest in half the estate was given to defendant 1 while the bulk of his estate was bequeathed to the plaintiff. The suit out of which this appeal arises was instituted by the plaintiff to declare that the plaintiff and defendant 1 are entitled to a life interest in two equal shares over the suit properties with a remainder over to the plaintiff and his sons, to call upon defendant 1 to render a full account of the entire estate left by the testator and in exclusive possession of defendant 1 and pass a general administration decree against him. These declarations are asked for on the basis of the second will which dealt with the suit properties as the self-acquired properties of Varadaraja Ayyar. The plaintiff has also an alternative claim. He stated that if the will is not valid he may be given his half-share of the properties free from encumbrances and with mesne profits. Defendant 1 attacked the validity of the second will. He stated that the will is not valid, that the properties are joint family properties and not his self-acquisitions, that Varadaraja Iyer had no right to make the will, that he is not liable to render accounts, that he has spent large sums on litigation and that he has no objection to a partition. Defendant 2 is the mother of defendant 1. She is a legatee under the will. Defendant 3 is the daughter of defendant 1. She is also a legatee, and defendants 4 and 6 are tenants in possession.

The main question for decision is whether the second will is valid, and this in its turn depends on the question whether the plaint properties are the self-acquisitions of the deceased Varadaraja Ayyar or are to be treated as joint family properties over which he had no disposing power. The case of defendant-appellant 1 is that all the properties standing in the name of Varadaraja Iyer were acquired by him with a nucleus of family funds, that his "earnings were freely thrown in the common stock and they all became by mingling with other joint family funds part and parcel of the joint family properties;" or in other words, that the suit properties were acquired by a blending of his own earnings and the amount which he got as ancestral property. The case of the plaintiff is that the properties are the self-acquisitions of Varadaraja Iyer and that no portion which he got from his family was utilized by him in acquiring them. The question is which view is the right one.

The learned Subordinate Judge on a careful consideration of the circumstances came to the conclusion that it cannot be

said that the properties acquired by Varadaraja Iyer are joint family properties, that though there was a nucleus of ancestral property it was not proved that the properties which he acquired can be traced to the nucleus and that there is nothing in the evidence to show that Varadaraja Iyer blended his private earnings with the ancestral property which came into his possession. In the circumstances he held that the suit properties were the self-acquired properties of Varadaraja Iyer and on that basis gave the plaintiff the main declaration asked for by him. It is not necessary for the purposes of this appeal to refer in detail to the various other subsidiary reliefs as the findings on them were not seriously attacked before us. We may also state that defendant 1 challenged the will on the ground that it was obtained by fraud and undue influence exercised by the plaintiff on Varadaraja Iyer, but the Subordinate Judge held that this plea was not made out and it has not been pressed before us in appeal. Another plea raised by defendant 1, that the streedhanam funds of his mother were also used in the acquisition of the properties, was negatived by the Subordinate Judge as there was not any evidence to support the allegation that she had any streedhanam funds, and this also has not been pressed before us.

The main argument urged in appeal is that a nucleus of joint family property came into the hands of Varadaraja Iyer, that he did not keep separate accounts of the income he derived from the family properties and his own private income, that once a nucleus has been proved, the presumption of law is that all the properties standing in the name of Varadaraja Iyer are joint family properties, that if the plaintiff claimed these as separate properties the burden of proving the same was on him and that the lower Court went wrong in the circumstances disclosed in the case in thinking that the burden of proof lay on the defendant and not on the plaintiff. It may be stated here that the judgment makes it clear that in the opinion of the Subordinate Judge, in the circumstances of the case the initial burden of proving that the properties are not the self-acquired properties of Varadaraja Iyer lay on the defendant. It is argued that there is no such foundation for any such presumption.

The evidence in the case lies within a brief compass. We will first refer to the nucleus of ancestral property that came into the hands of Varadaraja Iyer. Varadaraja Iyer had an elder brother named Venkateswara Pattar. They were members of an undivided Hindu Brahmin family governed by the Mitakshara law. Varadaraja Iyer was born in 1843. He was in Government service for about 12 or 15 years. He himself stated in a deposition given by him in O. S. No. 64 of 1892, Ex. 12, that he was in the employ of the Government for about 14 years. He worked as an Overseer from 1870 to 1880: see Service Register Ex. 2. The evidence does not show when he left the Government service. He was drawing a salary of Rs. 60 per month. In 1875 Varadaraja Iyer and his brother effected a partition. A sum of Rs. 400 due from one Vellaya Mootham, was given to Varadaraja Iyer. He was allowed to appropriate a further sum of Rs. 300 belonging to the family which was in his hands. He was also paid some cash. On the whole the total amount that came into the hands of Varadaraja Iyer under the partition was Rs. 2630. A portion of the house had been set apart to the mother of the parties according to the partition deed and it recited that after her death Varadaraja Iyer should be given a sum of Rs. 500 for his share of the house. This sum of Rs. 500 also came into the hands of Varadaraja Iyer after the death of his mother but long after the acquisition of the suit properties. Thus it will be seen that at the material period the nucleus of ancestral property which Varadaraja Iyer had in his hands was a bare sum of Rs. 2630 and nothing more. It may be mentioned here that the original family house which went to the share of Varadaraja Iyer's elder brother Venkateswara Pattar who died issueless came into the possession of Varadaraja Iyer as reversioner after the death of his widow.

We will now briefly refer to the properties which were acquired by Varadaraja Iyer and how he acquired them. The partition, as already stated, was in 1875. On 7th June 1877 Varadaraja Iyer advanced Rs. 2000 to one Raman Nair under a simple mortgage bond Ex. 4. The bond was satisfied as may be seen from an endorsement on it. This bond was secured from Raman Nair's nephew by defendant 1. He says the money got under the partition was invested by his father under Ex. 4. Beyond the fact that a sum of Rs. 2000 was given to Raman Nair there is no evidence to show what became of the money.

It is not clear from the evidence who made the endorsement or when it was made. There is no evidence to show whether any portion of this money was utilized by Varadaraja Iyer in buying the properties which will be referred to presently. If Varadaraja Iyer had no personal income or if the private properties were acquired more or less at the time when this money was got back, it may be said that the nucleus of ancestral property was used in the acquisition of some portion of the suit properties. As will be seen presently, the suit properties were acquired from time to time during various years, and the connexion between the nucleus of ancestral property and the new properties acquired has not been, nor can it be established by the evidence in the case. On 11th June 1879, Varadaraja Iyer advanced Rs. 1500 to one Puthiyedath Mana Narayana Nambudri : *see* Ex. 5. On 24th March 1881 he increased this sum to Rs. 4500. On 17th November 1881 he paid another Rs. 500. A sum of Rs. 2570 more was paid in cash and the jenm properties belonging to the Mana were sold to Varadaraja Iyer under the jenm deed dated 1884, Ex. 10. Thus between the years 1879 to 1884, Varadaraja Iyer acquired jenm property worth Rs. 9000. This is one of the properties dealt with under the will. Next year, on 30th October 1885, Varadaraja Iyer bought a house for Rs. 2000. This was afterwards sold and with the sale proceeds a kanom property known as Pallateri Nilom was acquired. In 1895, Varadaraja Iyer purchased another kanom property known as Payyathankannu estate for Rs. 2750. Out of this, a sum of Rs. 1500 was advanced before 1885. Both these kanom properties were redeemed and the moneys are now lying in Court. Before 1892 Varadaraja Iyer owned a shop in the bazar of Palghat, and he had advanced a sum of Rs. 4000 to one Kandappa Tharakan. His own deposition already referred to shows that in 1892 he was worth about Rs. 20,000. The properties dealt with by Varadaraja Iyer as his self acquisitions in his will consisted of what has been enumerated above, these being : (1) the jenm property bought for Rs. 9000 from Puthiyedath Mana, (2) Pythankannu kanom property, (3) Pallatheri kanom property, and (4) the house which he got on the death of his brother's wife, and also some moveables and cash. The question is whether the properties acquired by him can be treated as his self-acquisitions or whether they should be treated as family properties.

Now, the position is this : It is clear that Varadaraja Iyer had a nucleus of ancestral property of Rs. 2630. He was in the employ of the Government for about 15 years drawing a salary of Rs. 60 a month. He acquired the properties already referred to in the course of a few years. There is no evidence that any portion of the ancestral money which he had with him went towards the purchase of any of these properties. Admittedly Varadaraja Iyer did not keep any separate accounts of the income from the ancestral property or of his own private income. The appellant says that according to the decisions it must be held that the presumption is that Varadaraja Iyer combined his private earnings and the ancestral property which he got, and blended the income arising from both and that he purchased the properties with the same. If this position is true, the defendant can rely on this presumption and the burden of proving that the properties were acquired with the private earnings will be on the plaintiff. The Subordinate Judge held that there is no presumption in favour of blending of the two properties; that it should be held that the ancestral property was used for the maintenance of the family and for other family expenses and that the private earnings went towards the purchase of the property which must therefore be treated as self-acquisitions of the testator.

First, we will deal with the presumption of law arising in the above circumstances. A large number of decisions of this Court as well as of other Courts including a few of the Privy Council were brought to our notice in this connexion. The decisions relied on in support of the lower Court's position are these : In 27 M L J 677[1] it was held by Wallis and Seshagiri Iyer JJ. as follows :

> Under the Hindu law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilized for the purpose of making the subsequent acquisitions or the members must have thrown their joint earnings into the hotchpot with the intention of giving up their individual rights in them.

Then the learned Judges quoted the following two observations of Chamier J. in 33 All 677,[2]

1. Narayana Rao v. Asseshamma, (1915) 2 A I R Mad 426=26 I C 33=27 M L J 677.
2. Ram Kishen Das v. Tanda Mal, (1911) 33 All 677=10 I C 543=8 A L J 723.

1. There is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property.

2. It is only when a person alleging that the property is ancestral property proves that there was a nucleus of ancestral property by means of which other property might have been acquired, it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate ;

and stated that they agreed with these propositions. The learned Judges also referred to the decision in 3 M I A 229.[3] Both these decisions, 33 All 677[2] and 3 M I A 229,[3] were relied upon by the appellant's learned counsel, and we will deal with them separately. For the present we will only observe that 27 M L J 677[1] is authority for the position that it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on to the party alleging self-acquisitions to prove that the property was acquired without any aid from the family estate. In 16 M L W 936[4] it was held by Spencer and Devadoss JJ. that where a father who obtained on partition with his brothers lands valued at Rs. 200 and burdened with debts to the extent of Rs. 500 subsequently acquired with his income as dubash property worth Rs. 40,000, the nucleus was not sufficient to impress the subsequently acquired property with the character of joint family property. It was pointed out that the nucleus required for impressing a joint family character on the acquisitions of a member of the joint family must be of such value as could have reasonably formed the basis of such subsequent acquisitions. In A I R 1927 Mad 38[5] Krishnan and Venkatasubba Rao JJ. observed as follows :

While there is a presumption that a Hindu family is joint until the contrary is proved, there is no presumption that a Hindu family is possessed of property. The party alleging that the property held by any individual member of a joint family is joint family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. If this is shown, and only then, the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

In A I R 1930 Mad 662[6] Ananthakrishna Iyer J. discussed most of the relevant cases bearing on the question and pointed out as follows :

In some cases it is mentioned that mere possession of joint family property by a joint Hindu family would raise a presumption of law that all the property in the possession of a coparcener is joint family property. I should like to observe that the above position would be strictly correct only if the joint family property possessed by the joint Hindu family was such as would have enabled and led to the acquisition of the other property. If having regard to the nature of the income from the admitted joint family property or otherwise the same could not have possibly helped in or led to the acquisition of subsequent property, then there is no presumption that the subsequent property is joint family property.

In 1930 M W N 1016[7] the question of onus in cases like the present was thus dealt with by Sundaram Chetty J. :

Where the question is whether an item of property in the name and in the possession of a member of a joint family is his own self-acquisition or the family property, there is the initial burden of proof on the party setting up that it is family property, to show the existence of ancestral or joint family nucleus by means of which the property in question may have been acquired. Where the existence of ancestral or joint family nucleus is proved and it is such as would reasonably be taken to have contributed to the acquisition in question, or the acquisition is ordinarily traceable to such nucleus, to some extent at least it would be presumed to be joint family property unless it is affirmatively shown by the other side that the source of the purchase money was altogether different, and quite independent of the family nucleus, or that such nucleus was incapable of contributing anything to the purchase.

In 35 M L W 30[8] the following observations were made by Venkatasubba Rao and Pakenham Walsh JJ. :

The plaintiff puts his case thus : Some properties fell to the share of Subbiah at the partition; it must be therefore assumed that he purchased the items in question from the income of these properties. In other words the contention is that when it is shown that a Hindu father was possessed of some ancestral property, all his subsequent acquisitions must be presumed to be joint family property. With this contention we cannot agree.

And the learned Judges referred to the cases we have already mentioned. 1937 M W N 835,[9] (1937) 1 M L J 364[10] and

3. Dhuram Das Panday v. Mt. Shama Soondree, (1841-46) 3 M I A 229=6 W R 49 (P C).
4. Vadamalai v. Subramania, (1923) 10 A I R Mad 262=71 I C 130=16 M L W 936.
5. Kannammal v. Rama Thilakammal, (1927) 14 A I R Mad 38=97 I C 632.
6. Sankaranarayanan v. Tangaratna, (1930) 17 A I R Mad 662=126 I C 609.
7. Satchidanandam v. Subbaraju, (1930) M W N 1016.
8. Ramiah v. Mahalakshmma, (1931) 136 I C 205=35 M L W 30.
9. Narayanaswami Mudaliar v. Ratnasabhapathy Mudali, (1938) 25 A I R Mad 136=(1937) 2 M L J 906=1937 M W N 835.
10. Sandanam Pillai v. Somasundaram Chettiar, (1937) 24 A I R Mad 436=169 I C 325=(1937) 1 M L J 364.

45 M L W 422[11] are recent pronouncements by this Court on this question. The facts of the first of these decisions are somewhat like those of the present case and the question of the burden of proof is discussed by Varadachariar and Horwill JJ. at considerable length. In that case, one *S* was making a very substantial income from his profession as a native medical practitioner. At the partition between *S* and his coparceners he obtained only certain immovable properties the annual income from which was below Rs. 200. He had a large family to maintain and the maintenance of the family alone must have cost a great deal more than the income derived from the ancestral properties. His income from the profession must have contributed largely to the accumulation of wealth. *S* maintained no accounts. In these circumstances it was held (1) that the onus lay upon the person who pleaded that what was at any particular moment the separate property of a member of a joint Hindu family had at some later stage ceased to be so, to establish that it has been so dealt with as to have lost its separate character; (2) that plaintiffs could not succeed upon the mere circumstance that *S* kept no accounts and that it was not known how he dealt with the two sets of income; (3) that there was no reason to presume that *S's* separate earnings were spent on the maintenance of the joint family and that the income from the joint family went in whole or in part into the investments. There is no presumption in favour of blending. The presumption, if any, can only be of fact to be drawn in the light of all the surrounding circumstances and in accordance with what is described in S. 114, Evidence Act, as the common course of human conduct. In (1937) 1 M L J 364[10] Varadachariar J. followed his previous decision in A I R 1937 Mad 835,[12] and the proposition was repeated that it is only after it is shown that the family was possessed of some property with the aid of which the property in question could have been acquired, that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In 45 M L W 422[11] the same principle was once again asserted. In A I R 1928 Lah 397[13] it was held that there is no presumption that the members of a joint Hindu family possess their self-acquisitions as joint coparcenary property and that all acquisitions by members of a joint Hindu family are prima facie partible and the burden of proof lies on those who assert to the contrary. In A I R 1935 All 67[14] it was held that there is no presumption that a particular property is joint family property having been acquired with the aid of family funds. The question of presumption in cases like the present is thus dealt with :

> Where it is proved or admitted that a joint family possessed such nucleus as could lead to the acquisition in question, it may be presumed that the later acquired property belongs to the joint family, having been acquired with the aid of the nucleus. Mere existence of a nucleus, however small or insignificant, is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be a part of the joint family property.

The learned counsel for the appellant relied mainly on the decisions in 17 M L J 184,[15] 33 All 677[2] and 46 Mad 373[16] in support of his contention that when the existence of a nucleus of ancestral property is proved, all the subsequent acquisitions must be presumed to be joint family property and that the burden of proving that they were self-acquired and not acquired with the family funds lies on the person who makes such an assertion. On examination it will be found that these cases do not support him. In 17 M L J 184[15]—the same case is reported as a foot-note in 34 Mad 262—the two salient features were that the family lived joint in one house and there was a nucleus of joint family property. The character of the Worli property (that is the nucleus of the joint property) was undisputed in the Bombay Court. The following observations of the Privy Council with respect to this property explain the nature of the decision :

> The effect of the appellants in the present appeal has been to disparage the importance of the Worli property in comparison with the existing estate. This argument however is deprived of much of its force by the fact that the comparison is with the enhanced value of the more recent

11. Venkataramayya v. Seshamma, (1937) 24 A I R Mad 538=170 I C 107= I L R (1937) Mad 1012=45 M L W 422.
12. Kuppuswami Mudaliar v. Ranganatha Mudaliar, (1937) 24 A I R Mad 835.
13. Kanshi Ram v. Shankar Das, (1928) 15 A I R Lah 397=111 I C 596.
14. Suraj Kumar v. Jagannath, (1935) 22 A I R All 67=152 I C 541.
15. Anandrao v. Vasantarao, (1907) 17 M L J 184 =34 Mad 262*n* (P C).
16. Rajangam Ayyar v. Rajangam Ayyar, (1922) 9 A I R P C 266=69 I C 128=50 I A 134= 46 Mad 373 (P C).

acquisitions and their Lordships find sufficient evidence that the Worli property was of substantial value and when it was sold some of the proceeds were used in defraying the cost of rebuilding the new house in which the joint family lived. This being so, a nucleus exists and the family is joint. The onus is therefore on the party setting up a case of separate estate.

The meaning of their Lordships' statement is clear. The ancestral nucleus was of such substantial value that it may well have contributed to the acquisition of the property in question. As their Lordships say, as just stated, that some of the proceeds of its sale was used in defraying the costs of rebuilding the new building in which the joint family lived. In such circumstances, the burden of proving that the property is separate will be on the party setting it up according to the decisions noted above. It also appears in that case that the evidence of the tenor of family life proved the use of all the property as joint family property. 33 All 677,[2] as already mentioned, is referred to in 27 M L J 677[1] and the two propositions laid down by Chamier J. have been accepted by this Court. The second proposition amplifies the first and lays down the law which has been accepted by this Court not only in 27 M L J 677[1] but also in the subsequent decisions. In 3 M I A 229[3] the passage relied on is, "It is allowed that this was a family who lived in commensality, eating together and possessing joint property." As pointed out in 27 M L J 677[1]:

> The Judicial Committee laid down that under these circumstances the mere fact that purchases were made in the names of individual members of the family was not evidence of separate ownership.

Evidently the joint property must have been substantial in value. Neither 33 All 677[2] nor 3 M I A 229,[3] in the opinion of the learned Judges, ran counter to the proposition which they laid down in that case, namely that it is only when there is ancestral property by means of which other property may have been acquired that the burden is shifted on the party alleging self-acquisition to prove that the property was acquired without any aid from the family estate. The observations of their Lordships of the Privy Council in 46 Mad 373[16] at page 381, that

> the learned Judges of the High Court were however perfectly right in the view that the onus was on the defendant to establish that the properties he claimed as the self-acquired properties of his father, Krishnier, bore that character,

must be understood in the light of the special facts of the case. Having regard to the principles laid down in the above decisions, the mere proof by the defendant that his father had with him ancestral property of Rs. 2630 will not by itself shift the burden on to the plaintiff of proving that the subsequently acquired properties were acquired with his private earnings. The defendant to shift the burden on the plaintiff will have also to prove that the ancestral property was such that by its means his grandfather may have acquired the subsequently acquired properties. In the light of the decisions the presumption is against blending. As pointed out in 25 Mad 351,[17] with respect to an income derived by a Hindu widow from her husband's estate, the reasonable presumption to make in respect of any person having income at his or her disposal is that he or she had the income at his or her absolute disposal unless there is evidence to the contrary.

The question in the present case therefore is, has the defendant succeeded in showing whether this sum of Rs. 2630 could have contributed towards the purchase of the suit properties. The Subordinate Judge is emphatically of the opinion that the circumstances of the case show that after meeting all the expenses of the family, ordinary and extraordinary, nothing would have been left in the hands of Varadaraja Ayyar to purchase the suit properties, and we agree with him in that view. The joint family of which Varadaraja Ayyar was the head consisted of himself, his wife and his two children. His elder son died early. The second child Ammu was born in 1870 and was married in 1886 (see P. W. 3). The marriage expenses including the streedhanam and the making of jewels would undoubtedly have cost him some money. Varadaraja Ayyar had also to perform the upanayanam of defendant 1 and also his marriage. It is easy to conceive that large amounts must have been spent by him for the ordinary expenses of the family and also for the extraordinary expenses in connexion with the marriage, upanayanam, etc. It appears from the evidence that Varadaraja Ayyar has spent a large amount for the education of defendant 1 who appeared thrice for the Matriculation Examination and failed, and he had to maintain him also. Assuming that the sum of Rs. 2630 would yield an interest of Rs. 260 a year, the learned Judge has shown in paras. 36 and 37 of his judgment that there

17. Akkanna v. Venkayya, (1902) 25 Mad 351=12 M L J 5.

would hardly be any sum left in the hands of Varadaraja Ayyar to buy the suit properties. After all, he had only a sum of Rs. 2630 and he had to meet the ordinary as well as the extraordinary expenses of the household from 1874 up to the date of the execution of the will. It is a pertinent question to ask, why should we assume that this amount was not spent away in meeting these expenses and it was reserved for the acquisition of family properties, while the monthly pay which he was getting was utilized by him for the ordinary and extraordinary expenses of the family ? The presumption, as we have already stated, is against blending and it is only natural for a person to keep his self-acquired property separate from the joint family property meeting the expenses of the joint family from the joint family property. The learned Judge says :

If a calculation should be made of the amounts spent by him for ordinary as well as the extraordinary expenses incurred from 1874 up to the date of the execution of the will, it would be seen that these amounts far exceed this sum of Rs. 2630 and a further sum of Rs. 500 which Varadaraja Iyer got from his brother after the death of his mother and the income that could be derived from this sum of Rs. 3130 annually.

We accept this opinion having regard to the circumstances of this case. In both the wills it is stated that the properties are the self-acquired properties of Varadaraja Ayyar. Defendant 1 was his only son and was living with him at the time of the first will. He was then evidently very fond of him as he left the main bulk of the property to him. His subsequent conduct and his marriage with a Nair lady must evidently have prejudiced him in his eyes and this obviously led to the revocation of the first will and the execution of the second one. The quarrels in the family to which a mass of evidence relates has very little bearing on the question we have to decide and it is not necessary to refer to that evidence. On the whole, having regard to the presumptions of law and the evidence in the case, we cannot say that the learned Judge's opinion—conclusion that the suit properties have not been proved to be joint family properties and that they must be held to be the self-acquired properties of Varadaraja Ayyar—is not borne out by the evidence. The other findings of the learned Judge have not been seriously disputed before us. In the result the appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 847

BURN AND STODART JJ.

Public Prosecutor — Appellant.

v.

B. V. Sabapathy Chetty—Respondent.

Criminal Appeal No. 712 of 1937, Decided on 7th April 1938, against order of Sub-Magistrate, Orathanad, D/- 5th June 1937.

(a) Criminal P. C. (1898), S. 403 — Persons acquitted or convicted cannot subsequently be retried at all for same offence.

Section 403 does not say that a person who has been tried and convicted or acquitted shall be acquitted if an attempt is made to prosecute him again for the same offence. It says that he shall not be tried at all. [P 848 C 1]

(b) Madras Local Boards Act (14 of 1920), Ss. 159 (1) and 207—Prosecution for failure to obey notice to remove encroachment—Acquittal does not bar prosecution for failure to obey fresh notice: *58 Mad 513=67 M L J 873= A I R 1935 Mad 56=153 I C 322, Overruled.*

It is not strictly speaking correct to say that the offence under S. 207 consists in failure to remove the encroachment. Nobody commits an offence under the Local Boards Act by mere failure to remove an encroachment. He only commits an offence under S. 207 (1) when he fails to comply with a direction lawfully given. If a particular direction or requisition is not enforced, there is nothing in the Act that prevents the President from issuing another and if a prosecution is then launched, it is for failure to comply with the second requisition and not for failure to comply with the first. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice, but a different and distinct offence. If the encroachment is really an encroachment the encroacher is liable any time to receive a notice to remove it, and an acquittal or conviction on a charge of disobedience of any one of such notices cannot be a bar to his being tried for disobedience of any other : *58 Mad 513=67 M L J 873=A I R 1935 Mad 56=153 I C 322*, **Overruled** ; *1927 M W N 645 ; A I R 1932 Mad 535 and A I R 1932 Mad 537, Approved ; A I R 1926 Mad 763, Rel. on.*

[P 848 C 2; P 849 C 1, 2]

S. Parthasarathy — *for Respondent.*

Burn J.—This appeal raises a question of some importance, and of rather frequent recurrence, on which there are conflicting rulings of this Court. The respondent is a resident in Orathanad in the District of West Tanjore. He is the owner of a shop by the side of a District Board road passing through the village, and he is alleged to have made an encroachment on the road by putting up in front of his shop a tin sunshade 11 feet long and 2 feet broad. On 6th February 1937 he was served with a notice, dated 21st January 1937, issued by the President of the West Tanjore District Board under S. 159 (1), Madras Local Boards Act, requiring him to remove the

encroachment before 21st February 1937. Alleging that the respondent had failed to remove the encroachment, the District Board Overseer, duly authorized by the President, prosecuted him in C. C. No. 118 of 1937 on the file of the Sub-Magistrate of Orathanad for an offence under Sec. 207 (1), Local Boards Act. When the case came on for trial, the respondent pleaded that he had already been prosecuted in the matter of the same encroachment in C. C. No. 295 of 1936 in the same Court, that the prosecution had been withdrawn by the ex-officio President, that he had thereupon been acquitted under S. 248, Criminal P. C., and that the previous acquittal was a bar to any further proceedings on the same facts. The learned Sub-Magistrate, relying on the decision of Pandrang Row J. in A I R 1935 Mad 56[1] acquitted the respondent under S. 403, Criminal P. C. The learned Public Prosecutor has preferred this appeal.

It is quite clear that the order of acquittal is wrong. If S. 403, Criminal P. C., is applicable, the respondent could not have been put on his trial at all in C. C. No. 118 of 1937. Sec. 403 does not say that a person who has been tried and convicted or acquitted shall be acquitted if an attempt is made to prosecute him again for the same offence. It says that he shall not be tried at all.

That however is a minor matter; the important question is whether the previous acquittal in C. C. No. 295 of 1936 was a bar to the prosecution in C. C. No. 118 of 1937. The learned Sub-Magistrate is supported by the ruling of Pandrang Row J. on which he relied. He is supported also by the decision in 48 Mad 870[2] in which the facts seem to have been exactly the same as in this case. On the other hand, as the learned Public Prosecutor points out, there are three decisions of single Judges against this view, and one decision of a Bench of two Judges expressly disagreeing with one of the reasons for the decision of Srinivasa Ayyangar J. in 48 Mad 870.[2] Srinivasa Ayyangar J. held that a prosecution under Sec. 207 (1) must be launched within three months after the disobedience of the notice under S. 159 (1), and that if this had not been done, the Local Board could not extend that period of three months by the device of issuing a fresh notice in respect of the same encroachment. This view was overruled by Devadoss and Waller JJ. in 49 Mad 880,[3] where the learned Judges, (dealing with the precisely similar provisions of the District Municipalities Act) pointed out that the offence under S. 207 (1), "consists in the failure to obey a requisition issued by the competent authority". This was followed by Wallace J. in 1927 M W N 645[4] and referred to by Walsh J. in A I R 1932 Mad 535[5] and in A I R 1932 Mad 537.[6] In both these cases Walsh J. held that a previous acquittal or conviction does not bar a prosecution for disobedience of a fresh notice under S. 159 (1) even if the encroacher and the encroachment remain the same. As Pandrang Row J. observes in A I R 1935 Mad 56[1] this point was not decided by Devadoss and Waller JJ. who expressly reserved it, saying:

> If a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but the question does not arise here.

With great respect to Pandrang Row J. we think that the correct view is that taken by Wallace and Walsh JJ. in the cases quoted. The offence is failure to comply with any direction lawfully given or any requisition lawfully made; it is not strictly speaking correct to say that the offence consists in failure to remove the encroachment. Nobody commits an offence under the Local Boards Act by mere failure to remove an encroachment. He only commits an offence under S. 207 (1) when he fails to comply with a direction lawfully given. As Waller J. observed in 49 Mad 880,[3] if a particular direction or requisition is not enforced, there is nothing in the Act that prevents the President from issuing another, and if a prosecution is then launched, it is for failure to comply with the second requisition and not for failure to comply with the first. If this is borne in mind, it follows, as Walsh J. held, that it makes no difference whether there

1. Rangachariar v. Venkataswami Chetty, (1935) 22 A I R Mad 56=1935 Cr C 55=153 I C 322 =36 Cr L J 311=58 Mad 513=67 M L J 873.
2. Ramanuja Chariar v. Kailasam Iyer, (1925) 12 A I R Mad 1067=87 I C 969=26 Cr L J 1049=48 Mad 870=49 M L J 386.
3. Ramachendra Chetti v. Chairman, Municipal Council, Salem, (1926) 13 A I R Mad 763=96 I C 500=27 Cr L J 948=49 Mad 880=50 M L J 557.
4. Narayana Ayyar v. Rakupayal, (1927) M W N 645.
5. Moidi Beary v. President, Taluk Board, Mangalore, (1932) 19 A I R Mad 535=1932 Cr C 552 =138 I C 488=33 Cr L J 626.
6. Panchayat Board, Velgode v. Chinna Venkata Reddi, (1932) 19 A I R Mad 537=1932 Cr C 525=138 I C 491=33 Cr L J 629.

has or has not been any previous prosecution. Pandrang Row J. fears that there is grave risk of persons being repeatedly harassed for the same offence, but this is, we think, not so. The respondent, when he was prosecuted for failure to obey the requisition issued in 1937, was not in fact or in law being again harassed for the offence which he was alleged to have committed in 1936. He was being prosecuted for disobedience of the 1937 requisition, and it was no answer to that charge to say that he had been acquitted of the charge of disobedience of a requisition issued in 1936. We do not know why the prosecution in the case of 1936 was withdrawn; it might have been for any one of many conceivable reasons having nothing to do with the merits of the case. The learned Public Prosecutor says that according to his instructions it was withdrawn because the Collector, as ex-officio President, had given a license for the encroachment. If that is correct, and if the Board as at present constituted has decided that the encroachment must be removed, it is obvious that the respondent ought not to be able to avoid a prosecution merely because he was acquitted in the earlier case. If on the other hand the former prosecution was withdrawn because the District Board could not prove that an encroachment had been made, the Magistrate could have dealt with the matter under S. 250, Criminal P. C.

The view of Srinivasa Iyengar J. that the real offence in such cases is the 'encroachment, 48 Mad 870[2] at p. 873, was expressly dissented from in 49 Mad 880,[3] and we are of opinion that the reasoning in the latter case is against the view of Pandrang Row J. in A I R 1935 Mad 56.[1] If it were correct to say that the offence is complete once there is failure to disobey the notice, and that

another separate and distinct offence is not brought into being by the issue of a subsequent notice when that notice is by the same authority to the same person and relates to the same encroachment,

the learned Judges who decided 49 Mad 880[3] could hardly have held, as they did, that the Municipal Council was entitled to issue a second notice, more than three months after the disobedience of the first. Their decision is clearly based on the point that the offence consists in the failure to obey the requisition. All difficulties vanish, we think, if this is kept in mind. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice but a different and distinct offence. If the encroachment is really an encroachment the encroacher is liable any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of any one of such notices cannot be a bar to his being tried for disobedience of any other. The Magistrate to whom such a complaint is made must take the evidence and ascertain whether the direction or requisition has been lawfully given or made, and whether it has been disobeyed. If he finds that the direction has not been lawfully given, the fact that there has been a previous prosecution and acquittal in respect of the same encroachment will be of great assistance to him in deciding whether he will or will not use his powers under S. 250, Criminal P. C. We set aside the order of acquittal and direct the Sub-Magistrate to dispose of the case according to law.

C.R.K./D.S. *Order set aside.*

---

* A. I. R. 1938 Madras 849

LEACH C. J. AND MADHAVAN NAIR J.

A. N. Chockalingam Chettiar — Appellant.

v.

V. T. Sp. Muthukaruppan Chettiar and others — Respondents.

Appeal No. 379 of 1933, Decided on 29th March 1938, against decree of Sub-Judge, Devakottah, in O. S. No. 122 of 1931.

*** (a) Hindu Law—Partition—Consent decree in partition suit does not put an end to joint status when terms of decree are not carried into effect and members continue to live together.**

A decree passed by consent in a partition suit between members of a joint Hindu family does not put an end to the joint status of the members when the terms of the decree are never carried into effect and the members of the family continue to live together and regard themselves as still joint, having abandoned their intention to separate : *A I R 1922 P C 228 and A I R 1934 P C 138, Ref.* [P 850 C 1; P 851 C 2; P 852 C 1]

(b) Hindu Law — Joint family business — Manager of trading family entering into partnership with stranger for carrying on same kind of business – Members of family are liable to extent of their interest in family property for debts binding on manager.

No doubt, a contract of partnership by a manager does not ipso facto make the other members of the family partners but where the manager of a trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business, the members of the family, minor

or otherwise, become liable to the extent of their interests in the family property for the debts binding on the manager in the partnership business. Where the member happens to be a son of the manager he is also liable under the pious obligation rule : *Case law referred.* [P 852 C 1, 2; P 853 C 1]

S. Venkatesa Ayyangar—*for Appellant.*

C. S. Venkatachariar and R. Kesava Ayyangar — *for Respondents.*

Judgment. — This appeal raises two questions. One is whether the minor members of a trading family can be held liable to the extent of their interests in the family properties for debts incurred in a business carried on by the father in partnership with strangers. The other question is whether a decree passed by consent in a partition suit puts an end to the joint status, notwithstanding that the terms of the decree are never carried into effect and the members of the family continue to live together and regard themselves as still being joint.

The appellant is the son of one Narayanan, a Nattukottai Chettiar, who died in 1927. Narayanan had two wives, Unnamalai and Alamelu. By Unnamalai he had three sons, A. M. A. N. Annamalai Chettiar (respondent 3), A. M. A. N. Natesan alias Chidambaram Chettiar (respondent 5), and A. M. A. N. Sambandam Chettiar (respondent 6). By Alamelu he had four sons. The eldest, Annamalai, predeceased his father and the youngest Yoganandam was given in adoption. The other two sons are the appellant, and A. M. A. N Subbayya Chettiar (respondent 7). Many years ago Narayanan founded a money lending business with his brother at Kaula Lampur in the Federated Malay States. Afterwards they separated and on the partition of the family properties the Kaula Lampur business fell to the share of Narayanan, who carried it on until his death for the benefit of himself and his sons. This business was continued after his death and it is not disputed that it must be regarded as a family business. In 1907 there was a disagreement between the two wives of Narayanan with regard to their stridhanam moneys and it would appear that Unnamalai wished to make certain that her sons would not be prejudiced so far as their shares in the family properties were concerned as the result of other sons being born to Alamelu. At this time the only son born to Alamelu was Annamalai. As the result of the differences between the two wives a suit for partition was filed in the Court of the Subordinate Judge, Madura East, by the sons of Unnamalai, who were represented by their maternal grandfather Chidambaram Chettiar. This suit was numbered as O. S. No. 28 of 1907. The defendants were Narayanan, Unnamalai, Unnamalai's daughter Unnamalai, Alamelu's son Annamalai and Alamelu. There does not appear to be any doubt that this suit was of a friendly nature. Narayanan, his wives and children were all living together at the time and continued to live together until his death. In fact the sons have always lived in the family house. On 30th September 1908 a decree was passed by consent in the partition suit. It declared inter alia that the sons of the first wife were to have a half share of the family properties, and the sons of the second wife, including the sons to be born thereafter the other half. The decree did not however result in the division of the family properties and can only be regarded as embodying arrangements to be carried into effect if and when a partition did in fact take place. In the course of his evidence respondent 3 stated that the moveable properties were divided, but as it is clear that he was untruthful on other points we are not prepared to attach any weight to his testimony, and it was not accepted by the learned trial Judge. I will return to this compromise decree later.

After the partition suit had been settled, Narayanan entered into a partnership with respondents 2 and 4 for the purpose of carrying on a money lending business at Maubin in Burma under the vilasam of M. P. N. The capital contributed by Narayanan to this partnership must be deemed to have come from the common fund of the family. What the amount of the capital is does not appear. The books have not been produced and the appellant must share the responsibility for this. It is common ground that the business was a very successful one for many years and that Narayanan took part in its management during his life. On his death, it was not wound up, but continued exactly as before, except that respondent 3 as the eldest son took his father's place in the partnership. It was not until the rebellion, broken out in Burma in 1930, that the business ceased to prosper.

In the course of its business the M. P. N. firm accepted deposits from customers and paid interest on the amounts so received. During the lifetime of Narayanan and in

the ordinary course of business respondent 1 deposited a sum of money with the firm. On 27th April 1930 it was calculated that there was due by the firm in respect of this deposit Rs. 10,126-9-6, for which a promissory note was executed by the firm's agent and handed over to respondent 1. When he demanded payment, the firm failed to comply and respondent 1 was compelled to file the suit out of which this appeal arises. The defendants were Narayanan's partners and his sons. Respondents 2 and 4, who with Narayanan founded the firm, pleaded that the firm's agent had no power to accept the deposit. Respondents 3, 5 and 6, Narayanan's sons by Unnamalai, denied that they ever had any interest in the business. Their case was that their father merely represented himself and his sons by Alamelu. The appellant and respondent 7 contended that they had no interest in the business and that their father entered the partnership on behalf of himself and his sons by the first wife. These defences all failed and the suit was decreed with costs, the liability of the appellant and respondents 5, 6 and 7 being limited to their shares in the family properties.

The decision of the trial Judge is challenged by the appellant alone. He contends that the business of the M. P. N. firm cannot be regarded as being part of an ancestral business and says that unless it can be so regarded, he is under no liability to respondent 1. He asks the Court to hold that the family became divided as the result of the partition suit and that Narayanan did not enter into the M. P. N. partnership on behalf of himself and all his sons, but only on behalf of himself and his sons by Unnamalai. He says that even if Narayanan did enter into the partnership on behalf of all, the partnership was dissolved on his death and it could not be continued so as to make him liable. For respondent 1, it is denied that the effect of the partition suit was to divide the family. It is contended that the interest in the M. P. N. firm must be regarded as being part of an ancestral business; but, if it cannot be so regarded, it is said that the family being a trading family the M. P. N. business must be deemed to be part of the family business, which renders the minor members of the family liable to the extent of their interests in the family properties. It is also contended that the appellant is liable under the pious obligation rule of Hindu law.

The business here cannot be regarded as being ancestral. It is true that Narayanan and his sons are Nattukottai Chettiars and that their family trade is money lending, but no business came to Narayanan from his forbears. So far as the evidence discloses his business career commenced in Kaula Lampur with the firm founded there by him in partnership with his brother and the only other business interest which he had was his interest in the M. P. N. firm. While in these circumstances it cannot be said that Narayanan carried on an ancestral business, it can be said that he managed a family business. This is accepted by the appellant, but he says that the family business came to an end with the compromise decree passed in O. S. No. 28 of 1907 as this decree dissolved the joint status. We do not agree. That decree made no difference to the position of the family at the time it was passed and as far as we know it has never been acted on, not even in part. In 44 Mad 740[1] the Privy Council found that a custom existed among the Nattukottai Chetties inhabiting certain villages in the Madura District whereby when a Chettiar during his lifetime of his first wife married another wife he appropriated out of his property a part for the maintenance of his first wife and that the property so appropriated descended to her son and that the rest of the property was notionally divided, a half being allotted to the son or sons by the first wife and the other half to the son or sons by the second wife. There is no evidence of any such custom in the present case, but the judgment in 44 Mad 740[1] shows that in some parts of the Madura District there can be a notional division of property, and we consider that the evidence here discloses that this was the intention when the compromise decree was passed. If the family separates, the separation will be deemed to continue unless it is shown that there has been a re-union, and a person who sets up a re-union must prove it: 57 Mad 931.[2] But here we are concerned with a case where the members of the family never in fact separated and the members regarded themselves as being joint even after Narayanan's death. Exs. K and III show this

1. Palaniappa Chettiar v. Alagan Chetti, (1922) 9 A I R P C 228=64 I C 439=44 Mad 740=48 I A 539 (P C).
2. Babu v. Official Assignee of Madras, (1934) 21 A I R P C 138=150 I C 1=57 Mad 931=61 I A 257 (P C).

beyond doubt. Ex. K is an affidavit sworn by respondent 5 on 12th December 1927 in support of an application to bring on the record of a suit which Narayanan had filed in the names of his legal representatives. Paras. 3, 4 and 5 of this affidavit read as follows :

3. To the said late Narayanan Chettiar, his first wife's sons, viz. (1) A. S. Annamalai Chettiar, (2) A. N. Chidambaram Chettiar, and (3) Minor Sambandam Chettiar, aged 16 years, and his second wife's sons, viz., (4) Minor A. N. Chockaligam Chettiar, (5) Minor A. N. Subbayya Chettiar, and (6) Minor A. N Yoganandam Chettiar, are the undivided sons of the late A. N. Narayanan Chettiar and are the heirs who have succeeded to his estate by 'survivorship' and are his 'legal representatives'.

4. To the plaintiff A. N. Narayanan Chettiar, deceased, except we six persons, there are no other heirs.

5. Therefore, it is just and necessary that six persons mentioned in the petition, who are the sons of the plaintiff A. N. Narayanan Chettiar, deceased, and who have succeeded to his estate by 'right of survivorship' and who are his 'legal representatives' should be brought on record as his 'legal representatives', and the case proceeded with.

There is here sworn testimony by a member of the family, who was giving evidence on behalf of the family, that Narayanan and his sons by his two wives constituted an undivided family. Ex. III is the application itself and contains similar statements. Taking into consideration the course of events from the institution of the partition suit and the exhibits to which I have just referred, we are of the opinion that the partition decree was not intended to alter the joint status of the family. It did not in fact make any change and even if the intention was originally to divide the family, that intention must in the circumstances be deemed to have been abandoned.

When Narayanan embarked upon the M. P. N. partnership he did so as representing the family. That did not, however, make the members of his family partners. It is well settled law that a contract of partnership by a manager does not ipso facto make the other members of the family partners : 28 Mad 344,[3] 41 Mad 454,[4] 30 M L J 241[5] and 41 M L W 224.[6] But this does not mean that where a manager of the trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business, the members of the family are not liable to the extent of the family property for the debts binding on the manager in the partnership business. That they are liable to this extent is pointed out in Mayne, Edn. 9, pp. 398 and 399, from which I will quote the following passage :

On the other hand, the manager of a trading family has wider powers than those of the manager of a non-trading family. There is no deviation from the fundamental principle that what is done must be for the benefit or necessities of the family, but acts such as the incurring of debts and drawing of negotiable instruments are necessities to a trading family, which they would not be to a non-trading family . . . . But with a stranger partner the members of the family who are not actively engaged in the business have no contractual relation and they can seek no direct relief against him. To the creditors of the business they will be liable to the extent of their share of the family property embarked in the business ; and in the case of families whose hereditary occupation is trade, this will be tantamount to saying that their liability extends to their share of the family property as a whole. The business is conducted on the credit of the whole family property, and that property is swelled by the profits of the business, and it would be impossible to say that any particular portion of the family property, less than the whole, is to be regarded as specifically allocated to the business.

The hereditary occupation of Nattukottai Chetties is money lending and the business which Narayanan, the manager of the family, embarked on with respondents 2 and 4 was a money lending business. If this is to be regarded as an extension of the family business — and we regard it as such—the appellant is liable to the extent of his share in the family properties for the debt due to respondent 1. In 30 M L J 241[5] Coutts-Trotter and Srinivasa Iyengar JJ. pointed out that there may be many cases in which family property may in one way or other be available to the creditors of a partnership carried on by the manager with others, and the present case is in our opinion one of them.

In 53 All 190,[7] the Privy Council had to consider a case where an ancestral business of a Mitakshara joint family had been carried on in partnership with another person. Upon the retirement of the stranger partner there was a dissolution and winding up of the partnership, but the business

3. Sokkanadha Vannimundar v. Sokkanada Vannimundar, (1905) 28 Mad 344.

4. Gangayya v. Venkataramiah, (1918) 5 A I R Mad 37 = 43 I C 9=41 Mad 454=34 M L J 271.

5. Ramanathan Chetti v. Yegappa Chetty, (1917) 4 A I R Mad 352=32 I C 427=30 M L J 241.

6. Krishnasami Iyer v. Ramanadhan, (1935) 22 A I R Mad 314=156 I C 418=68 M L J 251 =41 M L W 224.

7. Ramkrishna Muraji v. Ratan Chand, (1931) 18 A I R P C 136=132 I C 613=53 All 190=58 I A 173 (P C).

was carried on thereafter on behalf of the joint family in the same commodities and upon the same premises. This was held not to be a new business but a continuation of the ancestral business. In the present case, the business was not an ancestral one, but it was a family one and when Narayanan died the family continued to be represented in the business of the M. P. N. partnership by respondent 3, the eldest member of the family. It was not really disputed that up to Narayanan's death the appellant was liable to the extent of his share in the family properties, but emphasis was laid on the fact that Narayanan's death effected a dissolution of the M. P. N.'s partnership. If the members of the family were all liable during Narayanan's lifetime, it is difficult to see why they should not be liable after his death. The senior member of the family took his place in the partnership, and the firm continued to do business on the same basis as before. Moreover, Narayanan's death made no difference so far as the debt due to respondent 1 was concerned as the debt had been incurred during Narayanan's lifetime. The learned advocate for the appellant has suggested that the present case falls within the decision of the Privy Council in 54 All 564,[8] but there their Lordships were considering a case where the manager had started a new business, not a case where the manager had entered on an extension of the family business. Consequently we hold that the debt to respondent 1 was incurred in the course of the family business and that the appellant is liable to the extent of his interest in the family assets. His brother and his half-brothers accept this position so far as they themselves are concerned.

We also consider that the appellant is liable under the pious obligation rule. It is said on behalf of the appellant that this was not pleaded and that the Privy Council refused to allow the question to be raised in 54 All 564,[8] because it was raised for the first time before their Lordships and it involved questions of fact which had not been tried. That case was a very different one. It is impossible for the appellant in this case to raise the plea that this debt was incurred by Narayanan for his own immoral purposes or that it did not come within the category of a necessity. The debt represented a deposit made in the ordinary course of the family business. For these reasons we consider that the case has been rightly decided by the trial Court, and the appeal must therefore be dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

8. Benares Bank Ltd. v. Hari Narain, (1932) 19 A I R P C 182=137 I C 781=54 All 564=59 I A 300 (P C).

---

* A. I. R. 1938 Madras 853

MADHAVAN NAIR AND ABDUR RAHMAN JJ.

Nama Nagayya — Petitioner.

v.

Kalle Narasayya — Respondent.

Civil Revn. Petn. No. 997 of 1936, Decided on 26th April 1938, from decree of Dist. Munsif, Prodattur, D/- 25th March 1936.

*** Minor—Guardian de facto—Acknowledgment by — Limitation under S. 21, Limitation Act is not saved :** *24 M L J 428=19 I C 362, Overruled.*

A de facto guardian cannot be considered to be a lawful guardian within the meaning of S. 21, Limitation Act, for the purpose of acknowledging a debt to keep it alive against the minor : *A I R 1928 Mad 226, Foll.; A I R 1918 Cal 977, Rel. on; 24 M L J 428=19 I C 362,* **Overruled**; *A I R 1917 Pat 510, Expl.* [P 855 C 1]

N. Vasudeva Rao — *for Petitioner.*

V. Ramaswamy Iyer and V. Seshadri — *for Respondent.*

ORDER OF REFERENCE.

Venkataramana Rao J. — The question raised in this civil revision petition is one of importance. It is this : whether an acknowledgment of liability by a de facto guardian of a minor would be a valid acknowledgment on his behalf under S. 19, Limitation Act, i. e. whether an acknowledgment by a de facto guardian would be an acknowledgment by a lawful guardian within the meaning of S. 21, Limitation Act. In 24 M L J 428[1] Bakewell J. seems to have taken the view that a de facto guardian can be a lawful guardian within the meaning of S. 21. This view was expressly dissented from in A I R 1928 Mad 226[2] by Kumaraswami Sastri and Curgenven JJ., but it is urged before me that the observation therein is only obiter because the learned Judges also held that the de facto guardian had no authority to acknowledge the debt, because the amount

1. Tirappayya v. Ramaswami, (1913) 24 M L J 428=19 I C 362=1913 M W N 364.
2. Ramaswamy v. Kasinatha, (1928) 15 A I R Mad 226=108 I C 529.

due under the bond in question in that case could have been paid out of the income and there was no necessity to keep the debt alive. Mr. Ramaswami Ayyar has brought to my notice the decision in 45 Cal 630,[3] which takes the same view; but a different view appears to have been taken in the Patna High Court which is in consonance with the view of Bakewell J. As the question is of frequent recurrence, it is desirable that there should be a decisive ruling of a Bench on this point and I therefore refer this civil revision petition for disposal by a Bench.

(In pursuance of the above Order of Reference, the Court delivered the following Judgment.)

Madhavan Nair J. — The plaintiff is the petitioner. In this revision petition we are called upon to consider the question whether an acknowledgment of a debt made by a person described as de facto guardian of a minor would keep the debt alive against the minor which would otherwise become barred. The de facto guardian is the son of the sister of the grandfather of the minor. S. 19, Expln. 2, Limitation Act, says that an acknowledgment to be effective against the person making it must be signed "either personally or by an agent duly authorized in his behalf." S. 20 requires that effective payment must be made by the person liable to pay or by his agent duly authorized in this behalf. Sec. 21 Limitation Act, explains the expression "agent duly authorized in this behalf" and says "in Ss. 19 and 20 'it' shall include in the case of a person under disability his lawful guardian, committee or manager etc." This sub-section was introduced because there was a conflict of decisions as to whether a guardian of a minor was an agent within the meaning of Ss. 19 and 20. The question we have got to consider is whether the de facto guardian in the present case is an agent duly authorized to acknowledge this debt on behalf of the minor.

It may be stated at once that he is not a lawful guardian of the minor under the Hindu law, nor has he been appointed a guardian by authority or by a will. The learned counsel for the petitioner in support of the contention that the de facto guardian is lawful guardian relied mainly on two decisions, one a decision of this Court and another a decision of the Patna High Court. The decision of this Court is reported in 24 M L J 428.[1] That is a decision by a single Judge. In that case the learned Judge, Bakewell J., was of opinion that a person who is acting as lawful guardian, though not legally appointed, can bind the estate for necessary purposes and that such a person is a lawful guardian within the meaning of S. 21. This decision no doubt supports the petitioner. The decision in the Patna High Court is reported in 40 I C 809.[4] In that case payment of money due under a mortgage bond was made by the de facto guardian of a minor in order to avoid the immediate bringing of a suit on the bond against the minor. The question was whether the payment made would save the bar under S. 20 of the Act.

The learned Judge has held that the de facto guardian would come within the description of the term "lawful guardian" in S. 21. This also supports the petitioner's case. The decision has got to be taken in connection with the facts of the case. Both these cases were considered by a Bench of this Court in a decision reported in A I R 1928 Mad 226.[2] In that case Kumaraswami Sastri J. who wrote the leading judgment dissented from the view of Bakewell J. in 24 M L J 428[1] and explained the circumstances bearing upon the decision in 40 I C 809.[4] In that Patna case[4] the person who made the payment was no doubt the de facto guardian but the learned Judge pointed out that there was nothing tangible on the records to show that he was not the lawful guardian. Reference is made in the judgment to certain suits and orders where he was described as guardian and it was in such circumstances that the payment made by him would be an effective payment. Barring these three decisions no decision directly bearing on the question has been brought to our notice by the learned counsel. There is a decision of the Calcutta High Court reported in 45 Cal 630[3] which supports the contention of the defendant that a de facto guardian cannot be considered to be lawful guardian within the meaning of S. 21, Limitation Act. This case also has been considered by the learned Judges who decided the case in A I R 1928 Mad 226.[2] We were referred to a series of cases by the learned counsel for

3. Bireswar Mukerjee v. Ambika Charan Bhattacharjee, (1918) 5 A I R Cal 977=42 I C 472=45 Cal 630.

4. Gita Prosad Singh v. Ragho Singh, (1917) 4 A I R Pat 510=40 I C 809.

the petitioner to show that alienations made by de facto guardians under the Hindu law were held valid if they were for the benefit of the minor. None of those cases have any bearing on the question. We are not concerned with the question whether the alienation should be binding or not.

The question we have to consider is whether the person described as de facto guardian would come within the description of lawful guardian within the meaning of S. 21, Limitation Act. As already stated, he is not the natural guardian nor was he testamentary guardian. His position strictly speaking is only that of an intermeddler of the estate of the minor. No doubt he may have been managing the estate of the minor and probably he may have been managing the estate to the advantage of the minor as well. He remains an intermeddler all the same. By a constant course of management, his position as that of an intermeddler cannot be converted into that of a lawful guardian. We accept with great respect the reasoning of Kumaraswami Sastri J. in A I R 1928 Mad 226[2] which was concurred in by Curgenven J. For the reasons given by the learned Judge we hold that a de facto guardian cannot be considered to be a lawful guardian within the meaning of S. 21 for the purpose of acknowledging a debt to keep it alive against the minor. In our opinion the decision in 24 M L J 428[1] does not state the law correctly. As the suit debt is therefore barred as it has not been acknowledged validly by the petitioner's guardian, the suit was rightly dismissed by the lower Court. The civil revision petition is dismissed with costs.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1938 Madras 855

PANDRANG ROW J.

Pandarathil Abdulla — Petitioner.

v.

Komalath Thanga Koya and others — Respondents.

Civil Revn. Petn. No. 437 of 1934, Decided on 28th March 1938, from order of Collector of Malabar, D/- 20th May 1933.

(a) Laccadive Islands and Minicoy Regulation (1 of 1912), S. 26—Collector exercising appellate jurisdiction is subject to revisional jurisdiction of High Court just as he is subject to appellate jurisdiction of High Court while exercising original jurisdiction.

Section 26 shows that a Collector while exercising his original jurisdiction is subject to the appellate jurisdiction of the High Court. This does not however show that the Collector exercising appellate jurisdiction is not subject to the High Court. Although no second appeals are provided for, yet the Collector exercising appellate jurisdiction is subject to the revisional jurisdiction of the High Court. [P 856 C 1, 2]

(b) Laccadive Islands and Minicoy Regulations (1 of 1912), S. 24—Transfer of case—High Court cannot transfer cases from file of Amin.

Transfer of a case from the file of the Amin to any other officer is not a matter to be decided by the High Court but only by the Collector or Inspecting Officer who are empowered to transfer civil suits from the Amin's file to their own file under S. 24 of the Regulation. [P 857 C 1]

K. N. Kumaran — *for Petitioner.*

B. Pocker — *for Respondents.*

Govt. Pleader as *amicus curiæ.*

Order.—This is a petition to revise the order of the Collector of Malabar dated 20th May 1933 dismissing the appeal from the order of the Amin of Androth Island dated 12th March 1933. It appears, there was a petition filed by the Koyas of the Island against the petitioner and another person on 12th March 1933 bringing to the notice of the Amin that the petitioner, who is a Melacheri, had agreed to hire a boat and register the agreement of hire contrary to the long prevailing custom in the Island. The Koyas alleged that the new departure threatened by the petitioner was likely to cause great hardship to them and would give rise to grave disturbances. The prayer in the petition was:

> We therefore request that the Court may be pleased to cancel the agreement regarding the chartering of the Odam and order that the Melacheries should not sail with Odams as owners of goods.

It appears therefore that the application was made to the Court of the Amin with a view to invoke his civil jurisdiction, though it is not quite clear, in view of the reference to the likelihood of grave disturbance, that it was not intended to invoke his criminal jurisdiction also. The Amin appears to have passed an order on the same day, apparently without hearing the other side, and without proceeding in the manner indicated in S. 22, Laccadive Islands and Minicoy Regulation 1 of 1912, which requires that the Amin sitting with four or more assessors shall be the Civil Court for the islands and shall have jurisdiction over all civil claims arising therein. The order passed does not purport to have been made by the Amin after sitting with four or

more assessors, and the fact that the order was passed on the same date as the date of the petition appears to show that the order passed by the Amin was a kind of interlocutory order on his own authority in view of the urgency of the matter. The order of the Amin was to the effect that in his opinion it was contrary to law and custom for Melacheries to own goods and take them in odams and that if such things were permitted there would be great trouble in the island and disturbances between the Melacheries and the Koyas. He expressed the opinion that the petition should be brought to the notice of the superior Court in order that it might be heard and that it must be heard and decided according to the directions of the higher authorities. The order wound up with the following sentence:

Therefore I hereby order and direct that the abovenamed Abdulla should not act according to the Karar and sail as owner of goods to the mainland thereby breaking the long-established custom till final orders are passed.

The petitioner's advocate is not able to say whether the matter has been taken up by the Amin once more for the purpose of passing final orders. The appeal preferred from this order of the Amin to the Collector of Malabar was dismissed by the Collector who apparently thought that the order appealed from was a final order. The Collector stated that the practice referred to by the Amin in his order is an established custom of the island and an integral part of the system of land tenure and that any interference with that custom would upset the economic arrangements of the island. Accordingly he confirmed the Amin's order and dismissed the appeal.

A preliminary objection was raised to the competency of the revision petition by Mr. Pocker who appeared for the respondents and as the matter was of some importance, notice of the petition was given to the Government Pleader so that his assistance may be available in deciding the question of jurisdiction, as was done some years ago in a similar case: *See* 49 Mad 419.[1] The learned Government Pleader has not put forward any new notifications, which have a bearing on the subject and the point has to be decided more or less in the light of Regulation 1 of 1912. Under S. 26 of the Regulation an appeal is provided to the High Court from any decision of the Collector in the exercise of his original jurisdiction and this shows that the Collector while exercising his original jurisdiction under the Regulation is subject to the appellate jurisdiction of the High Court. It is however contended by Mr. Pocker that this does not make the Collector when acting in his appellate jurisdiction subject to the jurisdiction of the High Court. I am unable to accept this contention. It is not possible in my opinion to regard the Collector exercising original jurisdiction as a different tribunal from the Collector exercising his appellate jurisdiction. The Collector is a judicial tribunal constituted under the Regulation and merely because appeals are not permitted by the Regulation from his appellate orders, on the general principle enunciated in S. 15 of the Regulation that no second appeal shall lie in any case whatever, it does not necessarily lead to the conclusion that the appellate orders of the Collector cannot be revised by the High Court. The appellate jurisdiction must be deemed to have been exercised by a tribunal subject to the appellate jurisdiction of the High Court, even though no appeals are permitted from orders passed by the Collector in his appellate jurisdiction. Under S. 107, Government of India Act, the petition for revision was maintainable, and in my opinion it does not cease to be competent because that Section has been repealed by the new Government of India Act of 1935 which came into force on 1st April 1937. The effect of the repeal is not to destroy or take away the jurisdiction which existed at the time when proceedings were initiated: *vide* S. 38 of the English Interpretation Act. I therefore overrule the preliminary objection and find that the petition is competent and that this Court has jurisdiction to entertain and dispose of the revision petition.

On the merits it is really impossible to deal with the question finally in view of the utter absence of material in the record. The order of the Amin appears to have been passed, as I have already observed, as an urgent order without hearing the other side and mainly to prevent a disturbance of the public tranquillity. It is obvious that, whether the Amin had authority to make such an order or not, at this distance of time no useful purpose will be served by investigating the question whether there was sufficient ground for making such an order. The Collector in dealing

1. Ahmed Koya v. Aisanma, (1926) 13 A I R Mad 657=93 I C 341=49 Mad 419.

with the matter in appeal appears to have thought that the Amin had finally decided that the custom pleaded by the Koyas was a long established custom which could be enforced and the Collector appears to have agreed with the view of the Amin. It is obvious that a matter of this importance cannot be decided in this manner without some semblance of a trial and without some regard to the rules of natural justice and in particular without hearing what the other side has to say before pronouncing a decision, which does not appear to have been done by the Amin. In these circumstances, all that can be done is to point out that the order of the Amin is only an interlocutory order and that it does not finally determine the rights of any party and that the Collector's order in appeal also does not decide finally the rights of the parties. It is perhaps necessary to add that the petition should be treated as a civil suit by the Amin and disposed of according to law. The learned advocate for the petitioner has brought to my notice that the Amin is himself a Koya and is biassed and prayed that the suit should be transferred from the Amin to the file of the Inspecting Officer or of the Collector. This is not a matter to be decided by the High Court but only by the Collector or Inspecting Officer who are empowered to transfer civil suits from the Amin's file to their own file under S. 24 of the Regulation. It will be open to the petitioner to make an application for transfer under this Section and there is no reason why the High Court should interfere with the discretion given by S. 24 of the Regulation as regards transfer to the Collector and the Inspecting Officer. In the circumstances of the case, I direct the parties to bear their own costs in this Court.

C.R.K./B.D. *Order accordingly.*

---

* A. I. R. 1938 Madras 857

BURN AND STODART JJ.

Sreeman Nallanichakravarthula Sampath Kumara Venkata Rangacharyulu Ayyavarlam Garu and others— Appellants.

v.

Jammi Turanga Rao and another — Respondents.

Second Appeal No. 552 of 1933, Decided on 10th May 1938, against decree of Sub-Judge, Cocanada, in A. S. No. 119 of 1931.

*** Civil P. C. (1908), O. 21, R. 63—Suit under, to set aside claim order — Rights of parties as on date of attachment or on date of order are to be taken into consideration.**

In a suit under O. 21, R. 63 to set aside the claim order, the rights of the parties on the date of the attachment or on the date of the order are the rights which have to be taken into consideration. Hence if on these dates plaintiff's adverse possession is not complete, he cannot succeed and it is immaterial that by the date on which suit under O. 21, R. 63 is filed his adverse possession is complete : *A I R 1918 Mad 572, Foll.*; *A I R 1926 Mad 42, Expl.* [P 858 C 1, 2]

P. V. Rajamannar — *for Appellants.*

Y. Suryanarayana and B. V. Ramanarasu — *for Respondents.*

Burn J. — This is an appeal from the decision of the learned Subordinate Judge of Cocanada in Appeal No. 199 of 1931. The appellant was the plaintiff in O. S. No. 166 of 1930 on the file of the District Munsif of Peddapuram in which he sued under the provisions of O. 21, R. 63, Civil P. C., to set aside the order made on a claim petition. The facts are comparatively simple. The property concerned in the claim was one half share in two vacant sites and a house. The appellant thought that he had purchased the whole of these properties on 15th April 1918 when a sale deed Ex. A was executed in his favour by Venkatasubba Rao and Ramadoss, the sons of one J. Chikka Rao. In 1921 the respondent filed a Small Cause Suit against one Venkataseshagiri Rao who was a son of a first cousin of J. Chikka Rao and in execution of his decree he attached, what he alleged to be the undivided half share in these properties belonging to Venkataseshagiri Rao. Now it is not disputed that at the time of the sale in 1918, Venkataseshagiri Rao's branch of the family, to which he and J. Chikka Rao belonged, was entitled to one half of the joint family properties. It is therefore not disputed that on 15th April 1918 the two sons of J. Chikka Rao were not in a position to sell to the appellant any more than the one half share which belonged to their branch of the family. The sale-deed Ex. A therefore conveyed to the appellant title to one half share only. The other half share which had belonged to Venkataseshagiri Rao was attached by the respondent on 31st October 1929. The appellant put in a claim petition which was dismissed on 6th January 1930. The order of the learned District Munsif dismissing this petition is Ex. F. On 23rd June 1930 the plaintiff

filed O. S. No. 166 of 1930 to set aside the claim order and to establish his own title.

The appellant bases his claim on adverse possession as against Venkataseshagiri Rao, the judgment-debtor in the Small Cause Suit. It is clear that on the date of the attachment, 31st October 1929, twelve years had not elapsed from the date of the sale-deed, Ex. A, that being the date on which it is assumed that the appellant's adverse possession began; twelve years had not elapsed on 6th January 1930 when the learned District Munsif dismissed the claim petition. But on 23rd June 1930 when this suit was instituted by the appellant, more than twelve years had elapsed since 15th April 1918. Now the appellant's contention is that by reason of this fact his title by adverse possession has been completed. The learned Subordinate Judge disagreeing with the learned District Munsif who tried the suit has held that what was to be decided was the rights of the parties on the date of the attachment, 31st October 1929, or at the latest on the date on which the claim petition was dismissed. The learned counsel for the appellant has referred us to cases, 11 M L J 344[1] and 49 M L J 656.[2] In those cases, it was held that the attachment of a judgment-debtor's interest in immovable property did not stop the running of adverse possession by the trespasser. The learned Subordinate Judge preferred to follow the case in 33 M L J 316,[3] which is a very similar case to this. It has been suggested that we should have this case referred to a Full Bench since the decisions of this Court are conflicting. The case however is a very old one; it is now nearly nine years since the attachment took place and we do not think that the matter is of sufficient difficulty or importance to be referred to a Full Bench.

The learned Subordinate Judge has pointed out that if the appellant had filed his suit to set aside the claim order on the day after the claim order was passed or on any day before 14th April 1930 he would have had no hope of success. The learned Subordinate Judge thinks that it is impossible for the plaintiff by waiting a few months more till 23rd June 1930 to clothe himself with additional rights and to compel the rightful owner, namely, the judgment-debtor to lose his right to the property. We agree with the learned Subordinate Judge in this view; and we agree with him that the decision in 49 M L J 656[2] is not really in conflict with this principle. In a suit like this to set aside the claim order, it is clear that the rights of the parties on the date of the attachment or on the date of the order are the rights which have to be taken into consideration. On 6th January 1930 the appellant, (assuming him to be in adverse possession as against Venkataseshagiri Rao) had not been in possession for twelve years, and therefore he had not perfected his title by prescription. Therefore on that date the real owner of the one half share which was attached was Venkataseshagiri Rao. The effect therefore of the order passed by the learned District Munsif on the claim petition was to declare that in so far as Venkataseshagiri Rao's half share was concerned, the appellant was holding it not on his own behalf but on behalf of the judgment-debtor. To succeed in his suit the appellant was therefore bound to show that this finding was incorrect. We think it is obvious that he cannot do this by waiting for five months more and then saying that even though he had no title in January he has got a title in June and therefore the claim order was wrong. In this view we find ourselves in agreement with the learned Subordinate Judge and we dismiss this appeal with costs.

C.R.K./D.S. *Appeal dismissed.*

1. Seetharami Reddi v. Venku Reddi, (1901) 11 M L J 344.
2. Ranganatha Aiyar v. Srinivasa Ayyangar, (1926) 13 A I R Mad 42=90 I C 1037=49 M L J 656.
3. Pandiayan Pillai v. Vellayappa Rowther, (1918) 5 A I R Mad 572=42 I C 438=33 M L J 316.

A. I. R. 1938 Madras 858

HORWILL J.

Arumugam and others — Appellants.

v.

Emperor.

Criminal Appeals Nos. 178, 200, 201 and 238 of 1937, Decided on 10th November 1937, against order of Court of Session, Coimbatore, D/- 15th March 1937.

(a) Penal Code (1860), S. 401—Several persons tried under S. 401 of being members of gang—Evidence that big gang was committing acts of depredation all over India and that some of the accused were found associated together in crime characteristic of gang is sufficient to justify Judge on very little proof of association in leaving it to jury whether particular accused was member of gang.

Where several persons are being tried under S. 401 of being members of a large gang, the evidence that a big gang was in existence and was committing acts of depredation on the community all over India, Burma and Ceylon and that some of the accused, who are residents of a particular village, were found associated together in crime characteristic of the gang in distant parts of India, is sufficient to justify a Judge even on very little proof of actual association of particular accused, in leaving it to the jury to decide whether the particular accused is a member of the gang. [P 860 C 2]

(b) Criminal P. C. (1898), S. 271 — Trial under S. 401, Penal Code—Number of charge-sheets originally filed against accused — All accused charged with being members of gang — There is nothing objectionable if only one charge is framed in Sessions Court against all accused.

In a trial under S. 401, Penal Code, although a number of charge-sheets are originally filed against the accused, there is nothing objectionable if only one charge is framed in the Sessions Court against all the accused, if all the accused are in fact members of a gang, for all the members of the gang can be tried together for the offence of being members of that gang and it matters not how and when they were arrested. [P 860 C 2 ; P 861 C 1]

(c) Criminal P. C. (1898), S. 188 — Several persons being tried under S. 401, Penal Code, for being members of gang — Proof of association outside British India to commit crimes is not barred under S. 188 read with S. 4 of Penal Code.

Where several persons are being tried under S. 401 for being members of a gang, proof of their association outside British India for the purpose of committing crimes is not barred under S. 188, Criminal P. C., read with S. 4, Penal Code, as the Court is not concerned with the trial of a person for an offence committed outside British India, but with the fact that the accused committed offences outside British India, which affords evidence that the accused associated together for the purpose of committing crime. [P 861 C 1]

(d) Penal Code (1860), S. 401—Evidence of association before period of charge is admissible to corroborate other evidence of association during that period.

Where several persons are being tried under S. 401 for being members of a gang the evidence of association before the period of charge is admissible to corroborate the evidence of association during that period. [P 861 C 1]

(e) Penal Code (1860), S. 401—Two Sessions cases started against accused tried under S. 401 — Accused members of one gang — Two cases can be combined together.

Where two Sessions cases are started against persons accused under S. 401 of being members of a gang, it is not only permissible to combine the two trials but is also convenient and proper when all the accused are members of one gang. [P 861 C 1]

(f) Criminal Trial — Previous convictions — Proof of — Convictions sought to be proved by finger-prints taken in previous trials—There is no room for doubt where sets of finger-prints taken by persons accustomed to take them are compared and declared by competent witness to be identical.

Where the previous convictions of the accused tried under S. 401, Penal Code, are sought to be proved by the finger-prints taken in the previous trials, there can be no room for error where sets of finger prints taken by persons accustomed to taking finger-prints are compared and declared by some competent witness to be identical. When an expert gives evidence with regard to the identity of impressions, he should give his reasons for saying so and the Court should require some evidence from the expert witness on this matter. However, in a simple case of comparing two sets of impressions, the giving of reasons cannot make the matter any more certain to the Court. [P 861 C 1, 2]

(g) Evidence Act (1872), S. 74 — Finger-print slip taken in pursuance of statutory duty cast upon police officers after convict enters jail is public document — So also jail registers written up by jail authorities in ordinary course of their duties.

A finger-print slip taken in pursuance of a statutory duty cast upon police officers after a convict enters a jail is an act of the executive within the meaning of S. 74, and is therefore a public document. So also a jail register written up by the jail authorities in the ordinary course of their duty as soon as a convict is admitted into jail is a public document : *3 N L R 1 and A I R 1916 Cal 344, Expl.* [P 862 C 1, 2]

(h) Criminal Trial — Previous convictions — Proof of—Convictions sought to be proved by finger-prints and calendar extracts—Sufficiency of evidence as to identity of accused is question of fact in each case—Sufficiency of evidence as to identity in particular circumstances discussed.

Where the previous convictions of several accused in a trial are being sought to be proved by their finger-prints, taken in the previous trials and the calendar extracts of their previous convictions, the sufficiency of the evidence as to the identity of the convicted persons must in each case be a question of fact and no hard and fast rule can be laid down as to what evidence is necessary for the establishment of that identity. [P 862 C 2]

Where it is proved that the accused before the Court had his finger-prints taken in jail far away from his native place, soon after a person of his name was convicted of an offence, that is certainly very strong evidence that the person bearing his name who was convicted was the very person who shortly afterwards had his thumb impressions taken. Where however the finger-prints were taken elsewhere and taken in a place which was not the place of conviction and were taken some time after the conviction, it cannot be said that the identity of the accused person before Court is established. Where a calendar extract shows a previous conviction, there can be no doubt that the person last convicted was also convicted under the various charges mentioned in the calendar extract. In such case a list of previous convictions would be confirmatory of the other evidence establishing the identity of the convicted person in the earlier cases with the accused before the Court. A list of previous convictions containing a finger-print slip taken in jail is not satisfactory evidence of convictions recited therein although the list forms part of the document. The presumption of correctness in respect of these entries is not strong enough in warranting a criminal Court in asserting that the

person whose finger-prints were recorded had received those previous convictions. So also, where the prosecution are able to prove that a number of persons bearing the name of accused are found in a calendar extract and that the finger prints of the accused were taken in the same jail at or about the same time, it is very strong evidence that those persons were jointly convicted.

[P 862 C 2; P 863 C 1]

(i) Penal Code (1860), S. 401—Several persons tried under S. 401—Previous convictions of accused not properly proved—Prosecution case weakened — Ordinary course would be retrial—Retrial should not however be ordered where it would involve another elaborate trial at great cost to Crown and accused and where accused have been in jail for several months.

Where in a trial of several accused under S. 401, the alleged previous convictions of some accused are not properly proved, which results in material weakening of the prosecution case, the ordinary and proper procedure would be to order retrial of the accused. Where however that would necessitate another elaborate trial at a considerable cost to both the crown and to the accused and the accused have already served several months in jail, the interests of justice do not demand that a retrial of the accused should be ordered.

[P 863 C 2]

N. Somasundaram, B. R. Bhat and Kuppuswami — *for Appellants.*

K. Venkataraghavachari—*for the Crown.*

Judgment.—The appellants were convicted by the Sessions Judge of Coimbatore under S. 401, I. P. C., of being members of a large gang known as the kepmari gang, and some of them were sentenced to six months' rigorous imprisonment and the others to two years' rigorous imprisonment. The Crown has embarked upon this rather ambitious project of trying to prove that the various accused in this case who were 39 in number, were members of a huge gang which, P. W. 1 says, amounted at times to 700 or 800 people. To obtain the necessary evidence for proving all the constituents of this offence was a very big task, and had the accused been tried by a Judge instead of by a jury, it would have been very doubtful whether the Judge would have found the evidence definite and substantial enough to warrant a conviction. However, the learned Sessions Judge has put the matter very fairly to the jury and he has pointed out in para. 13 of his judgment that the prosecution had to establish four facts: (1) that there existed a gang of persons during the charge period, i. e. June 1921 to November 1934; (2) that those persons were consciously associated for the express purpose of committing theft; (3) that theft was to be committed by the gang habitually, and (4) that the accused were members of such a gang. He further added that

the Section is a highly penal one and the offence is one of a very special character and entirely the creature of statute. The Section must therefore be strictly construed. It is not the purpose of this Section to sweep into a wide net a large number of persons whom the police merely suspect or who give them trouble.

The prosecution has successfully established that there was a very large gang which for practical purposes was termed the kepmari gang and that the members of this gang, whose work was characterised by a particular *modus operandi*, worked together in different parts of India, Burma and Ceylon in committing a number of crimes characteristic of that gang. Most of them were members of a criminal tribe, and with the exception of accused 12, 16, 19, 23 and 37 to 39, were residents of the village of Edayapatti. The occupations of these accused are cultivation for the most part, a few following such other peaceful occupations as those of a weaver, goldsmith tailor, pujari, and so on. One would expect that persons of this status following these quiet occupations would not ordinarily absent themselves from their village except on occasions of festivity; yet they were found associated in places hundreds of miles away from their native villages; for example, a number of them obtained G passes from the police for the purpose of attending a wedding at Pondicherry and all of them, with the exception of one, were three months later arrested in Karachi on a charge of committing a bank theft. The evidence that a big gang was in existence and was committing acts of depredation on the community all over India, Burma and Ceylon and that these villagers were found associated together in crime characteristic of the gang in parts so distant as Calcutta, Midnapore, Karachi, various parts of Ceylon, and Rangoon was sufficient to justify a Judge even on very little proof of actual association of particular accused—in leaving it to the jury to decide whether the accused was a member of the gang.

A number of objections have been raised to the charge other than that discussed above, viz. that the Judge ought to have directed the jury that there was no evidence which would justify a verdict of 'guilty.' The first arises out of the fact that a number of independent charge-sheets were originally filed and that in the Sessions Court only one charge has been framed against all the accused. I can see

nothing objectionable in this if all the accused were in fact members of a gang; for it is clear that all the members of the gang can be tried together for the offence of being members of that gang; and it matters not how and when they were arrested. Presumably the charge-sheets were filed soon after the accused were arrested and related to persons recently arrested. Another objection is that association outside British India, e. g. in Mysore and Ceylon, ought not to have been proved, because of the prohibitions under S. 188, Criminal P. C., read with Sec. 4, I. P. C. But we are not now concerned with the trial of a person for an offence committed outside British India, but with the fact that the accused committed offences outside British India, which affords evidence that the accused associated together for the purpose of committing crime. Another objection is that certain evidence has been let in with regard to a period before that which is the subject of this charge, namely 1921 to 1934. There is nothing improper in this; for, evidence of association before the period of charge is admissible to corroborate other evidence of association during that period. It is objected also that the learned Sessions Judge has combined two Sessions cases; but that was not only permissible, but convenient and proper; for, if all the accused are members of one gang, they ought to be tried together in one trial. Another objection is that the Judge did not direct the jury as to the import of convictions under Criminal Tribes Act. The learned Judge has certainly stated at various places that certain convictions under the Criminal Tribes Act should not be taken into account. I do not think that it was necessary that he should elaborate in greater detail what the scope of the Criminal Tribes Act was. I have no doubt that the jurymen had a very fair idea themselves of the scope and purpose of that Act.

It has been pointed out that the learned Sessions Judge had, in every case where evidence has been tendered of previous convictions, stated 'the accused has been convicted of . . . . .' instead of saying that 'the finger-print expert is of opinion that . . . . .' No doubt it would have been more correct if the learned Sessions Judge had framed his charge in the terms of the latter phrase; but this is not of any importance, because there can be no doubt that there is no room for error where sets of finger-prints taken by persons accustomed to taking finger-prints are compared and declared by some competent witness to be identical. There is of course always room for doubt where one has only two impressions of the same finger and where one or both of them may be blurred or indistinct; but where there is a set of impressions there can be no doubt at all. It is of course true that when an expert gives evidence with regard to the identity of impressions he should give his reasons for saying so, and the learned Sessions Judge should have required some evidence, I think, from the expert witness on this matter. However, in a simple case of comparing two sets of impressions, the giving of reasons could not have made the matter any more certain to the Court. It appears that in referring to the evidence certain charts were put into the hands of the jurors which purported to show joint convictions and separate convictions; and it is argued that these slips might have misled the members of the jury. I see no reason to think that it did; for the Judge was careful in summing up to state what weight should be given to the evidence with regard to each conviction. It was impossible to associate with a chart a summary of the evidence of each conviction. The jury must have understood that it was a mere list of convictions on which evidence had been given and not that it was intended to convey to them the idea that these convictions had all been proved. In many cases the learned Sessions Judge distinctly stated that there had been no proof of certain convictions. Another complaint is that the attention of the jury was not drawn to the individual statements of the accused. The Judge himself has given his reasons for that. They were stereotyped and amounted to a mere denial of the charges against them. The learned Sessions Judge also did not ask the accused whether it was true that they had been convicted as stated by the witnesses; but that, it appears, was a deliberate omission; for the Judge feared that such a question might lead the accused into admitting something which the jury might otherwise reject as not having been proved.

The learned counsel for the appellants has however made one good point against the charge; and that is that the Judge has allowed the jury without warning to accept insufficient evidence of certain convictions of the accused. In many cases where calendar extracts of previous convictions have been

filed there has been no evidence to prove that the person bearing the name of the accused in the calendar extract is the accused before the Court. In almost all those cases where identity has been sought to be proved the evidence has consisted almost entirely of the production of finger-print slips and a question has arisen how far the production of these finger-prints and the evidence of an expert can be said to establish the identity of the accused before the Court with the persons who were convicted in the various Courts and whose calendar extracts have been filed. P. W. 64 has explained in detail the process adopted by the police and the jail authorities in recording finger-print impressions of suspected and accused persons and how they are sent to the central bureau. When a previous conviction is sought to be proved the finger-print slips are sent for. This process has been explained in detail in the charge of the lower Court and it is not necessary to repeat it here.

It appears that when a convict who has been previously convicted is admitted in jail and his finger-prints recorded, his previous slips are destroyed and the particulars of the previous conviction noted in the latest finger-print slip. I have no doubt that it would be unsafe for the Court to assume the correctness of the previous convictions merely on the recitals contained in the finger-print slips; but it is further contended that these finger-print slips cannot be admitted for the purpose of identifying the accused person with the convict whose impressions were taken, unless the police officer who actually recorded the finger-prints gives evidence that he did so and identifies the impressions as those taken from the accused—an impossible task. In considering this objection the question arises whether a finger-print impression is a public document. It seems to me that a finger-print slip taken in pursuance of a statutory duty cast upon police officers after a convict enters the jail is an act of the executive within the meaning of S. 74 Evidence Act, and is therefore a public document. A case however has been quoted in which it is said that a contrary opinion was held. That case is 5 Cr L J 220,[1] where it will be seen that the Additional Judicial Commissioner, Nagpur, at p. 232, was of opinion that a finger-print slip with which he had to deal was not a public document although he did not find it necessary to decide the case on that point. He says:

> It is no doubt the case that the document is headed "Central Provinces Police" and it is proved to have come from the Head Office of that department. But it might nevertheless be merely an exhibit in some museum of curiosities maintained in that office. In its present form, without authoritative signature or certificate of any kind, showing it to be an authorized record of police acts, it is impossible to regard it as a public document within the meaning of Section 74 aforesaid.

In the present instance we find that all the finger-print slips are signed by some responsible officer and purport to have been taken either in the jail itself or (in a few cases) upon arrest and there is therefore no doubt in this case that these documents were taken in the exercise of a statutory duty cast upon the police and not, as the learned Additional Judicial Commissioner found in that case, "that they might be merely an exhibit in some bureau of curiosities." In some cases we find that instead of calendar extracts the prosecution have filed an extract from the jail register which is written up by the jail authorities in the ordinary course of their duty as soon as a convict is admitted into jail. This register too, as far as I can see, must be a public document. The learned advocate for the appellants relies on 43 Cal 1128,[2] as showing that two learned Judges of the Calcutta High Court were of opinion that the register was not a public document. I do not find however that such was the finding of those learned Judges. What they were concerned about was whether the identity of the person whose name appeared in the jail register had been satisfactorily established to be that of the accused who was being tried in the case before them. The sufficiency of the evidence as to the identity of a convicted person must in each case be a question of fact; and no hard and fast rule can be laid down as to what evidence is necessary for the establishment of that identity. In most of the instances in which finger-print slips have been filed the prints were taken in jail, in a place at or near the place of trial and at a date shortly after the conviction. Where therefore it is proved that the accused before the Court had his finger-prints taken in

1. Emperor v. Sahdeo, (1907) 3 N L R 1=5 Cr L J 220.

2. Emperor v. Sheikh Abdul, (1916) 3 A I R Cal 344=33 I C 825=43 Cal 1128 = 17 Cr L J 185=20 C W N 725.

jail far away from his native place, soon after a person of his name was convicted of an offence, that is certainly very strong evidence indeed that the person bearing his name who was convicted was the very person who shortly afterwards had his thumb impressions taken.

In a few cases however we find that the finger-prints were taken elsewhere or taken in a place which was not the place of conviction, and taken sometimo after the conviction. In those cases it cannot be said that the identity of the convicted person with the accused before the Court has been established. In some cases a calendar extract has shown previous convictions, and in those cases there can be no doubt that the person last convicted was also convicted under the various charges mentioned in the calendar extract ; for the accused they had been tried and convicted under Sec. 75 for having been convicted a number of times before. In such cases a list of previous convictions would be confirmatory of the other evidence establishing the identity of the convicted person in earlier cases with the accused before the Court. I agree with the learned advocate for the appellants that the list of previous convictions contained on the finger print slips is not satisfactory evidence of the previous convictions recited therein ; although it may be true that the list of previous convictions forms part of the document. Evidence has been let in by the finger-print expert, P. W. 64, explaining how this list of previous convictions referred to in the finger-print slip has come to be recorded and it is probable that the entries therein are correct; but the presumption of correctness is not strong enough to warrant a criminal Court in asserting that the person whose finger-prints were recorded had received those previous convictions. One other question that has arisen out of the production of calendar extracts and finger-print slips is whether the prosecution have proved that certain accused were convicted jointly. If the prosecution are able to prove—and they have proved it in the present case—that a number of persons bearing the names of the accused are found in a calendar extract and that the finger-prints of those accused were taken in the same jail at or about the same time, that is very strong evidence indeed that those persons were jointly convicted.

It is seen from the above discussion that the only misdirection of the learned Sessions Judge was with regard to certain convictions which, as has been shown, were not properly proved. Unfortunately, this misdirection has made it necessary for me to go through the evidence against each of the 39 accused and in some cases I have found that the failure to establish identity in one or more cases has materially weakened the prosecution case. In such cases the ordinary and proper procedure would be to order a retrial of these accused ; but in view of the facts that this would necessitate another very elaborate trial at considerable cost and trouble to both the Crown and to the accused and that the accused have already served nine months in jail, the interests of justice do not demand that a retrial of these accused should be ordered. In such cases the accused will be acquitted. In other cases I have found that even after making allowance for the fact that a portion of the evidence against a particular accused did not prove a conviction ; yet the remaining evidence against him is so strong that there can be no doubt from the nature of the verdict given by the jury with regard to other accused that the misdirection did not materially affect the case against that particular accused. In such cases the convictions will have to be upheld.

It is not necessary for me here to discuss the evidence against each of the accused; and it suffices for me to say that the evidence against the accused 1, 11, 15, 20 and 36 has been materially weakened by misdirection ; and the appeals with regard to these accused will be allowed and the convictions quashed. The convictions of the other accused are affirmed. In view of the widespread activities of this gang it cannot be said that the terms of imprisonment awarded by the lower Court are excessive, even if the fact that the accused were under remand for a long time is taken into account. Some of the sentences were for six months only and the highest was for two years. The other appeals are therefore dismissed.

C.R.K./R.M. *Order accordingly.*

✻ A. I. R. 1938 Madras 864

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Vedakannu Nadar — Petitioner.

v.

Gnanayya Nadar — Respondent.

Criminal Revn. Petn. No. 1004 of 1934, Decided on 2nd May 1938, from decree of Sub-Judge, Tinnevelly, in Small Cause Suit No. 1185 of 1932.

✻ **Provincial Small Cause Courts Act (1887), Art. 28—Art. 28 contemplates suit between rival claimants to property of intestate—Husband claiming property of his wife removed by her brother—Brother admitting husband's right of succession—Suit held triable by Small Cause Court** : *49 M L J 554=A I R 1926 Mad 37=91 I C 561 and A I R 1933 Mad 346=142 I C 613, Overruled.*

Where a person sues for the recovery of certain jewels as the heir of the deceased wife alleging that upon her death in the house of her brother, the brother wrongfully took possession of her jewels and the fact that the husband has succeeded to his wife's property is not disputed by the brother, the case raises no question of a disputed succession and is triable by a Small Cause Court as not being excepted by Art. 28 which contemplates a suit between rival claimants to the property of intestate : *27 All 622 and A I R 1915 Cal 740, Rel. on ; 49 M L J 554=A I R 1926 Mad 37=91 I C 561 and A I R 1933 Mad 346=142 I C 613,* **Overruled** *; A I R 1914 Mad 501, Expl. and Disting.* [P 864 C 1, 2]

M. C. Sridharan — *for Petitioner.*

J. S. Vedamanickam — *for Respondent.*

Venkatasubba Rao J.—This civil revision petition has been referred to a Bench on the ground that it raises an important question of law. The question turns upon the construction of Art. 28, Sch. 2 to the Provincial Small Cause Courts Act. Under that Article "a suit for a legacy, or for the whole of or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate" is excepted from the cognizance of a Provincial Small Cause Court. The plaintiff sues for the recovery of certain jewels as the heir of the deceased wife. He alleges that upon her death in the house of her brother the defendant, the latter wrongfully took possession of her jewels. That the plaintiff has succeeded to his wife's property is not disputed by the defendant; in other words, the case raises no question of a disputed succession. In our opinion, on a proper construction of the relevant words, there must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise, the Article does not apply. This follows, as the various decisions on the point have held, from the use of the word 'intestate' in the Section. The matter has been put clearly by Banerji and Richards JJ. who observe that the Article contemplates a suit between rival claimants to the property of an intestate: 27 All 622.[1] The authorities on the point have been fully considered by a Bench of the Calcutta High Court which has adopted the same view in 19 C W N 614[2] and it is unnecessary to refer to the same authorities again. As pointed out in that decision, in no previous case has a different view prevailed. The lower Court in holding that the Article in question does not apply to the present suit, has thus come to a correct conclusion.

But Mr. Sridharan, the learned counsel for the defendant-petitioner, contends that the lower Court's view is wrong and relies in support of his contention upon two cases of our Court : 49 M L J 554[3] and A I R 1933 Mad 346.[4] The first of them was decided by Ramesam J. and the second is also a decision of a single Judge (Pakenham Walsh J.) who follows the earlier decision. We are unable to follow these cases, for, as a question of construction, we are inclined to agree that the view taken by the Calcutta and the Allahabad High Courts is right. As to 37 Mad 538,[5] the present question did not arise there and there is no more than a passing observation on which the petitioner can rely. The object of the relevant part of the Article seems to be to remove from the cognizance of a Small Cause Court, matters involving disputed succession, for, they may raise complicated questions. A reference to the earlier part of the Article strengthens this view. A suit for legacy or a residue, as is evident from the provisions of the Succession Act, may raise intricate questions of law and a Small Cause Court is not expected to deal with such questions. In the result, the civil revision petition is dismissed, but we make no order as to costs.

C.R.K./B.D. *Petition dismissed.*

1. Chedi v. Gulabo, (1905) 27 All 622=2 A L J 388=1905 A W N 134.
2. Tika Sahu v. Chirkat Sahu, (1915) 2 A I R Cal 740=27 I C 773=19 C W N 614.
3. Samu Asari v. Anachi Ammal, (1926) 13 A I R Mad 37=91 I C 561=49 M L J 554.
4. Rathinaswami v. Nataraja, (1933) 20 A I R Mad 346=142 I C 613.
5. Chinnayya v. Achamma, (1914) 1 A I R Mad 501=16 I C 542=37 Mad 538=23 M L J 282.

* A. I. R. 1938 Madras 865

MADHAVAN NAIR AND STODART JJ.

S. Rm. M. Rm. Ramanathan Chettiar and another—Appellants.

v.

H. H. Maharana Shri Dowlat Singjee Thakore Sahib, Limbdi and others—Respondents.

Appeal No. 104 of 1932, Decided on 1st February 1938, against decree of Court of Sub-Judge, Trichinopoly, in O. S. No. 1 of 1929.

(a) Transfer of Property Act (1882), S. 58 (f) —Monies advanced in pursuance of oral agreement between parties — Title deeds deposited subsequently, creating equitable mortgage on certain properties—Later on, formal document purporting to be memorandum of completed transaction of mortgage executed—Such document does not require registration — Oral evidence is admissible to prove deposit of title deeds.

Where in pursuance of an oral agreement between the parties monies are advanced by one of them from time to time and certain title deeds are deposited subsequently creating an equitable mortgage on certain property in consideration of the sums advanced, and later on, a formal document, which merely purports to be a memorandum of the completed transaction of the mortgage and which does not constitute the agreement between the parties in respect to the deposit of the title deeds, and is thus simply evidence of a fact from which mortgage can be inferred, is executed, such a document does not require registration and oral evidence is admissible to prove the deposit of title deeds: *Case law discussed.* [P 869 C 2; P 870 C 1; P 871 C 1, 2; P 872 C 1, 2]

*** (b) Transfer of Property Act (1882), S. 58 (f) — Sub-mortgage by deposit of title deeds in case where original mortgage is by deposit of title deeds, is valid.**

A sub-mortgage by deposit of title deeds in a case where the original mortgage has been by deposit of title deeds is valid. There is nothing in S. 58 (f), against the validity of an equitable sub-mortgage of a mortgage created by deposit of title deeds : *A I R 1937 Rang 69, Rel. on.* [P 874 C 1]

*** (c) Transfer of Property Act (1882), S. 58 (f) — Deposit of only some of the title deeds relating to property is sufficient to create valid equitable mortgage over entire property.**

A deposit of some of the title deeds relating to a property is enough to create a valid equitable mortgage over the entire property, if it was the intention of the parties that the mortgage should be in respect of the entire property to which the documents of title relate : *(1805) 32 E R 1141; (1856) 61 E R 1024 ; (1857) 53 E R 343 ; A I R 1917 Pat 268 ; A I R 1929 Rang 65 ; A I R 1927 Mad 1145 and A I R 1930 Lah 920, Rel. on.* [P 874 C 2]

(d) Registration Act (1908), S. 49—Mortgage suit—Mortgagors while executing another mortgage in respect of suit properties addressing letter to proposed mortgagee containing statement that suit properties are under mortgage with plaintiff — Letter although not registered is admissible as evidence of collateral fact, namely acknowledgment of mortgage in favour of plaintiff.

A compulsorily registrable document though unregistered and inadmissible as evidence of a transaction affecting immovable property may be admitted as evidence of a collateral fact or for any collateral purpose. [P 875 C 2]

Where the defendants in a mortgage suit, while executing another mortgage in respect of the suit properties address a letter to the proposed mortgagee containing a statement that the suit properties are subject-matter of a mortgage executed in favour of the plaintiff, such letter, although not registered, is admissible as evidence of a collateral fact, namely the acknowledgment by defendants of the mortgage in favour of the plaintiff and can be admitted in evidence under S. 49 : *A I R 1919 P C 44; 26 Cal 334 ; A I R 1926 Mad 1040 and A I R 1930 Lah 985, Rel. on.* [P 875 C 2]

*** (e) Civil P. C. (1908), O. 2, R. 2, O. 23, R. 1 — Suit on equitable mortgage instituted in Bombay High Court — Mortgagee seeking to enforce his claim against property situate in Madras Presidency as well as other lands included in mortgage—Bombay High Court giving permission to institute fresh suit in respect of property situated in Madras Presidency in Court of local jurisdiction—Direction of Court included in final decree — Fresh suit on mortgage in respect of lands in Madras is not barred merely because no specific application was made by plaintiff in previous suit to withdraw claim and no specific order was passed.**

Where in a suit on an equitable mortgage instituted in the Bombay High Court, the plaintiff wants to enforce his claim against certain property situate in the Madras Presidency as well as other lands included in the equitable mortgage and High Court of Bombay gives permission, presumably under O. 23, to institute a fresh suit in respect of the property situate in the Madras Presidency in the Court of the local jurisdiction and the direction is included in the final decree, a fresh suit on the mortgage in respect of the lands in Madras is not barred under O. 2, Rule 2, merely because no specific application was made by the plaintiff in the previous suit to withdraw the claim with respect to the Madras land and no specific order was passed allowing withdrawal of the claim and granting permission to institute fresh suit. Suit by plaintiff in Madras Presidency, although originally one for possession of the suit property (plaintiff having purchased it with the permission of the Insolvency Court from the Official Assignee appointed during insolvency of the mortgagor), held to include an alternative claim based on the mortgage and held maintainable as framed. [P 876 C 2]

(f) Practice — Relief—Pleadings defective — Court can grant relief not prayed for, if it is not inconsistent with facts of case, provided defendant is not placed at disadvantage.

Even if it is not prayed for in the plaint, the Court can grant a relief which is not inconsistent with the facts of the case, provided the defendant is not placed at any disadvantage in the course of the trial by reason of the defect in pleadings. [P 878 C 1]

Advocate-General, K. Umamaheswaran, M. Subbaraya Ayyar and T. S. Krishnamurthy Ayyar — *for Appellants.*

V. V. Srinivasa Iyengar, V. C. Gopalarathnam and C. V. Atmanathan — *for Respondents.*

Madhavan Nair J. — This is an appeal by defendants 1 and 5 against the decree of the Subordinate Judge of Trichinopoly in O. S. No. 1 of 1929. The plaintiff in the suit is H. H. The Maharana Thakur Sahib of Limbdi. In the appeal, the question is raised as to whether the plaintiff is entitled to a sale of the suit properties in enforcement of an alleged sub-mortgage of an equitable mortgage by deposit of title deeds, granted to him by defendant 3 of the suit properties. These, called the Vadavoor lands, are situate in the Trichinopoly District. These and various other properties situated in Madras and Bangalore belonged to Messrs. Tawker & Sons, a well-known firm of jewellers in Madras. They mortgaged the title deeds of all these properties to Messrs. Nagarseth & Sons, defendant 3 in the present suit, in 1916 for a sum of over 18 lakhs of rupees borrowed from time to time for carrying on their family business. Exs. M, M-1 and M-2 are the documents which were deposited as the title deeds of the properties. Of these, Ex. M is only a judgment and strictly speaking is not a title deed. In August 1922 Nagarseth instituted C. S. No. 3772 of 1922 in the Bombay High Court (Ex. D-4 being the plaint) against Messrs. Tawker & Sons (who were defendants 1, 2 and 3) for the enforcement of the equitable mortgage. This suit was not finally decreed till 1928. Meanwhile, on 17th January 1925 Messrs. Tawker & Sons were adjudicated insolvents and the Official Assignee of Madras was made a party in that suit as defendant 4. In the course of the suit the present plaintiff was also made a party as defendant 5 at the instance of the plaintiffs in that suit (the present defendant 3)—*see* Ex. J dated 17th April 1925—on the ground that they had made an 'equitable sub mortgage' in his favour of the title of the immovable properties situate at Madras, Trichinopoly and Bangalore mortgaged to them. He then lodged what is called a counter-claim against Nagarseth & Sons for Rs. 18,23,517-6-3, which he averred was secured by deposit with him of the title deeds mentioned in the plaint and he prayed that the properties covered by the title deeds be sold and the proceeds applied in satisfaction of his debt; *see* Ex. N.

It may be mentioned here that defendant 3 used to obtain moneys from the present plaintiff for lending them to the Tawkers. The present defendants 1 and 2, the latter representing the P. M. A. Estate as receivers, claiming right to the Vadavoor properties involved in the present suit as purchasers of the same in the course of execution proceedings in C. S. No. 196 of 1921 on the file of the High Court of Judicature at Madras, applied on 12th April 1928 to be made parties in C. S. No. 3772 of 1922. Thereupon the present plaintiff and defendant 3 (defendant 5 and the plaintiffs in the Bombay suit) agreed to omit from that suit their claim to the Vadavoor lands, the present suit properties, and to bring a suit for the same within three months in Madras. In the circumstances, the learned Judge declared that he made no order on the application (*see* Ex. O dated 18th June 1928) : and defendants 1 and 2 were not made parties to the suit. The learned Judge stated in Ex. O that the plaintiff and defendant 5 (that is the Nagarseths and the present plaintiff) agreed to omit from their suit their claim as regards the Vadavoor village and to file a suit within three months 'inter alia against the applicants (that is, defendants 1 and 2) to enforce their claim against the said Vadavoor village in the Court of local jurisdiction'.

In July 1926, shortly after his appearance in the suit, an interim decree was passed by consent as between the Nagarseths and the present plaintiff. That decree (*see* Ex. L) directed the Nagarseths to pay him the sum of Rs. 19,26,232. No relief was granted with respect to the submortgage, but it was declared that this decree is without prejudice to the rights of defendant 5 (the present plaintiff) to take proceedings on the equitable mortgage of the properties in the Madras Presidency and to prove his claim in the insolvency against the estate of defendants 1, 2 and 3 (the Tawkers). Ex. L-1 is the copy of the amended decree passed in the Bombay suit on 5th November 1928 and in it the direction contained in Ex. O was repeated. It declared that for the amount due by Tawker & Sons to the Nagarseths, namely, Rs. 15,37,243, the Nagarseths were entitled to an equitable mortgage and a first charge on the lands comprised in the title deeds with the exception of the lands in the

Vadavoor village (the present suit properties) and it was declared that by virtue of the deposit of the title deeds by the Nagarseths with defendant 5, the Rajah of Limbdi, the properties were validly mortgaged to the latter for the Nagarseths' debt to him which had been already fixed at Rs. 19,26,232 by the previous consent decree; and lastly it was declared that in default of payment by the Nagarseths to the Rajah, he would be entitled to a decree absolute for sale but without prejudice to his own and Nagarseths' rights

to institute a suit (that is, the right of the plaintiffs and defendant 5) against S. Rm M. Rm. Ramanathan Chettiar and Messrs. Fraser & Ross, Receivers of the P. M. A. Estate of Madras (the present defendants 1 and 2) to enforce their respective rights under the said mortgage as provided by the previous order of 18th June (Ex. O).

Ten days after the decree in the Bombay High Court, the present plaintiff made an application in this Court sitting in insolvency for permission to buy all the mortgaged properties at a valuation of ten lakhs of rupees, agreeing to give credit for this sum in the mortgage decree and declaring his willingness to rank as an unsecured creditor for the balance of the amount: *see* Ex. 6. The Court thereupon authorized the Official Assignee who was seized of the estate of Messrs. Tawker, to execute a sale deed in favour of the plaintiff conveying all the properties: *see* Fx. P, dated 19th November 1928. The conveyance by the Official Assignee to the plaintiff of the entire mortgage properties including the present suit properties was made on 17th April 1929 under Ex. Q. In pursuance of his undertaking (*see* Ex. O) the suit out of which this appeal arises was instituted by the plaintiff on 8th December 1928 for a declaration that he is the absolute owner of the plaint-mentioned properties and that he is entitled to be in possession thereof: *see* paras. 15 and 18 (a) of the plaint. In Cl. (d) of para. 18 he prayed that if the Court should decide that defendants 1 and 2 had any right to redeem or otherwise the suit properties in respect of the mortgage in favour of defendant 3 and the plaintiff, it may determine and give proper directions "in respect of the working out of the relative rights of the respective parties." As will be presently mentioned, the plaint was allowed to be amended by order of the Court dated 12th November 1930 (I. A. No. 1215 of 1930).

We will now briefly refer to the rights alleged by defendants 1 and 5 to the suit properties and their contentions with regard to the rights claimed by the plaintiff. Records show that defendant 1 and P. M. A. (now represented by defendant 2) had obtained a decree (preliminary decree dated 26th April 1922, decree absolute for sale dated 18th July 1922) in C. S. No. 196 of 1921 against Messrs. Tawker & Sons for moneys advanced to them on a mortgage of certain properties not involved in the present suit and an order for sale had been made by the Court. During the course of execution proceedings the Official Assignee of Madras was made a party on 16th February 1925. As Tawker & Sons were not able to pay the amount in time they applied for postponement of sale and obtained an extension of time for payment by giving by way of additional security the present suit properties and charging the same with the payment of the amount due under the decree. The Court extended the time making the present suit properties also liable for the decree amount if it was not paid in time: *see* Ex. 19 dated 23rd July 1923. As the amount was not paid, the suit properties were auctioned and purchased by defendant 1 and P. M. A. in 1925. The sale was confirmed (*see* Ex. 20 dated 31st March 1926) and a sale certificate was issued in their favour on 12th May 1926 (Ex. 20-A). On 12th April 1926, as already stated, they applied to be brought on record in the Bombay suit. It may be mentioned here that in O. S. No. 762 of 1926, the partition suit in the P. M. A. family, Messrs. Fraser & Ross, the present defendant 2, were appointed receivers and hence they have been made a party to the present suit. Defendant 5 having become entitled by purchase to the interest of the P. M. A. estate in the suit properties on 23rd January 1930, was almost made a party to the suit on 25th September 1930. Defendant 4 to the suit is the Official Assignee of Madras.

In their written statements defendants 1 and 5 claiming right to the properties in the manner indicated above denied the equitable mortgage and the sub-mortgage alleged by the plaintiff and their validity, and contended that these were not binding on them. They also contended that the alleged mortgages even if true and valid were not binding on the entire extent of the suit properties. It was also contended by them that the suit was not maintainable and was barred by limitation and also under O. 2, R. 2, Civil P. C. The other

contentions raised by them are not material for this appeal. As many as 19 issues were raised in the case, but in the appeal the appellants question the findings of the lower Court only with respect to six issues, these being Issues 1, 2, 8, 9, 10 and 11. Generally stated, Issues 6, 7 and 17 raised the question whether the sale to the plaintiff of the suit properties by the Official Assignee of Madras, defendant 4, on which a decree for possession is asked for by the plaintiff (*see* para. 15 of the plaint) is valid and binding and to what extent it will prevail against the sale in favour of defendants 1 and 2. On this point the lower Court recorded a finding against the plaintiff holding that the Official Assignee had no right to any of the plaint properties on the date of the sale by him and though he sold all of them to the plaintiff, the plaintiff can have no title to them. This finding has not been appealed against by the respondent and his learned counsel has not pressed that claim in this appeal; and so, the only claim of the plaintiff to the suit properties that we are called upon to consider is that which is based on the alleged sub-mortgage of the equitable mortgage in his favour. This forms the subject matter of Issue 8. Issues 1, 2, 8, 9, 10 and 11 referred to above are as follows :

Issue 1.—Whether the plaint-mentioned equitable mortgage in favour of defendant 3 is true and valid in respect of the plaint-mentioned properties and is binding on defendants 1, 2 and 5 to any and to what extent.

Issue 2.—Whether the plaint-mentioned sub-mortgage in favour of plaintiff is true and valid.

Issue 8. — If not (if the plaintiff's sale referred to in issue 7 is not valid), is the plaintiff entitled to enforce his claim, if any, under the plaint-mentioned equitable mortgage to any and what extent against the plaint-mentioned properties in the hands of defendants 1 and 2?

Issue 9.—Is the claim set up in issue 8 in time?

Issue 10.—Is the claim set up in suit barred by O. 2, R. 2, Civil P. C., by reason of the filing of C. S. No. 3772 of 1922 of the Bombay High Court?

Issue 11.—Is the suit as framed not maintainable?

On the above issues the learned Subordinate Judge recorded findings in favour of the plaintiff and passed in his favour the decree now appealed against by defendants 1 and 5. Under this decree the plaintiff was held entitled to get a sum of Rs. 1,25,062-4-6 for principal and interest up to 30th April 1932 and costs and it was declared that if the amount was not paid in the time fixed by Court the suit properties should be sold. The issues were framed on 8th November 1929 but before the case was actually taken up for trial the plaintiff filed in August 1930, I. A. No. 1215 of 1930 for amending his plaint. In para. 15 of the plaint the plaintiff stated that

he is entitled to a declaration that he is the absolute owner of the plaint schedule properties and is also entitled to be put in possession thereof,

the right being based on the purchase of the property from defendant 4, the Official Assignee. Accordingly the first relief claimed in his plaint (see para. 18 (a)) is for a declaration that he is the full owner of the plaint schedule lands. The equitable mortgage in favour of defendant 3 by Tawker & Sons and of the sub-mortgage by the latter in his favour were mentioned by the plaintiff in para. 3 of the plaint. In para. 13 he asserted his own rights as well as the rights of defendant 3 to the suit properties based on their respective mortgages as against the claim of defendants 1 and 2, and in cl. (d) of para. 18 he prayed the Court to give directions in respect of the working out of the relative rights of the respective parties in case the Court should decide that defendants 1 and 2 had as charge holders "any right to redeem or otherwise in respect of the mortgage in favour of defendant 3 and the plaintiff." In the amendment application the plaintiff stated that he should be given relief with respect to the suit properties as the holder of the sub-mortgage which he had alleged defendant 3 had given him of the suit properties. He prayed for permission to add a new paragraph to the plaint as para. 15 (a) and to amend cl. (d) of para. 18 by inserting in it suitable words to describe clearly the nature of the relief claimed by him. The new paragraph and the words sought to be introduced in the relief portion are as follows :

Paragraph 15. (a) "In case it be held that the sale by defendant 4 to the plaintiff does not pass any title, the plaintiff is entitled to the mortgage decree for sale of the undermentioned properties for realization of a sum of one lakh of rupees, being a proportionate part of the mortgage amount due on the undermentioned properties."

In cl. (d) of para. 18 he sought to add after the words "in favour of defendant 3 and the plaintiff" and the words "such rights, etc." the following :

The undermentioned properties may be ordered to be sold for realization of a lakh of rupees out of the mortgage money due on the undermentioned properties together with subsequent interest and costs and such right.

The amendment was opposed but it was allowed by the learned Judge. A petition to revise this order of amendment filed by

the present appellants (C. R. P. No. 163 of 1931) was dismissed by the High Court on 9th February 1931, with the remark "I see no reason to interfere." The question whether this amendment was proper will be considered by us in dealing with the question whether the suit is maintainable. We will now proceed to consider the various questions in order. The first question is whether the plaint-mentioned equitable mortgage in favour of defendant 3 is true and valid; or in other words whether there is any equitable mortgage capable of legal proof having regard to the fact that there was a written memorandum (to which reference will be made presently) relating to the matter which was not registered under the Registration Act.

Evidence shows that Tawker & Sons had pledged their jewels with various firms and persons. In order to redeem them they entered into an agreement with Nagarseth & Sons, defendant 3, and obtained advances of moneys from time to time. As security for the advances, it was agreed that Nagarseth & Sons were to have pledge of the jewels to be redeemed and that immovable properties should also be given as collateral security by way of deposit of title-deeds. On this understanding which was oral, various sums of money were advanced from the middle of June 1916 to the Tawkers by the Nagarseths. Ex. 18 is a letter written by the Tawkers to Nagarseth & Sons on 17th June 1916 in which after acknowledging that they have received Rs. 75,000 they agreed to deposit title-deeds relating to immovable property. Ex. 18-a shows that on 19th June a sum of Rupees 80,000 was advanced and the Tawkers agreed to give collateral security by deposit of title-deeds. Ex. 17, a letter dated 1st July 1916, refers to these and other payments of Rs. 80,000 (29th June 1916) and Rs. 5400 (1st July 1916), all of which were made between 17th June and 1st July 1916. On or after 9th September 1916 a written agreement was executed by Nagarseth & Sons and Tawker & Sons embodying the terms of the oral agreement of June 1916. (The document bears no date but the stamp on which it is engrossed bears the date 9th September 1916). It makes reference to the previous loans and to the deposit of title-deeds as security and states that these loans must be considered to have been made under the terms of this agreement and fixes 11 lakhs of rupees as the limit of the advance.

The plaintiff's case is that in pursuance of the oral agreement between the parties in June these moneys were advanced from time to time and the title-deeds were deposited subsequently and that Ex. H is a subsequent formal document evidencing the original understanding. The first deposit of title-deeds was made in June 1916 and the deposit was completed by the end of June—prior to 1st July 1916. The agreement and the deposit of title-deeds before 1st July 1916 are proved by the evidence of P. Ws. 3, 4 and 5, particularly the evidence of P. Ws. 4 and 5, whose testimony on these points has been accepted by the lower Court for cogent reasons. We have been taken through their evidence and we see no reason to reject the same. P. W. 3 is the broker who negotiated the loan. P. W. 4 was the manager of defendant 3's firm. He is an advocate of the Bombay High Court, a member of the Bombay Municipal Corporation and a member of its standing committee and also of the City and Bombay Improvement Trust. P. W. 5 is Kasthuribhai Nagarseth, a partner. He states that the agreement of advance was originally oral, that it was subsequently reduced to writing, that the title-deeds were given to him in the last week of June 1916 and that he handed them to his manager P. W. 4 to put them into the safe. The argument of the appellant on the point is not so much that the evidence of these witnesses should not be believed as that that evidence being oral is inadmissible, having regard to the unregistered written memorandum executed by the parties which for want of registration cannot be accepted in evidence under the Registration Act. The decree in C. S. No. 3772 of 1922 on the file of the Bombay High Court was obtained by defendant 3 against Tawker & Sons on the basis of the equitable mortgage : *see* Ex. L-1. This no doubt is not evidence against defendants 1, 2 and 5 who were not parties to that suit, but it is an instance in which the right now claimed and set up was recognized by the Court. Apart from the oral evidence, the most direct evidence to prove the equitable mortgage is Ex. D-14. Ex. D-14 is a memorandum dated 1st July 1916 given by the Tawkers to Nagarseth & Sons. It runs as follows :

> We have pledged with you as equitable mortgage as agreed in our writing with you
>
> 1. Vadavoor village properties, papers worth Rs. 3,00,000.
>
> 2. Pallikarney property, papers worth Rupees 1,00,000.

3. Bangalore bungalow worth Rs. 45,000.

(Sd). T. R. Tawker & Sons.
1st July 1916.

To Messrs. Nagarseth & Sons,
Bombay.

It is signed T. R. Tawker & Sons. Item 1 of property referred to in it is the present suit property. Exs. M, M-1 and M-2 are the three title-deeds alleged to have been deposited with Nagarseth & Sons in respect of these properties. Under S. 58 (f), T. P. Act, a transaction called a mortgage by deposit of title-deeds can be created by a person delivering to a creditor or his agent documents of title to immovable property, with intent to create a security thereon. Sec. 59 provides that

where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The equitable mortgage in the present case took place in Bombay and does not require registration under the provisions of the Transfer of Property Act. Under S. 17, Registration Act, registration is required of (a) instruments of gift of immovable property, (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property. By S 49 of the Act, it is provided that

no document required by S. 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall (a) affect any immovable property comprised therein, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

The learned counsel for the appellant argues that in the present case the memorandum Ex. D.14 is in itself the equitable mortgage, that, having regard to Ss. 17 and 49, Registration Act it is void, inasmuch as it was effected by an instrument which was admittedly not registered, and that oral evidence is not admissible as the memorandum constituted the contract between the parties (S. 91, Evidence Act). On the other hand the respondent's learned counsel argues that the act of deposit which constitutes the equitable mortgage was not effected by Ex. D.14, that it is merely a memorandum of the completed transaction of mortgage, that it does not therefore require registration and that in the circumstances oral evidence is admissible to prove the deposit.

The question we have to consider is whether Ex. D-14, having regard to its construction and the circumstances in which it came into existence, is an instrument within the meaning of S. 17, Registration Act, which purports or operates to create or declare whether in present or in future any right, title or interest, whether vested or contingent, in the suit properties which are admittedly over the value of Rs. 100. Various cases were brought to our notice to explain the principles that should be applied in deciding this question. We will refer only to a few of the more important of these decisions. In the leading case in (1872) 5 H L 321[1] at p. 340, Lord Cairns observed :

Although it is a well established rule of equity that a deposit of document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed.

In 11 Beng L R 405,[2] Couch C. J. said:

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement.

If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within S. 17, Registration Act. In 43 Cal 895[3] at p. 900, the Privy Council laid down the law as follows:

The law upon this subject is beyond any doubt: (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security.

---

1. Shaw v. Foster, (1872) 5 H L 321=42 L J Ch 49=27 L T 281=20 W R 907.
2. Kedarnath v. Shamlall Khettry, (1873) 11 Beng L R 405=20 W R 150.
3. Pranjivandoss Jagjivandas Mehta v. Chan Ma Phee, (1916) 3 A I R P C 115=35 I C 190=43 Cal 895=43 I A 122 (P C).

Applying the principles laid down in these cases, Lord Carson said, in 50 Cal 338,[4] the test is :

> Did the document constitute the bargain between the parties, or was it merely the record of an already completed transaction ?

As observed by Sir Walter Schwabe C. J. (with whom Ramesam J. concurred) in 46 M L J 295[5]:

> If it constitutes the bargain, then on the well known rule that where contracts are reduced to writing you cannot give parol evidence of their contents, in order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document and, if it is a mortgage document, he would be precluded from so doing by the Transfer of Property Act and under the Registration Act. The question in each case, which it is difficult to decide, is whether or not the document does constitute the bargain, or is merely a record of a completed transaction.

In affirming a judgment of this Court, the Privy Council in 54 Mad 257[6] referred to 50 Cal 338[4] and observed as follows :

> While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within S. 17, Registration Act, unless it embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the Section *unless on its face it embodies such terms* and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties. (The *italics* are ours.)

Shortly stated the question we have to consider is, does Ex. D.14 constitute the agreement with respect to the deposit between the parties, or is it simply evidence of a fact from which the mortgage could be inferred? The document states that the executants pledged as agreed upon in their writings, papers relating to the properties mentioned in it. The question arises, when was the pledge made, was it contemporaneous with the execution of the document or was it before or after? It appears to us having regard to the language used, that the pledge must have been made at a date anterior to the execution of the document; in other words, the deposit as agreed to must have been made before the document Ex. D.14 was executed; otherwise the expression used would not have been "We have pledged." The agreement of deposit must have been made therefore a prior one. In 46 M L J 295,[5] the learned Judges pointed out that when one looks at the cases the easiest guide in determining the question whether the document constitutes the bargain or not, is the question whether or not money was paid before the making of the document, because if the money is handed over contemporaneously with or in exchange for the document or after the document, it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. If we apply this test to the present case, we find that the understanding was that advances were to be made from time to time and the moneys were as a matter of fact advanced before Ex. D-14 was executed. The contract therefore must have been before Ex. D-14 and the document can only be the record of a transaction that was completed some time before in the past. Except the fact that a pledge has been made, it is clear that the document does not on its face embody, to use the language of their Lordships of the Privy Council, "the particulars of the transaction of which the deposit forms a part" or in other words, the contract with respect to the deposit.

It is argued that the statement contained in the document 'as agreed upon in the writings with you' amplifies its scope and thereby introduces into the document the terms of the bargain between the parties. We cannot accept this argument. The writings referred to are Exs. 18 and 18-a. Shortly stated, in these documents, already referred to, the executants merely state that with respect to the moneys borrowed Rs. 75,000 under Ex. 18 on the strength of certain hundis and Rs. 80,000 under Ex. 18-a on a promissory note, they agree to deposit title deeds with the lenders creating equitable mortgages and Ex. D-14 says that in pursuance of this agreement to deposit the title deeds (i. e. as agreed to in the writings), the deposit has already been made of the title deeds of properties mentioned in it. The reference to these documents does not thereby introduce into Ex. D-14 the terms of the bargain between the parties. These words "as agreed upon in the writings" can only mean this and nothing more, viz. "We have agreed to deposit the title deeds and we have deposited the following title deeds as agreed to

4. Subramanian v. Lutchman, (1923) 10 A I R P C 50=71 I C 650=50 Cal 338=1 Rang 66 =50 I A 77 (P C).
5. Krishnayya v. Ponnusami Ayyar, (1924) 11 A I R Mad 547=84 I C 629=47 Mad 398=46 M L J 295.
6. Sundaracharlar v. Narayana Ayyar, (1931) 18 A I R P C 36=131 I C 328=54 Mad 257=58 I A 68 (P C).

in the writings referred to." In our opinion the words are not adequate enough to incorporate the whole of those documents in this one document. Even assuming that everything stated in those documents is incorporated in Ex. D.14, still the document says that the deposit has already been made; about that there can be no doubt. If so, the equitable mortgage was completed before Ex. D.14 was written and is a past transaction. Ex. D.14 is therefore only a memorandum of a completed transaction. In whichever manner we examine the document, it seems to us that it refers to a past act of deposit and the equitable mortgage thereby created was complete without this memorandum.

For helping us in construing the expression "we have pledged" appearing in Ex. D.14, our attention was invited to numerous cases of equitable mortgages wherein Courts were called upon to construe expressions of similar import like the one we are considering. These are : 11 Beng L R 405,[2] 13 Cal 322,[7] 31 M L J 347,[8] 16 M L W 936,[9] 50 Cal 338,[4] 46 M L J 295,[5] A I R 1925 Cal 973,[10] 26 M L W 28,[11] A I R 1927 Cal 538,[12] A I R 1930 Lah 920,[13] *Jagannatham Pillai* v. *Official Assignee of Madras*,[14] 54 Mad 257,[6] 59 Cal 781,[15] 62 Cal 998,[16] A I R 1936 Mad 256[17] and A I R 1921 Lah 253,[18] A few of these containing general principles have already been noticed : 11 Beng L R 405;[2] 50 Cal 338;[4] 46 M L J 295[5] and 54 Mad 257;[6] the rest we have read; but we do not think any useful purpose will be served by discussing them as the decision in each case must necessarily depend upon the construction of the terms contained in the memorandum dealt with in that case in the light of its special circumstances.

The circumstances already adverted to, show that the moneys were advanced on various dates in June, the deposit of title deeds was completed towards the end of that month and it was after these were done, that Ex. D.14 was executed as memorandum. As already stated, in our opinion, it is only a record of a completed transaction and there is nothing in the circumstances connected with its coming into existence which requires us to give a different meaning. We hold that Ex. D.14 does not require registration and affords along with other evidence complete proof of the equitable mortgage in question. If Ex. D.14 does not require registration, it has not been shown how the equitable mortgage is invalid. In our opinion the oral evidence of the witnesses already referred to Ex. D.14 and the decree in the Bombay suit prove to our complete satisfaction that the alleged equitable mortgage is true. Before we leave this question, we may mention that it was argued in the lower Court that Ex. D.14 was got up subsequent to Ex. H and was ante-dated and should on that account alone be thrown out of consideration, but the learned Judge held that this suggestion was not proved : see paras. 11 and 12 of the judgment. No special ground has been taken against that finding in the memorandum of appeal and the learned Advocate-General after alluding to the point in the earlier part of his argument abandoned it altogether and so we do not consider it in this judgment.

The next question is whether the plaint-mentioned sub-mortgage in favour of the plaintiff is true and valid (Issue 2). The answer to this question would depend mainly upon a consideration of the oral evidence of P. Ws. 3 and 5 who speak to the handing over of the documents, Exs. M, M-1 and M-2, by the Nagarseths to the plaintiff. There are other witnesses also whose evidence is relevant in this connexion : see P. Ws. 1, 2, 4 and 6. It is argued that apart from what were referred to as intrinsic defects in their evidence the

---

7. Oo Noung v. Moung Htoon Oo, (1886) 13 Cal 322.
8. Muthiah Chetti v. Kothandaramaswami Naidu, (1917) 4 A I R Mad 799=35 I C 864 =31 M L J 347.
9. Vadamalai Pillai v. Subramania Chettiar, (1923) 10 A I R Mad 262=71 I C 130=16 M L W 936.
10. Bhuban Mohan v. Co-operative Hindusthan Bank, (1925) 12 A I R Cal 973=88 I C 866= 29 C W N 784.
11. Ramakrishna Doss v. Kesavalu Chetti, (1927) 14 A I R Mad 1145=102 I C 34=53 M L J 179=26 M L W 28.
12. Kshetranath v. Harasukdas, (1927) 14 A I R Cal 538=102 I C 871=45 C L J 233=31 C W N 703.
13. Ralli Brothers v. Punjab National Bank, (1930) 17 A I R Lah 920=129 I C 21=11 Lah 564=31 P L R 934.
14. (1931) 18 A I R Mad 124=129 I C 814=60 M L J 309.
15. Surendra Mohan Ray Chowdhry v. Mahendranath Banerji, (1932) 19 A I R Cal 589=140 I C 662=59 Cal 781=36 C W N 420.
16. Kalidas Chandra v. Jugalkishore Dutta, (1935) 62 Cal 998=164 I C 197.
17. Krishnaswami Ayyangar v. Gouriamma, (1936) 23 A I R Mad 256=163 I C 195.
18. Moti Ram Mohan Lal v. Bharath National Bank Ltd. Dehli, (1921) 8 A I R Lah 253= 67 I C 421.

probabilities of the case show that their evidence cannot be true. The learned Judge after considering carefully and in great detail this question came to the definite conclusion that the sub-mortgage has been proved.

The case of the plaintiff relating to the sub-mortgage is as follows : The plaintiff came to Bombay at the end of March 1922 and as the Tawkers were not paying the amount, P. W. 3, interested as he was as the broker of the loan, asked P. W. 5 to hand over all the title deeds to him as security for the money and P. W. 5 handed over all the documents to him at the Colaba station when he left Bombay from that station. It would seem that the plaintiff had come to Bombay in connexion with the marriage of a son of Narottam Morarji, a great friend of his, and also to receive the Maharana of Porbunder when he returned from England. On that occasion he met P. W. 5, Kasthuribhai Nagarseth, and as the loan was unsecured it was arranged that he should hand over the title deeds to him. The house of P. W. 5 was near the Colaba station. He went with the documents to the station and handed them over to the plaintiff. This handing over was seen by P. W. 2. P. W. 6, the present Private Secretary of the plaintiff, also saw the handing over as he was present at the station. He did not see the papers then but he saw them later in 1925, when, as he says, the Nagarseths wrote to the plaintiff to produce them in connexion with a receiver petition which they had filed in the Bombay suit. He says that he went with the papers to the Nagarseths and told them that the papers could not be handed over unless the plaintiff was also made a party and then he saw the documents; and he identified Exs. M, M.1 and M.2. The learned Judge says that this witness, the only one examined in Court, the others having been examined on commission, is a graduate in law and impressed him as a very straight-forward witness.

To exhaust the direct oral evidence relating to the existence of the sub-mortgage, we may also refer to the evidence of P. W. 1, the Sheristadar to the Finance Secretary of Limbdi State. He says that the Secretary gave him some deeds in the year 1922 and he learnt that they had to do with the moneys advanced to the Tawkers and that he kept them for safe custody. It was a sealed packet that was given to him. Except that Brijlal told him that the packet contained valuable documents in respect of the moneys advanced by the plaintiff to Messrs. Tawker & Sons, he does not know much about them. He himself did not see the document. He kept them for two or three years in the safe and when the plaintiff sent for them he handed the packet to the Secretary and did not get it back again. If the above evidence is believed, there is no question that a sub-mortgage of the equitable mortgage has been proved. No doubt the evidence is oral, but no intrinsic defects such as would necessitate its rejection have been pointed out to us. (His Lordship then discussed the circumstantial evidence with respect to the sub-mortgage and concluded the sub-mortgage was true and then proceeded). The next question is whether the equitable sub-mortgage, which we have found to be true, is valid in law. It will be observed that the suit sub-mortgage was created by a re-deposit by the Nagarseths with the plaintiff of the very title deeds, Exs. M, M.1 and M.2 deposited with them originally by Tawker & Sons. It is argued that since it is the mortgagee's interest that is being sub-mortgaged a sub-mortgage of such interest by depositing the title deeds can be created only by depositing the title deed evidencing the title of the mortgagee, and since admittedly no such document has been deposited as none such is in existence, the mere re-depositing of the title deeds of the original mortgagor cannot in law create a valid equitable sub-mortgage. Shortly stated, what is urged is that while a sub-mortgage by deposit of title deeds of a mortgage effected by a registered deed is valid, such a sub-mortgage of a mortgage itself created by deposit of title deeds is invalid because there is no document evidencing his own title for the mortgagee to make the deposit. It is contended that this must follow from the definition of "mortgage by deposit of title deeds" in S. 58, T. P. Act. No authority in support of this contention has been brought to our notice. On the other hand, there is an authority in the Indian Reports directly against it, wherein the relevant English authorities have been referred to : *see* 14 Rang 522.[19] In that case Mosely J. with whom Ba U J. concurred, dealt with the contention as follows :

> A mortgage of immovable property is itself an interest in immovable property and can be itself mortgaged. The transaction is called a sub-mortgage. It would appear prima facie that such a

19. Gurnam Kaur v. R. K. Banerjee, (1937) 24 A I R Rang 69=168 I C 330=14 Rang 522.

sub-mortgage can be made by deposit of title deeds in exactly the same way as an original mortgage can. Admittedly in England (where the corresponding terms are 'equitable mortgage' and 'sub-mortgage') equitable sub-mortgages or equitable mortgages can be made, *vide* (1842) 11 L J Bk 16.[20] *See also* Fisher's Law of Mortgage, Edn. 6, p. 18, para. 30; Halsbury's Laws of England, Vol. 21, page 82; and Bower, Vol. 2, page 924, para. 1485.

Then, after referring to some judgments of the Indian Courts to show that they do not affect the above position, the learned Judge stated :

I can see no reason why a sub-mortgage by deposit of title deeds in the case where the original mortgage has been by deposit of title deeds should not be valid. This appears to be clearly in accordance with law. nor has any reason of practice or convenience been argued against it.

We entirely agree with the above opinion of the learned Judge. If in law a mortgagee's interest in property can be created by the mere deposit to him of title deeds of the mortgagor, we see no reason why the mortgagee's interest thus created cannot be sub-mortgaged by depositing the very title deeds, the deposit of which with him created his interest in the property. We cannot find anything in S. 58, Cl. (f), T. P. Act, against the validity of an equitable sub-mortgage of a mortgage created by deposit of title deeds. In England there never was a doubt about the validity of such a sub-mortgage. In our opinion the suit sub-mortgage is true and valid in law.

The equitable mortgage and the sub-mortgage having been found to be true and valid, the question arises, to what extent these are capable of enforcement against defendants 1 and 2 : see issues 1 and 8. The melwaram right in all the 58 acres of Vadavoor village excepting the right in a small portion was acquired by the Tawkers under Ex. M.1. The learned Judge is not strictly right when he says that under the document the Tawkers obtained the melwaram right of all the lands. Under the same document they also obtained the kudivaram right over some of the lands. The kudivaram right in respect of the other lands were obtained by them under Exs. M.2 and 7 to 16. In the view that we take of the arguments advanced before us it is not necessary to discuss the exact extent of the melwaram and the kudivaram interest obtained by the Tawkers under the abovementioned documents. Suffice it to say that it is freely conceded by the respondents that there are certain lands in which the Tawkers own melwaram and certain lands in which they own kudivaram which are not included in Exs. M.1 and M.2. In other words, all the title deeds respecting the entire interest which the Tawkers have in the suit properties have not been deposited by them with the Nagarseths. As the learned Judge points out, the fact that Exs. 7 to 16 were produced by the defendants indicates that all the documents under which they obtained all the rights which they owned in the properties were not deposited with the Nagarseths. In the suit, the claim is made against the entire interest of the Tawkers in the suit properties. As all the documents relating to their entire right over the suit properties were not deposited by them with the Nagarseths, it is argued that no equitable mortgage was obtained of the entire interest of the Tawkers in the properties and the equitable mortgage and the sub-mortgage are effective only to a limited extent. We cannot accept this argument Evidence makes it clear that the intention of the parties was that the entire right which the Tawkers had over the suit properties should be mortgaged to secure the loans advanced to them by the Nagarseths. In Ex. S the Tawkers state that '*lands at Vadavoor*' (the italics are ours) 'are now with the Nagarseths as security'. In Ex. T, the mortgage executed to Chaturbhoojadoss Khusaldoss by the Tawkers, it is stated that the mortgage over the Sch. B properties which include the lands in the Vadavoor village is a second mortgage. The evidence bearing on the question which properties the Tawkers intended to mortgage is considered by the learned Subordinate Judge in para. 18 of the judgment.

It was not seriously contended, nor do we think it can be contended in the circumstances of the case, that it was not the intention of the parties to mortgage the entire Vadavoor properties belonging to the Tawkers. We accept the finding of the learned Judge on this point; and we know that all the documents mortgaged with the Nagarseths were sub-mortgaged by them to the plaintiff. There is ample authority both in England and in India to show that a deposit of some of the title deeds relating to a property is enough to create a valid equitable mortgage over the entire property, if it was the intention of the parties that the mortgage should be in respect of the entire property to which the

20. Ex parte Smith ; In re Hillyard, (1842) 11 L J Bk 16=2 Mont D & D 587=6 Jur 610.

documents of title relate : (1805) 32 E R 1141[21] is authority for the position that equitable mortgage with respect to the entire security could be created from a deposit of part of the title deeds, if from the evidence it can be gathered that the object of the parties was to create a security upon the whole property. In (1856) 61 E R 1024,[22] it was held that :

> It is not necessary, to create an equitable mortgage, that all the title deeds or even all the material title deeds should be deposited; it is sufficient if the deeds deposited are material evidences of title and are proved to have been deposited with the intention of creating a mortgage.

See also (1857) 53 E R 343,[23] where it was held that to constitute a good equitable mortgage it is not necessary that the deeds deposited should show a good title in the depositor. In that case a solicitor made an equitable deposit of the title deeds of his estate to his client, omitting the conveyance to himself. He afterwards deposited the latter, as a security, with his bankers. It was held that the client had priority over the bankers : *see* the headnote. The Indian authorities are also to the same effect. In 2 Pat L J 293,[24] it was pointed out that "there is no technical rule that in an equitable mortgage all the title deeds should be deposited. It is merely a question of intention", whether the mortgage was of the entire property : *see also* A I R 1929 Rang 65,[25] 26 M L W 28[11] and A I R 1930 Lah 920.[13] For the above reasons, we hold that though the title deeds deposited were only Exs. M-1 and M-2 the equitable mortgage took effect over the entire suit properties as the parties intended that the entire interest of the Tawkers in the properties should be mortgaged. The same is the case with the sub-mortgage also.

The next question is, is the plaintiff's claim to enforce the equitable mortgage barred by time? This is raised in both issues 9 and 18. The equitable mortgage to defendant 3 was in June 1916. The plaint in the present suit was filed on 8th December 1928. Under Art. 132, Limitation Act, the Article applicable to the case, the suit should be filed within 12 years from June 1916. Admittedly it has been filed more than 12 years subsequent to the date of the mortgage and is therefore barred by time. But the plaintiff in order to save limitation relies on an acknowledgment of the mortgage debt contained in Exhibit S, under S. 19, Limitation Act. In 1924 Tawker & Sons executed a mortgage, Ex. T in respect of Vadavoor, the present suit properties, and other properties to Chaturbhujadoss Khusaldoss & Sons, Madras. Before the execution of the deed, they gave to Chaturbhujadoss Khusaldoss & Sons a letter, Ex. S. In it the Tawkers state :

> In consideration of withdrawing the suit pending now and also to cover up any deficiency in all the claims and accounts we hereby give you a lien on the following undermentioned properties *now with* Messrs. Nagarseth and Sons of Bombay as collateral security. (The *italics* are ours.)

The list of the properties mentioned in it contains 'lands at Vadavoor in Trichinopoly' as item 5. The date of this letter is 12th February 1922. The plaintiff relies on this to show that the Tawkers admitted the mortgage right in favour of the Nagarseths in respect of the suit lands. If this document is admissible in evidence, it clearly amounts to an acknowledgment of the existence of the mortgage. We may also mention that in Ex. T the Vadavoor lands are described as having been given as second mortgage to Chaturbhujadoss Khusaldoss & Sons. The Tawkers herein admit the subsisting liability of the mortgage in favour of the Nagarseths. Ex. S is an unregistered document and on that ground objection is taken that it is not admissible in evidence. In our opinion, even if registrable, as the document is relied on only as evidence of a collateral fact, namely an acknowledgment by the Tawkers, it can be admitted in evidence under Sec. 49, Registration Act. There is abundance of authority in support of the position that a compulsorily registrable document, though unregistered and inadmissible as evidence of a transaction affecting immovable property, may be admitted as evidence of a collateral fact or for any collateral purpose. In 43 Mad 244,[26] the Privy Council pointed out with reference to certain petitions filed in the

21. Ex parte Wetherell, (1805) 11 Ves. Jun 398=32 E R 1141.
22. Lacon v. Allen, (1856) 3 Drew 579=26 L J Ch 18=4 W R 693=61 E R 1024.
23. Roberts v. Croft, (1857) 24 Beav 223=53 E R 343.
24. Bhupendranath Basu v. Mt. Wajibunnissa Begam, (1917) 4 A I R Pat 268=39 I C 564=2 Pat L J 293.
25. N. E. A. R. M. Chettiar Firm v. A. K. R. M. K. Chettiar Firm, (1929) 16 A I R Rang 65=116 I C 475=7 Rang 28.
26. Varada Pillai v. Jeevarathnammal, (1919) 6 A I R P C 44=53 I C 901=43 Mad 244=46 I A 285 (P C).

Court of the Collector reciting the fact of a gift in that case that :

> Although the petitions . . . . are not admissible to prove the gift, they may nevertheless be referred to as explaining the nature and character of the possession . . . .

See also 26 Cal 334,[27] 49 Mad 738[28] and A I R 1930 Lah 985.[29] The admission of the equitable mortgage contained in Ex. S is of the year 1922, before defendants 1, 2 and 5 acquired any right in the properties. It is within 12 years after the date of the mortgage and within 12 years before the suit. We hold therefore that the suit is not barred by time. (Apart from these documents the debt and the mortgage were clearly set out in the schedules to their insolvency petition which Tawkers filed in 1925.)

The next question for decision is, is the claim set up in suit barred by O. 2, R. 2, Civil P. C., by reason of the filing of C. S. No. 3772 of 1922 in the Bombay High Court ? The claim is the right to enforce the sale of the Vadavoor lands. According to O. 2, R. 2, Civil P. C., when a person is entitled to more than one relief in respect of the same cause of action, he can, if he takes the permission of the Court omit one of the reliefs claimed by him, and if he takes such permission a subsequent suit with respect to that relief will not be barred. O. 23, Civil P. C., gives liberty to a party to withdraw or abandon part of a claim with liberty to institute a fresh suit in respect of the subject-matter of the said suit or such part of the claim after getting permission of the Court to withdraw from such suit or abandon such part of the claim. Issue 3 refers specifically to O. 2, R. 2, Civil P. C., and makes no reference to O. 23, Civil P. C. The arguments of the learned Advocate-General on this issue were directed to show that the present suit was barred under O. 23, Civil P. C. The learned Judge in holding that the suit is not barred refers to both O. 23, and O. 2, R. 2. Whether we examine the question raised in the issue from the standpoint of O. 23 or O. 2, R. 2, Civil P. C., the main point for decision is the same, viz. whether permission was granted by the Bombay High Court in C. S. No. 3772 of 1922 to institute a fresh suit for the sale of the Vadavoor lands, which was one of claims included in that suit, as the plaintiff therein wanted to enforce his claim against the Tawkers with respect to these lands as well as the other lands included in the equitable mortgage. Ex. O dated 18th June 1928 recorded that the plaintiff and defendant 5 (that is, the Nagarseths and the Rajah of Limbdi) agreed to omit from the Bombay suit the claim as regards the Vadavoor lands and to file a fresh suit "within three months in the Court of the local jurisdiction". The period was extended to 24th September 1928 and again extended peremptorily for a fresh period of 15 days from 26th November 1928, that is, up to 11th December 1928 (see Ex. O-1 dated 26th November 1928), and the present suit was filed on 8th December 1928, within the time allowed. The direction in Ex. O is included also in the final decree, Ex. L-1 passed in the suit.

It was strenuously argued by the learned Advocate-General that no application was made by the present plaintiff or the Nagarseths to withdraw the claim in respect of the Vadavoor lands from the Bombay suit, that no order was passed by the Court allowing the withdrawal of the claim and granting permission to institute a fresh suit, and that therefore the present suit is not maintainable. We may say at once that we cannot accept these contentions. The High Court of Bombay has in our opinion given the plaintiff and the Nagarseths permission to file a fresh suit in the Court of local jurisdiction in respect of the mortgage over the Vadavoor lands. No doubt the plaintiff or the Nagarseths did not make any specific application for withdrawing the claim and for filing a fresh suit, nor was any specific order granting permission passed by the Bombay High Court; but Exs. O and L-1 make it clear that the claim with respect to the Vadavoor lands was withdrawn by the Nagarseths and the present plaintiff, and permission to file a fresh suit within three months was accorded by the Bombay High Court; otherwise one cannot understand the direction contained in Exs. O and L-1, and the subsequent orders passed by the Bombay High Court extending the time. Ex. O directed that the costs of defendants 1 and 2 with respect to the Chamber Summons should be paid in case the suit was not

---

27. Mugniram v. Gurmukh Roy, (1899) 26 Cal 334.
28. Venkataratnam v. Subba Rao, (1926) 13 A I R Mad 1040=96 I C 881=49 Mad 738=51 M L J 410.
29. Davinder Singh v. Mt. Lachmi Devi, (1930) 17 A I R Lah 985=129 I C 281=12 Lah 239 =32 P L R 976.

filed within three months, thereby implying that the Court contemplated the filing of a suit within three months from that date. Though the plaintiff in the Bombay suit asked for the sale of the Vadavoor properties also, no decree was given in respect of them in the Bombay High Court, nor was the suit in respect of those properties dismissed. On the other hand we find from Ex. L-1, the decree, that it was passed without prejudice to the Nagarseths and the present plaintiff to institute a fresh suit against defendants 1 and 2 to enforce their rights under their respective mortgages. This order should be construed to mean that permission was granted by the Bombay High Court to the plaintiff and defendant 5 therein, (that is the Nagarseths and the present plaintiff) to file a fresh suit in respect of the Vadavoor lands. This is clearly borne out also by the last order extending time, Ex. O-1, which was passed after notice to present defendants 1 and 2 and the Tawkers and the Official Assignee. We have already referred to this order. After extending the time it says :

> I do further order that if no suit is filed within the said period of 15 days the plaintiff and defendent 5 be and they are hereby debarred from filing such a suit.

This clearly means that with respect to the Vadavoor lands the claim of the plaintiff and defendant 5 was allowed to be withdrawn from the Bombay High Court and that it gave permission to them to institute a further suit and that if no such suit was filed within the time allowed their right of instituting a fresh suit would be barred. The proceedings we have referred to show that the Bombay High Court acted under O. 23, Civil P. C., and gave permission to the plaintiff and the Nagarseths to institute a fresh suit, and that order was complied with by the plaintiff by instituting the present suit. It was also argued that if an implied permission to institute a fresh suit can be gathered from the proceedings referred to, then the permission is bad because no reason has been given for such permission. This argument is without substance, for, it is clear that on account of the withdrawal of the claim with respect to the Vadavoor lands from the scope of the Bombay suit, defendants 1 and 2 who wanted to agitate their claims with respect to those lands were not made parties to the Bombay suit and the order Ex. O was passed on the application of defendants 1 and 2 to be made parties to the suit. In the light of the circumstances adverted to above, we have no doubt that the suit of the present plaintiff is not barred by reason of the suit C. S. No. 3772 of 1922 filed in the Bombay High Court.

The last question for consideration is, is the suit as framed not maintainable? It will be observed that by the time the plaintiff filed the suit he had, with the previous permission of this Court sitting in insolvency, obtained the sale of the suit properties from the Official Assignee. Having thus become the owner of the equity of redemption he could no longer sue to enforce his mortgage by the sale of the properties. The suit was originally filed therefore for possession of the lands. On 15th November, as already stated, the plaint was amended by the addition of an alternative prayer for a mortgage decree for sale in case it should be held that the conveyance of the land by the Official Assignee to the plaintiff did not pass any title. We have already referred to the amendment application and the order passed thereon. The objection urged by the appellants to the frame of the suit is that the suit which the High Court of Bombay permitted the plaintiff to file was a suit on the mortgage, that under the terms of that Court's order he was bound to file a suit within 10th December 1928, but that he did not in effect file it till 15th November 1930, when the amendment just mentioned was allowed to be made to the plaint. We do not think that this objection should be allowed to prevail. We think that the suit as originally filed includes an alternative claim based on the plaintiff's mortgage right: see paragraphs 12 and 13 of the plaint, the relevant portions of which are as follows:

> Para. 12.—. . . He (plaintiff) is informed that the claim of defendant 1 is based upon a charge over the plaint schedule properties alleged to have been created in his favour by Messrs. Tawker & Sons in the month of July 1923 in the course of the execution proceedings in C. S. No. 196 of 1921 on the file of the High Court of Judicature at Madras to which the plaintiff was not a party.

> Para. 13. — The plaintiff states that any claim of defendant 1 whether based upon the said charge created in the year 1923 or otherwise cannot prevail against the rights of the plaintiff and can only be subject thereto. Both the mortgages in favour of the plaintiff as well as in favour of defendant 3 (Nagarseths) having been earlier in date to the date of the alleged charge are entitled to priority and any claim of defendants 1 and 2 cannot prevail against the claims of the plaintiff or defendant 3. The plaintiff is not bound by either the alleged charge in favour of defendant 1 or the

proceedings pursuant to the said charge culminating in the purchase of the plaint schedule lands by defendant 1, etc.

Then in the prayer portion, para. 18 (d) we have a definite indication of the plaintiff's alternative claim as follows :

"The plaintiff therefore prays judgment that if this Honourable Court should decide that on the charge claimed by defendants 1 and 2 they had as representing the Tawkers. . . . any right to redeem or otherwise in respect of the mortgage in favour of defendant 3 and the plaintiff;" such rights, "if any, may also be determined by this Honourable Court and appropriate directions given by the Court in respect of the working out of the relative rights of the respective parties."

On this pleading we are of opinion that even without the amendment it was open to the Court to treat this suit in the alternative as a suit for sale by a prior mortgagee against a person claiming under a title derived from a subsequent mortgage. Apart from this, it is clear that even if it is not prayed for in the plaint the Court can grant a relief which is not inconsistent with the facts of the case, provided the defendant is not placed at any disadvantage in the course of the trial by reason of the defect in the pleadings. The plaintiff's suit for a relief on his sub-mortgage being thus maintainable even according to the original plaint, there was no need for amending the plaint by the addition of an alternative prayer for a mortgage decree for sale. That the plaint was understood in the way in which we have interpreted it becomes clear when we examine the issues. Issue 8 states :

Is the plaintiff entitled to enforce his claim, if any, under the plaint-mentioned equitable mortgage, etc.?

This issue shows clearly that even before the amendment it was clearly understood by the Court that the plaintiff did claim relief on the basis of his equitable mortgage. And in para. 18 (d) he asks that the relative rights of the parties, that is the right of defendants 1 and 2 to redeem and of the plaintiff to bring the properties to sale, may be worked out. By amending the plaint the plaintiff wanted to bring out in full relief his right to sell the suit properties based on the grant of the sub-mortgage. In the circumstances we do not think that by the amendment the plaintiff was setting up a new case or asking for a relief not originally asked for in the plaint. In this connexion reference may also be made to the order of amendment passed by the learned Judge. For the above reasons we overrule the objection that the suit as framed is not maintainable. No other points were argued before us. For the reasons given above, on the points argued we accept the opinion of the learned Subordinate Judge who has dealt with all the points in the case very ably and clearly in his judgment. Before we conclude, we may say that no personal decree against defendants 1 and 5 is contemplated under the decree except for costs. In the result the appeal is dismissed with costs. We certify costs for two counsel for the respondents.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 878

PANDRANG ROW J.

In re Kandan Padayachi and others
Petitioners.

Criminal Revn. Cases No. 230 and 232 and Petitions Nos. 223 and 225 of 1938, Decided on 29th July 1938, from order of Second Class Magistrate, Ariyalur, D/- 12th March 1938.

Legal Practitioner—Rights of— Lawyer cited as witness by prosecution is not disqualified from appearing as counsel for accused.

No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or continue to hold a brief from the accused; but the mere fact that a lawyer has been cited as a witness by the prosecution will not disqualify him from appearing as counsel for accused in the case.

[P 878 C 2; P 879 C 1]

R. Sundaralingam — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — Both these cases arise out of the same matter, viz. disallowance by the Second Class Magistrate of Ariyalur of Mr. T. S. Arumugham Pillai, an advocate, from appearing as counsel for the accused in a case of murder pending enquiry before the Magistrate. The disallowance was entirely on the ground that he had been cited as a witness by the police in the charge-sheet. It would appear that there were three charge-sheets filed in this case and the advocate's name appears as a witness only in the last charge-sheet. But this is a minor matter. The reason given for the disallowance is obviously unsound. The mere fact that a lawyer is cited as a witness by the prosecution will not disqualify him from appearing as counsel for the accused in the case. No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or to continue to hold a brief from the accused.

That is not the case here. The mere citing of an advocate as a witness by the police does not operate as a disqualification. It is easy to imagine the extraordinary results which might follow otherwise. The unfortunate effect of the order of the Magistrate has been that the accused have been continuing in custody for four months and more. The order is therefore set aside and he is directed to allow the advocate to appear for the accused.

C.R.K./R.M. *Order set aside.*

A. I. R. 1938 Madras 879

HORWILL J.

In re Venkatasubba Pillai — Petitioner.

Criminal Revn. Case No. 1018 and Petn. No. 950 of 1937, Decided on 4th May 1938, from order of the District Magistrate, Trichinopoly, in Criminal Revn. Case No. 17 of 1937.

Criminal Trial—Issue of process—Record not showing sufficient grounds—Process not issued—Reason not given—Interference in revision is undesirable — But where serious allegations of tyranny are made, High Court and complainant should be satisfied whether there is case made out or not— If case is made out, process must issue.

Where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, the High Court will not be justified in interfering in revision merely because the Magistrate who had cognizance of the matter failed to give reasons for not issuing the process. However, in a case where serious allegations of tyranny are made, the interests of justice require that the High Court and the complainant should be satisfied that the Magistrate has considered the allegations against the accused and has come to a decision either that there is no case against him or that there is. If there is, the Magistrate must issue process to him. [P 879 C 2; P 880 C 1]

T. R. Srinivasan and J. R. Gundappa Rao — *for Petitioner.*

A. S. Srirangachariar — *for Accused.*

N. Somasundaram — *for the Crown.*

Order.—The petitioner filed a complaint in the Court of the Sub-Divisional Magistrate of Ariyalur to the effect that accused 1 to 6 illegally distrained his bulls at the instigation of accused 7. The Sub-Divisional Magistrate, without assigning any reasons, declined to take any action against accused 7. He merely passed an order, "Issue summonses to A.1 to A.6." The petitioner went in revision to the District Magistrate who passed an order :

The enquiry under S. 202, Criminal P. C., showed that accused 7 took no part in the alleged removal of bulls and was not present at the scene of the alleged offence. The lower Court was right in declining to issue process to him. I see no reason to interfere in revision.

It is argued by the learned advocate for accused 7, that this Court has no jurisdiction to entertain this revision petition. Although the offence is said to have been one under S. 212, Madras Estates Land Act, and the petitioner applied in revision to the District Collector under S. 205 of the Act, yet the procedure to be adopted is governed by the Criminal Procedure Code. The complaint was made to the Magistrate under S. 202, Criminal P. C., and the Magistrate made enquiry under S. 202 and eventually passed an order under Ss. 203 and 204, Criminal P. C. If the Magistrate does not act as he should under S. 202, Criminal P. C., then undoubtedly the petitioner would be entitled to file a revision petition before the District Magistrate; and this Court would have jurisdiction under the code to interfere if necessary in the interests of justice. There can therefore be no doubt this Court has jurisdiction to entertain this revision petition.

I agree with the learned Public Prosecutor that where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, this Court will not be justified in interfering in revision merely because the Magistrate, who had cognizance of the matter, failed to give reasons for not issuing the process; but I find from the records before me that the Magistrate had not good grounds for not issuing process. It may be that he misunderstood the complainant's case in the same way as the District Magistrate seems to have done. The complainant has not said that accused 7 played any part himself in the actual distraint or seizure of the bulls; nor that he instigated accused 1 to 6 at the time when the bulls were seized. The complainant states that he has evidence to show that accused 7 instigated his servants A-1 to A-6 to go and distrain the animals. If so, the Sub-Divisional Magistrate should have considered the complaint against accused 7 and if, in spite of the allegations made, he was of opinion that there was no reason for believing that accused 7 instigated A-1 to A-6, he could have refused to issue process to accused 7 and given his reasons for not doing so.

It is further contended by the learned advocate for accused 7 and the learned Public Prosecutor that as the evidence

already recorded does not show any case against accused 7 there is no need to order further enquiry; but it has to be remembered that any evidence by these witnesses of instigation by accused 7 would have been irrelevant to the enquiry against accused 1 to 6. The fact that there is no evidence on record against accused 7 is not in itself a sufficient reason therefore why this Court should not interfere in revision. In a case where serious allegations of tyranny are made, I think the interests of justice require that this Court and the complainant should be satisfied that the Sub-Divisional Magistrate has considered the allegations against accused 7 and has come to a decision either that there is no case against him or that there is. If there is, the Magistrate must issue process to him. This petition is therefore allowed and the Sub-Divisional Magistrate ordered to consider the complaint as far as it concerns accused 7 and to pass a proper order under S. 203 or to issue process under S. 204, Criminal P. C.

C.R.K./B.D. *Petition allowed.*

A. I. R. 1938 Madras 880

STODART J.

B. Venkatachala Mudaliar —

Petitioner.

v.

Coimbatore Municipality —

Respondent.

Civil Revn. Petn. No. 563 of 1936, Decided on 7th January 1938, from decree of District Munsif, Coimbatore, in S. C. S. No. 1400 of 1935.

Madras District Municipalities Act (5 of 1920), Ss. 3 (25) and 93—Person absent from house without letting it and with intention of being at hill station for certain period — He does not cease to reside in such house.

Where a person has remained absent from his house without letting it to anybody else, it is clear that he is at liberty to return at any time and he cannot be said to have abandoned his intention of returning when he merely signifies his intention of being absent at a hill station for a certain period. He is therefore liable to profession tax.

[P 880 C 2]

V. Govindarajachari and P. Rajeswaran — *for Petitioner.*

M. Krishna Bharathi — *for Respondent.*

Order. — Without seeing the order of the Council (assuming that there was such an order) it is impossible to say on what ground the Council justified the levy of profession tax on the petitioner, and without knowing that, it is impossible to say that the provisions of the Act have not been complied with. If they have been complied with the decision of the Council is final and no suit lies. See S. 354 of the Act. The lower Court should have, I think, satisfied itself on this point. However that may be, I agree with the lower Court's finding on the merits. Petitioner has a house in Coimbatore where he ordinarily lives and he actually lived in the Municipality from 1st to 7th April and from 9th to 30th September. Between 7th April and 9th September he was absent at Coonoor. That has been so found by the learned District Munsif. Before going to Coonoor he informed the Municipal Commissioner that he intended to be absent from 7th April till about the end of August. Under S. 93 (1) (b), a person who in any half year resides in the Municipality for not less than sixty days shall pay a half yearly profession tax on income from pension or investments. Petitioner did not reside in the Municipality for 60 days in the ordinary sense of the term. Did he reside in the sense defined in S. 3, sub.s. 25? Sub-s. 25 is:

> A person is deemed to reside in any house if he sometimes uses any portion of it as a sleeping apartment,
>
> and
>
> is not deemed to cease to reside in any such house, merely because he is absent from it if he is at liberty to return at any time and has not abandoned his intention of returning.

It is the last clause which has to be construed. Had the petitioner ceased to reside in his house within the meaning of this clause during the whole of the period 7th April to 9th September? There can be no doubt that he was at liberty to return at any time as he had not let the house to anyone else; so the only question is whether the second part of the clause applies. Leaving out the words about liberty to return, the clause reads, a person is not deemed to cease to reside in any such house, merely because he is absent from it if he has not abandoned his intention of returning. Can a man be said to have abandoned his intention of returning when he merely signifies his intention of being absent at a hill station for a certain period? I do not think so. All that petitioner said here was that he might re-occupy the house about the end of August. I dismiss the petition with costs.

C.R.K./D.S. *Petition dismissed.*

*** A. I. R. 1938 Madras 881**

VENKATARAMANA RAO J.

Palapatti Raghudu and another —
Appellants.

v.

Nallagadda Erraiya and another —
Respondents.

City Civil Court Appeal No. 18 of 1936, Decided on 22nd April 1938, against decree of Court of City Civil Judge, Madras, D/- 6th January 1936.

(a) Transfer of Property Act (1882) S. 6 (a) —Under English law property of every description is assignable for value—Under Indian law mortgage of property non-existing but to come into existence in future can be mortgaged—But mere possibility or expectancy is expressly prohibited—Mortgage of future income to be derived from scavenging is expectancy and so invalid.

Under English law, property of every description, even possibilities and expectancies, is assignable for value. Under Indian law a mortgage of non-existing property and a transfer of property to come into existence in future can no doubt be mortgaged, but it must be property which under the law, if existing, could be the subject of a transfer. Under the Indian law, what in English law would be called a transfer of possibility or expectancy is expressly prohibited by S. 6 (a), T. P. Act. [P 882 C 2 ; P 883 C 1]

The mortgage of a future income to be derived from the work of scavenging is an expectancy or possibility within the meaning of S. 6 (a), T. P. Act. The hypothecation of this income is therefore invalid and no right to relief can be founded on it : *A I R 1916 Mad 579* and *A I R 1923 P C 189, Rel. on ; (1888) 13 A C 523 and (1862) 10 H L C 191, Expl. & Disting.* [P 883 C 1, 2]

(b) Injunction—Grant of — Law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do—Scavengers claiming permanent injunction against other scavengers from doing work in certain houses—Claim held was in substance a right preventing a man from pursuing his legitimate calling and so no such injunction could be granted.

The law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do, and any restriction which is sought to be imposed on a man pursuing his legitimate calling will always be considered to be illegal unless it is brought within any of the recognized exceptions known to law. Such exceptions have been recognized in the interests of trade or business and they too in the interest of the general public. [P 883 C 2]

The parties to suit belonged to the scavenger class. The defendants borrowed certain amount from plaintiffs, hypothecating their income to be derived in future from the scavenging work to be done by the defendants in certain houses. The mortgage money was payable in instalments. Default in payment entitled the plaintiffs to do work themselves in those houses and credit the amount. The defendants committed default. The defendants after allowing the plaintiffs to do scavenging work for some time obstructed them. Hence the action by the plaintiffs claiming permanent injunction against the defendants restraining the defendants from obstructing them and from themselves or others doing the scavenging work :

Held that the right was not based on any definite contract with the owners of the said houses by which they were bound to employ the defendants for any particular period. If the owners refused to employ them, no cause of action could be founded thereon, and no injunction could be granted, compelling them to employ these people. The right that was claimed was therefore a right in substance to prevent a man from pursuing his legitimate calling. Scavenging work was not a trade or business or profession involving skill. Therefore, as the right that was claimed was one which the law could not recognize, no injunction could be given in favour of the plaintiffs : *7 Mad 424 ; 3 Bom 232 and A I R 1915 Mad 597, Rel. on.* [P 883 C 2 ; P 884 C 1]

*** (c) Custom—Validity of—Custom amongst scavenger community in Madras allowing their scavenging rights to be mortgaged, sold, etc., is an oppressive monopoly and cannot be sustained in Court of law, having regard to modern conditions.**

Any custom which is contrary to public good and operates to the prejudice of the many and beneficial only to a particular individual is prima facie unreasonable and cannot be enforced by any Court of law. [P 884 C 1]

The custom to claim a monopoly to pursue an occupation which is reasonable at one time may become unreasonable at another time : *30 Mad 185, Rel. on.* [P 884 C 1, 2]

A custom obtaining amongst the scavenger community in Madras allowing their scavenging rights to be mortgaged, sold etc., cannot be allowed, as it would turn out to be an oppressive monopoly. Further such a custom could not have been reasonable even at the commencement, and much less can it be held to be so in a city like Madras, having regard to the modern conditions : *12 C L J 74, Rel. on.* [P 884 C 2]

A. Ramaswamy Iyengar —
for Appellants.

C. Vedagiri Rama Sastri —
for Respondents.

Judgment.—This appeal raises an interesting question of law. The respondents, the defendants in the action out of which this appeal arises, borrowed on 25th June 1924 from the appellants, the plaintiffs in the action, a sum of Rs. 550 and executed a bond styled a hypothecation debt bond in their (plaintiffs) favour hypothecating the income derived from the houses numbering 109 described in Sch. A to the plaint in respect of the work done by them. The parties belong to the scavenger caste and earn their livelihood by doing scavenging work. It is stipulated in the said bond that the amount borrowed should be discharged within three years with interest

at 2 per cent. per mensem. The respondents undertook to discharge the mortgage by payment of monthly instalments of Rs. 17 and in default of such payment covenanted as follows :

> In default of payment in each month in that manner, you shall get the sweeping work done in the undermentioned houses by men through you from the month succeeding to that of default, irrespective of us, and give credit to that income. Immediately after the discharge of the debt, we shall get this hypothecation deed cancelled and take back the same. If you get the work done through your men in that manner, and if, then, we or our heirs cause hindrance by preventing the doing of the undermentioned sweeping work or by saying that income should not be given, we shall be liable to criminal prosecution for breach of trust against you.

The case of the appellants is that the respondents committed default in making such payments and when pressed, allowed the appellants to do scavenging work for 36 out of the 109 houses for some time and in or about December 1931, alleging that the debt had been discharged, obstructed them from doing scavenging work in the said houses and began to do it themselves and hence the appellants had to institute the present action praying for a permanent injunction restraining the respondents from obstructing them by themselves doing or causing to be done the scavenging work in the 109 houses referred to in Sch. A to the plaint and also further restraining the respondents, their agents and servants from doing the scavenging work in all or any of the said 109 houses and directing them to put the appellants in possession of the scavenging right in the 109 houses. The basis of their claim is stated in para. 3 of the plaint wherein it is alleged that by virtue of the said deed of mortgage the respondents

> mortgaged the scavenging right belonging to them in the said houses which scavenging rights are *res commerciam* capable of being mortgaged, sold etc, amongst the scavenger community according to the custom obtaining amongst them in Madras.

It is alleged in the plaint that a large sum was due to the appellants and the respondents committed default in payment and they were entitled to possession of the scavenging rights and to a permanent injunction as prayed for. The defence is that the debt had been discharged and a denial of the right to an injunction claimed in the plaint. But the written statement admitted the allegations in para. 3 of the plaint which relate to the custom alleged therein. Subsequent to the filing of the written statement there was a reference to arbitration of Mr. P. R. Sundaresan, an advocate of this Court on the matters in dispute between the parties. The arbitrator delivered his award on 5th January 1934 directing the respondents to pay Rs. 598.5.0 to the appellants. A decree was passed in accordance with the said award but on revision it was set aside by Burn J. on the ground that the arbitrator exceeded his jurisdiction in granting a decree for money when the plaintiffs did not ask for that relief and when the only relief prayed for in the plaint was an injunction. He therefore remanded the suit for a fresh disposal and on remand the learned City Civil Judge declined to grant the injunction on two grounds, namely: (1) that damages are an adequate remedy and (2) that there is no such thing as a right to scavenge, and the recognition of any such right in any individual to the exclusion of others would be repugnant to law. It is against this decision that this appeal has been preferred.

It is strongly contended before me that both the grounds on which the learned Judge rested his decision are unsound and that the right claimed should, at any rate, be upheld on the ground of the custom set up by the plaintiffs and not denied by the defendants. Before dealing with the tenability of this contention it is necessary to examine the basis of the plaintiffs' claim. What was sought to be hypothecated in favour of the appellants was the future income to be derived from the work of scavenging. It was thus a mortgage of non-existing property and a transfer of property to come in future. Such a property may no doubt be mortgaged but it must be property which under the law, if existing, could be the subject of a transfer. Under the English law, property of every description, even possibilities and expectancies, is assignable for value : *vide* (1888) 13 A C 523[1] at p. 543, per Lord Macnaghten. The principle upon which such alienations are upheld under the English law is that though they are void under the common law, under equity they are treated as contracts binding on the conscience of the assignor and binding on the subject-matter of the contract when it came into existence, if it was of such a nature and so described in the deed of assignment so as to be capable of being ascertained and identified. In

1. Tailby v. Official Receiver, (1888) 13 A C 523 =58 L J Q B 75=60 L T 162=37 W R 513.

(1862) 10 H L C 191[2] at p. 211 Lord Westbury indicated that the said principle assumed that the supposed contract was one of that class which a Court of Equity would decree specific performance. In 13 A C 523[1] at p. 547 Lord Macnaghten points out that the doctrines relating to the specific performance do not afford a test or measure of the rights created and Lord Westbury did not intend to lay down as a rule to guide or perplex the Court that considerations applicable to the case of specific performance are to be applied to every case of equitable assignment dealing with future property. In the present case however the test laid down by Lord Westbury will have to be applied as the substance of the plaintiffs' claim is to enforce specific performance of the covenant, that is of the negative bargain entered into by the respondents in favour of the appellants. But the main question in this case is, is the property capable of transfer under the Indian law? Under the Indian Statute law what in English law would be called a transfer of possibility or expectancy is prohibited. S. 6 (a), T. P. Act, is absolutely clear on the matter. It states that

> The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature cannot be transferred.

By virtue of this provision, our High Court and also the Privy Council prohibited the transfer of a reversion expectant on the death of a Hindu widow: *vide* 39 Mad 554[3] and 50 Cal 929.[4] In fact the Privy Council approved the dicta in 39 Mad 554[3] of both the learned Judges, Sir John Wallis and Tyabji JJ., that in view of the express provision of S. 6 (a), T. P. Act, the English decisions bearing on the matter would have no application. Therefore the principle of English law as laid down in (1862) 10 H L C 191[2] or (1888) 13 A C 523[1] cannot be applied in India to a case of transfer or expectancy or possibility though it has been applied to other cases of transfers of property to come into existence in future. In my opinion the mortgage of the income derivable in future from the scavenging work to be done by the respondents will be an expectancy or a possibility within the meaning of S. 6 (a). The hypothecation in this case of the said income will therefore be invalid and no right to relief can be founded thereon.

But it is contended that what was mortgaged was the right to scavenge and what was sought was therefore possession of such a right and not a mere possibility. The right that is claimed is a right in the defendants to do scavenging work in the 109 houses and to exclude others from doing so. The right is not based on any definite contract with the owners of the said houses by which they were bound to employ the respondents for any particular period. If the owners refused to employ them, no cause of action can be founded thereon and no injunction can be granted compelling them to employ these people: *vide* 7 Mad 424[5] and 3 Bom 232.[6] The right that is claimed is therefore in substance a right to prevent a man from pursuing his legitimate calling. The general principle is that

> the law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do,

and any restriction which is sought to be imposed on a man pursuing his legitimate calling will always be considered to be illegal unless it is brought within any of the recognized exceptions known to law. Such exceptions have been recognized in the interests of trade or business and they too in the interest of the general public. It is not pretended that doing scavenging work is a trade or business or a profession involving skill. In 26 M L J 482[7] Sadasiva Ayyar and Seshagiri Ayyar JJ. declined to recognize a claim for the recovery of moneys said to be due to the plaintiffs by the defendant under a lease of an alleged right to do *purohitam* service in certain villages. The basis of the plaintiffs' claim in that case was that they were entitled to the hereditary purohitship of the said villages. In the course of the judgment Sadasiva Ayyar J. observed as follows:

> The right to exclude other people from following a legitimate calling or profession cannot be countenanced by Courts. There can be no individual property in any such common calling, though, of course the following of that calling by the plaintiff as an individual can give rise to rights in him as

2. Holroyd v. Marshall, (1862) 10 H L C 191=33 LJ Ch 193=9 Jur (N S) 213=7 L T (N S) 172 =11 W R 171=138 R R 108=11 E R 999.
3. Jagannadha Raju v. Lakshmi Narasimma, (1916) 3 A I R Mad 579=29 I C 241=39 Mad 554=28 M L J 650.
4. Annada Mohan Roy v. Gour Mohan Mullick, (1923) 10 A I R P C 189=74 I C 499=50 Cal 929=50 I A 239 (P C).
5. Ramakrishna v. Ranga, (1884) 7 Mad 424.
6. Raja Shivapa v. Krishna Bhat, (1878) 3 Bom 232.
7. China Mahadeva v. Suryaprakasam, (1915) 2 A I R Mad 597=24 I C 204 = 26 M L J 482.

against those who have entered into contracts and obtained benefits from the exercise of that calling by the plaintiff.

The right that is claimed in this case is not appurtenant to any office, a grant whereof was made by the Crown with a right of claim to do service to the exclusion of others and levy a fee for such service. Therefore, as the right that is claimed is one which the law cannot recognize, no injunction could be given in favour of the plaintiffs. Lastly, it is contended that the claim of the plaintiff is based on custom and therefore it is sustainable. It is a well settled principle that any custom which is contrary to public good and operates to the prejudice of the many and beneficial only to a particular individual is prima facie unreasonable and cannot be enforced by any Court of law. In dealing with the claim of a plaintiff, who was a Brahmin, to officiate as a priest at cremation ceremonies to the exclusion of other Brahmins of the class to which he belonged on the ground of customary right, Mukerjee J. in 12 C L J 74[8] at p. 83 made the following observations :

The voluntary consent of the people to the employment of the plaintiff or her predecessors as cremation priests, cannot confer upon them any exclusive right, and the continuance of this state of things, even for generations, cannot confer upon her a legally enforceable right : (1861) 9 H L C 692[9] at p. 701. If we were to recognize the alleged custom as reasonable, we would have to uphold what must, in the end, turn out to be an oppressive monopoly, and the very first reason assigned in the celebrated case of monopolies, *Dacy* v. *Allen*,[10] would be conclusive upon the matter, namely that if the monopoly was sustained, the person in whose favour that monopoly was created, might charge whatever price he pleased.

I would respectfully apply those observations to the facts of this case and hold that the custom, if allowed, would turn out to be an oppressive monopoly and should not be allowed. Whatever may have been the origin of this custom at its commencement, having regard to the modern conditions, such a custom can never be sustainable in a Court of law. As observed by Lord Macnaghten in the course of the argument in 11 C W N 585[11] at p. 590 the custom to claim a monopoly to pursue an occupation which is reasonable at one time may become unreasonable at another time. To my mind, the custom of the description that is now asserted could not have been reasonable even at the commencement and much less can it be held to be so in a city like Madras in the present day. I therefore hold that the relief of injunction is clearly unsustainable and the learned Judge was right in declining to grant the injunction. I may also observe that I fully agree with the learned Judge that damages would be an adequate remedy assuming that there was a legal enforceable right in favour of the plaintiffs; and the plaintiffs could have, if they liked, sued for recovery of the money which they deliberately omitted to do. The decision of the learned Judge in non-suiting the plaintiffs is correct and this appeal is accordingly dismissed with costs.

C.R.K./V.B.B. *Appeal dismissed.*

8. Gourmoni Debi v. Chairman of Panihate Municipality, (1910) 12 C L J 74 = 6 I C 864 =14 C W N 1057.
9. Salisbury v. Robertson Gladstone, (1861) 9 H L C 692=34 L J C P 222=8 Jur (N S) 625 =4 L T 849=9 W R 930=131 R R 403.
10. (1602) 11 Coke 84.
11. Sadagopachariar v. A. Rama Rao, (1907) 30 Mad 185=17 M L J 240 = 11 C W N 585=5 C L J 566 (P C).

---

* A. I. R. 1938 Madras 884

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

S. Rm. Rm. Chockalingam Chettiar — Petitioner.

v.

A. R. P. L. S. P. Muthiah Chettiar (deceased) and others — Respondents.

Civil Revision Petn. No. 1177 of 1933, Decided on 3rd May 1938, from order of Dist. Court, Ramnad at Madura, in C. M. A. No. 55 of 1932.

*** Insolvency — Amendment of petition — Insolvency petition by creditor alleging that certain amount was due by insolvent to certain firm of which he claimed to be sole proprietor — On day of petition, creditor in fact not sole proprietor but declared to be so four days afterwards—Amendment of petition held should be allowed.**

If the effect of the amendment is to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed or in other words if its effect is to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded, the Court will not grant leave to amend. But if on the contrary, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing. [P 886 C 1]

A petition was presented by a person who described himself as a creditor of the insolvent. He alleged that certain amount was due by the insolvent to a certain firm of which he claimed to be the sole proprietor; it was upon this assertion that

he founded his claim to be solely entitled to the debt. The petition was filed on 24th November 1930, but on that date, an arbitration enquiry was pending in regard to a dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on 28th November 1930 the petitioner became solely entitled to the debt on which the insolvency petition was founded :

Held that the petitioner could be allowed to amend his petition and proceed with it. All that was necessary was to allow the petitioning creditor to amend his petition by adding that the inchoate right which he had previous to the petition, became perfected in virtue of the award delivered four days later. As the person who had made the blunder must pay for it the petitioning creditor could be directed to pay the costs : *(1884) 14 Q B D 184; (1887) 4 Morrell's Bank Reports 283 and (1884) 13 Q B D 113, Rel. on; (1895) 1 Q B 194, Expl.; A I R 1932 Mad 112, Dissent.*

[P 886 C 2]

M. Patanjali Sastri and P. S. Narayanaswamy Iyer — *for Petitioner.*

K. Rajah Iyer — *for Respondents.*

Venkatasubba Rao J.—This raises an important question bearing upon the power of the Court to allow an insolvency petition to be amended. The petition in the lower Court was presented by a person who described himself as a creditor of the insolvent. He alleged that Rs. 16,000 odd was due by the insolvent to a certain firm of which he claimed to be the sole proprietor; it was upon this assertion that he founded his claim to be solely entitled to the debt. The petition was filed on 24th November 1930, but on that date, an arbitration enquiry was pending in regard to a dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on 28th November 1930, the petitioner became solely entitled to the debt on which the insolvency petition was founded. It being assumed that the petition as originally filed is incompetent (it is unnecessary in the view we have taken to discuss this point), the question arises whether the petitioner can be allowed to amend his petition and proceed with it. On the facts stated, the petition would require to be amended by the petitioner being allowed to state that four days after the presentation of the petition, the entire right to the debt vested in him by reason of the award. The learned District Judge allowed the petition to be amended, but according to him the amendment that was needed was to change the date from the 24th into the 28th. In our opinion the lower Appellate Court's view that the petition could be amended is right, although the particular amendment indicated by the learned Judge is wrong. The petition was founded on alleged acts of bankruptcy that occurred on 17th September 1930 and 13th October 1930, i. e. within three months of the petition. Even should the date of its filing be taken as the 28th November, the petition would still be within time.

In (1884) 14 Q B D 184[1] a bankruptcy petition was filed by a person who was a mere trustee of the debt for his sister, and the Registrar dismissed it, holding that the *cestui que trust* was a necessary party. The Court of Appeal agreed with the Registrar that the petition as filed was incompetent, but long after the three months period, gave leave to amend the petition. The debtor's counsel is reported to have contended,

> the amendment would be equivalent to the presentation of a new petition, founded on an act of bankruptcy, more than three months old.

That the trustee had no right to present the bankruptcy petition is, as already stated, declared by the Court of Appeal. Brett M. R. observes that the trustee was not a good petitioning creditor alone, but that the *cestui que trust* ought to have joined in the petition. Similarly, Lindley L. J. says that it has been the settled rule in bankruptcy that in order to maintain a bankruptcy petition in respect of a debt due to a trusee, the *cestui que trust* must join in the petition. In spite of this however leave to amend was granted, Lord Coleridge C. J. observing :

> A blunder by no means unnatural has been made in the construction of the Act; it is a mere slip : (1884) 14 Q B D 184.[1]

The Court of Appeal in a yet later decision re-affirmed this principle and allowed a similar amendment: (1887) 4 Morrell's Bank Reports 283.[2] (1884) 13 Q B D 113[3] though not directly in point, throws some light upon the matter in hand. There the petition as originally filed was properly constituted, but before the hearing the interest of one of the partners of the creditor firm (petitioners) became vested in a trustee. The Registrar, even in the absence of the trustee, made a receiving order. The Court of Appeal held that the trustee was

1. Ex parte Deasle; In re Hastings, (1884) 14 Q B D 184=54 L J Q B 74=33 W R 440=1 Morrell 281.
2. In re Ellis, (1887) 4 Morrell's Bank Reports 283.
3. Ex parte Owen; In re Owen, (1884) 13 Q B D 113=53 L J Ch 863=50 L T 514=32 W R 811=1 Morrell 93.

a necessary party and that the proper course was to correct the irregularity by joining him as a petitioner. Leave was accordingly given to amend the petition: (1884) 13 Q B D 113.[3] The appellant however strongly relies upon (1895) 1 Q B 194,[4] which of course is an authority to the extent to which it goes; but surely it cannot be suggested that it has the effect of impairing the value of the decisions of the Court of Appeal. In (1895) 1 Q B 194[4] certain creditors, the aggregate of whose debts was of the requisite amount, filed the bankruptcy petition. Some of the alleged debts, it was found, had in fact no existence. The Registrar allowed the petition to be amended by the names being added of two other persons as petitioning creditors. At the time the application for amendment was made, more than three months had elapsed from the date of the committal of the act of bankruptcy on which the petition was founded. The learned Judges of the Queen's Bench Division held that the Registrar's order was wrong. The point of distinction between the Court of Appeal decisions and this case is most clearly brought out in the very terse judgment of Wright J. The learned Judge observes :

> As I understand the matter, every debt sought to be added, as ground of the petition, after three months from the date of the act of bankruptcy, is unavailable for that purpose; but if within that period a debt has been made ground of the petition and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice.

Vaugham Williams J. puts the test in words very similar: Is the effect of the amendment to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed? To express the same idea differently, is its effect to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded? If that is what is sought to be done, the Court will not grant leave to amend. But if, on the contrary, as Wright J. in the passage quoted above, observes, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing. In the case before the learned Judges it was sought to introduce new creditors and new debts, and leave on the principle mentioned above was refused. The facts here bring the case directly within the principle of the two cases, already cited, of the Court of Appeal. Here there is, as in those cases, "a good petitioning-creditor's debt": per Brett M. R. in (1884) 14 Q B D 184.[1] The petitioners there were not properly constituted owing to the *cestui que trust* not having been joined; the defect in the present case is the non-joinder of the other partner. The parallel seems to be complete and we must respectfully dissent from 61 M L J 544,[5] a decision of Cornish J. The learned Judge's attention was not called to the crucial cases on the point — the decisions of the Court of Appeal. The lower Court has thus acted rightly in granting leave to amend; but as already stated, all that need be done is to allow the petitioning creditor to amend his petition by adding that the inchoate right which he had previous to the petition, became perfected in virtue of the award delivered four days later. As observed by Lord Coleridge C. J. in (1884) 14 Q B D 184[1] the person who has made the blunder must pay for it and the lower Court has very properly directed the petitioning creditor to pay the costs that have been thrown away. The contention of the petitioner therefore fails.

Next it has been argued for him that in regard to the merits the lower Appellate Court's order of remand is wrong. There can be no doubt, as the District Judge suggests, that in the trial Court the petitioning creditor thought, not unreasonably, that the contest was in regard to the preliminary question alone. The various entries in the B Diary support the lower Appellate Court's inference and the Subordinate Judge, it seems to us, dealt with the merits not because they were gone into, but because he imagined that to make his judgment complete he had to touch on them. The petition will be amended in the lower Court within one month from the re-opening of the Sub-Court. In the result, the civil revision petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

4. In re Maund, (1895) 1 Q B 194=64 L J Q B 183=15 R 159=72 L T 58=43 W R 207.

5. Vaithianathier v. Vaithianathier, (1932) 19 A I R Mad 112=135 I C 613=61 M L J 544.

*** A. I. R. 1938 Madras 887**
FULL BENCH

LEACH C. J., VARADACHARIAR AND PANDRANG ROW JJ.

S. N. V. R. Narayanan Chetti — Appellant.

v.

S. Pr. Al. Periapapn and others — Respondents.

Appeal No. 77 of 1933, Decided on 2nd December 1937, against decree of Sub-Judge, Sivaganga, in O. S. No. 61 of 1930.

*** Court-fees—Suit for accounts— Once suit is valued in plaint, its valuation cannot be changed in appeal — Valuation determines forum of suit and appeal — Valuation however can be changed only if portion of relief is abandoned.**

The scheme of the Act in respect of suit for accounts is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this he is bound by the valuation fixed by himself at the commencement of the litigation. Hence an appellant in appeal against a decree dismissing a suit for an account cannot change his valuation, although the subject-matter of the appeal is the same as in the trial Court : *A I R 1929 P C 147, Explained ; 24 M L J 233 (F B) ; A I R 1915 Mad 948 (F B) ; 25 Mad 543 ; 10 M I A 313 (P C) and A I R 1938 Mad 435, Rel. on ; A I R 1933 Mad 330, Held overruled by A I R 1938 Mad 435 (F B).* [P 887 C 2 ; P 889 C 1]

A. V. Viswanatha Iyer Sastri — *for Appellant.*

M. Patanjali Sastri and N. G. Krishna Iyengar — *for Respondent.*

Government Pleader — *for the Crown.*

Leach C. J. — The question which we are called upon now to decide in this case is whether the memorandum of appeal has been properly stamped. The suit out of which the appeal arises was filed in the Court of the Subordinate Judge of Sivaganga for the taking of the accounts of a dissolved partnership. The plaintiff valued his relief at Rs. 16,500 and paid the court-fee of Rs. 1004-15-0. The trial Court dismissed the suit on the ground that it was barred by law of limitation. The plaintiff then appealed to this Court and in his memorandum of appeal valued the relief at Rupees 1000 paying the corresponding court-fee of Rs. 112-7-0. In consequence of the decision of this Court in 56 Mad 705[1] this valuation was accepted by the officer whose duty it was to check the stamping of the memorandum of appeal. But that case has recently been overruled by a Full Bench, S. A. No. 393 of 1937, reported in A I R 1938 Mad 435.[2] The respondents have in consequence contended that the appellant should value his relief in accordance with the figure at which it was valued in his plaint. The appellant contends that, notwithstanding the fact that 56 Mad 705[1] has been overruled, the case is governed by 10 Lah 737[3] and that the memorandum of appeal is properly stamped.

The question resolves itself into this : Can the appellant in an appeal against a decree dismissing a suit for an account change his valuation, although the subject-matter of the appeal is the same as in the trial Court ? Sec. 7 (iv), Court-fees Act, requires a suit for accounts to be stamped "according to the value at which the relief is valued in the plaint or memorandum" and adds : "In all such suits the plaintiff shall state the amount at which he values the relief sought." It is said, that, as there is a reference in this clause to the memorandum of appeal, the appellant is allowed to value the relief on appeal at whatever he likes, notwithstanding that he valued it in the trial Court at a higher figure and that the correctness of this course is expressly recognized in 10 Lah 737.[3] It was held by a Full Bench of this Court in 24 M L J 233[4] and by another Full Bench in 38 Mad 922[5] that a plaintiff in a suit of this nature is entitled to value his relief at what he likes, it being no objection to his valuation that it is an arbitrary one; and these decisions have not been challenged before us. We therefore start with this. The plaintiff may in his plaint value the relief at his own figure. But having made the valuation for the purpose of the litigation, can he reduce it when he comes to appeal ? It has always been considered in this Court and in the other High Courts in India that he cannot. Until 56 Mad 705[1] was decided, a plaintiff appealing against a

1. In re Venkatanandam, (1933) 20 A I R Mad 330=141 IC 602=56 Mad 705=64 MLJ 122.

2. In re Dhanukodi Nayakkar, (1938) 25 A I R Mad 435=175 I C 470=I L R (1938) Mad 598=(1938) 1 M L J 628 (F B).

3. Faizullah Khan v. Mauladad Khan, (1929) 16 A I R P C 147=117 I C 493=10 Lah 737=56 I A 232 (P C).

4. Ramiah v. Ramaswamy, (1913) 24 M L J 233 =18 I C 363 (F B).

5. Arunachala Chetty v. Rangaswami Pillai, (1915) 2 A I R Mad 948=28 I C 79=38 Mad Mad 922=28 M L J 118 (F B).

decree dismissing a suit for an account was required in this Court to stamp his memorandum of appeal according to the full amount of valuation on his plaint. Of course he could if he so desired waive some of the relief which he claimed in the trial Court and in this case he would stamp his memorandum of appeal accordingly.

The Court will not change a long established practice unless it is shown that the practice is opposed to law. Before we can hold that the practice which has been followed in this Court until the decision in 56 Mad 705,[1] and throughout in other Courts should be altered, it must be shown that the practice is inconsistent with the provisions of S. 7 (iv) (f), Court-fees Act. It must be remembered that the valuation of the relief in the plaint decides the forum—for instance whether the suit shall be filed in the District Munsif's Court or the Subordinate Judge's Court—and the valuation affects the forum of the appeal. In this case, if the appellant had valued his relief in the plaint at Rs. 1000, the figure at which he values it in the memorandum of appeal, the suit would have been filed in the District Munsif's Court, and the appeal would be to the District Court. As the result of valuing his relief in the plaint at Rs. 16,500, he has had the advantage of an appeal direct to this Court. In Second Appeal No. 393 of 1937=A I R 1938 Mad 435,[2] the Court held that where a defendant appeals from a preliminary decree for accounts, he must value his relief according to the value stated in the plaint. If the appellant's contention here is correct, it would mean that he could value his memorandum at what he likes but the defendants could not. It certainly could not have been the intention of the Legislature to make any distinction between the plaintiff and the defendant in this respect.

The doctrine that a party cannot approbate and reprobate has been applied to application for leave to appeal to the Privy Council. In 58 Cal 66[6] Rankin C. J. and Ghose J. held that this doctrine applied to a case where a party appealed to the lower Court upon a valuation inconsistent with the valuation upon which he sought a certificate to enable him to appeal to His Majesty in Council and that a party who sued or appealed in a Court which would have no jurisdiction if the value exceeded Rs. 10,000 would debar himself from claiming at a later stage to have the subject-matter of the suit in the Court of first instance treated for the purposes of an appeal to the Privy Council as exceeding Rs. 10,000. The principle governing this decision was stated by their Lordships of the Privy Council in 10 M I A 313[7] and has been applied by this Court in 43 M L J 728[8] and by the Bombay High Court in 53 Bom 552.[9] We see no reason why the doctrine referred to should not apply to a case like the present one.

In 25 Mad 543[10] Benson and Bhashyam Iyengar JJ. held that a plaintiff could not change his valuation in the trial Court although he applied for leave to do so. This was a case in which the plaintiff had sued for an account. He obtained a preliminary decree and the account was taken, the result being that he was entitled to a larger sum than that claimed in his plaint and in respect of which he had paid court-fee. When the report of the Commissioner who had taken the account was made, the plaintiff applied for leave to amend his plaint and leave was granted. The District Munsif then ordered that the plaint should be returned to the plaintiff for presentation in the proper Court. The Division Bench which heard the appeal held that this was wrong and that the suit had to remain in the District Munsif's Court for the purpose of the passing of the final decree.

Although there are all these indications that it was not the intention to allow a plaintiff to change his valuation on appeal, the learned advocate for the appellant has argued, as I have already indicated, that the Judicial Committee has decided that he can. In 10 Lah 737[3] the plaintiff-appellants stamped their memorandum of appeal at a higher sum than at which they stamped their plaint. They sued for an account valued at Rs. 3000. Their claim was dismissed by the trial Court and a decree was passed against them for Rs. 19,991. On appeal they asked that the decree against them should be set aside and they valued their relief at Rs. 19,991, but they did

6. Mahendranarayanan Ray v. Janakinath Ray, (1931) 18 A I R Cal 417=132 I C 910=58 Cal 66.

7. Muthuswami Jagavera Yettappa Naicker v. Venkateswara Yettia, (1869-66) 10 M I A 313 =1 Jur (N S) 205=2 Sar 131 (P C).

8. Alagappa Chetti v. Nachiappan, (1923) 10 A I R Mad 125=69 I C 385=43 M L J 728.

9. Lallubhai Pragji v. Bhimbhai Dhajibhai, (1929) 16 A I R Bom 341=119 I C 782=53 Bom 552=31 Bom L R 632.

10. Arogya Udayan v. Appachi Rowthan, (1902) 25 Mad 543=12 M L J 35.

not pay court-fee on their own claim for Rs. 3000. The Appellate Court allowed the appeal and remanded the case for re-trial, but inasmuch as the appellants had not stamped their memorandum of appeal sufficiently to cover their own claim ordered that they should not have a decree for any sum which might be found due to them and to that extent held that the appeal was barred by limitation. The Privy Council held that the memorandum of appeal had been sufficiently stamped. This was a case in which the appeal was from the final decree, and therefore their Lordships were not considering the question of an appeal from a preliminary decree. The question now before us was never under discussion. For these reasons, we are unable to agree that 10 Lah 737[3] declares that the practice of the High Courts in India with regard to the stamping of appeals like the present appeal is contrary to law.

In our opinion the scheme of the Act in this respect is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this we are of opinion that he is bound by the valuation fixed by himself at the commencement of the litigation. Accordingly we hold that the memorandum of appeal in this case has been insufficiently stamped and if the appellant wishes to continue the appeal, he must value his relief here in accordance with his valuation in the Court below and pay the corresponding stamp-fee. We will allow him time until 5th January 1938 in which to pay the additional court-fee. If the additional fee is paid by that date, the appeal will be placed in the ordinary list for hearing. If it is not paid by that date, the appeal will be rejected. It follows, of course, that if the appellant wishes to limit his relief on appeal to any figure less than Rupees 16,500, he can do so provided the memorandum of appeal is stamped sufficiently.

C.R.K./B.D. *Order accordingly.*

---

* * **A. I. R. 1938 Madras 889**

FULL BENCH

LEACH C. J., MADHAVAN NAIR AND VARADACHARIAR JJ.

Patelkhana Venkataramasami and another — Appellants.

v.

Imperial Bank of India, Rajahmundry and others — Respondents.

Appeal No. 251 of 1933, Decided on 11th April 1938, against decree of Sub-Judge, Rajahmundry, in O. S. No. 18 of 1932.

** **(a) Hindu Law — Antecedent debt — Mortgage — Money advanced to father on understanding that he will execute mortgage whenever required — Debt not being part of same transaction constitutes antecedent debt — Mortgage executed to secure such debt is binding on sons.**

If the agreement is merely to execute a mortgage, if and when called upon, and the money is lent on this understanding, the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction but the debt will constitute an antecedent debt within the meaning of Hindu law. The agreement must be a genuine agreement and not a device for evading the law: *A I R 1919 Mad 75; A I R 1924 P C 50 and A I R 1917 P C 61, Rel. on; 1934 M W N 812, Expl.*

[P 892 C 1, 2]

Where therefore money was advanced to the father, in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender, such advance will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower.

[P 891 C 1; P 892 C 1]

(b) Mortgage — Agreement to, does not create charge.

In India an agreement to create mortgage creates no charge. [P 892 C 1]

M. S. Ramachandra Rao — *for Appellants.*

O. T. G. Nambiar — *for Respondents.*

ORRER OF REFERENCE

Varadachariar J. — This appeal arises out of a suit to enforce specific performance of an agreement entered into by defendants 1 and 2 to execute a mortgage in favour of the plaintiff-Bank, to secure repayment of moneys advanced to them in pursuance of that agreement. Moneys were advanced on more than one occasion and some time in December 1930 the plaintiffs say that they asked for the execution of the security in pursuance of the agreement. The Bank has obtained a simple money decree against defendants 1 to 4 for the amount due. Defendants 1 and 2 are father and son and defendants 3 and 4 are the minor sons of defendant 2. All the

four defendants are members of an undivided family. Defendant 5 is the Official Receiver in the insolvency of defendants 1 and 2. Defendants 1 and 2 seem to have carried on a joint business and they purported to borrow money from the plaintiff Bank in connexion with that business, but the question has not been raised or decided whether that was an "ancestral" business in respect of which defendants 1 and 2 can create a mortgage so as to bind the shares of defendants 3 and 4 in the family property. Defendants 3 and 4 contend that according to the test laid down in the Privy Council decisions, the suit debts are not "antecedent debts" in relation to the mortgage because they were lent on the strength of the agreement to create a mortgage and that therefore any mortgage executed by defendants 1 and 2 on foot of such agreement cannot bind their shares in the family property.

If these defendants had not been impleaded in this suit, specific performance might have been decreed in the usual course as against the parties to the agreement, leaving the question of the binding character of the mortgage to be agitated in appropriate proceedings. But as they have been impleaded in this suit and the question has been raised and dealt with in the Court below, we do not think it proper to ignore that contention. The learned Subordinate Judge was of opinion that the mortgage now to be executed by defendants 1 and 2 must be deemed to be one in respect of an antecedent debt, because the debts have already been advanced. The appellants' learned counsel relies on the decision of a Division Bench of this Court in 1934 M W N 812,[1] in support of his contention that where money has been advanced on the strength of an agreement to create a security on the family property, the fact that the mortgage comes to be executed only after the advance has been made will not make the mortgage valid as one created to secure repayment of an antecedent debt. This is a direct authority on the point; but we have felt some difficulty in reconciling it with the principle of the Full Bench decision in 42 Mad 711,[2] which was approved by the Judicial Committee in 46 All 95.[3] If money which had been advanced on a mortgage of joint family property can be regarded as an antecedent debt validating a later mortgage securing repayment of the same sum, it is not easy to see why money which has been advanced on the strength of an agreement to execute a mortgage should be regarded as standing on a different footing. The principle of the decision in 42 Mad 711[2] has also been applied by the Privy Council in 47 All 795.[4] But for the judgment in 1934 M W N 812[1] we should have been prepared to concur in the decision of the lower Court. In view however of that decision we refer to the decision of a Full Bench the question, "whether money advanced to the father, in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower."

(This appeal came on for hearing before Sir A. H. L. Leach C. J., Madhavan Nair and Varadachariar JJ., in pursuance of the aforesaid Order of Reference to a Full Bench and the Court expressed the following)

OPINION

Leach C. J.—The suit which has given rise to this reference was instituted in the Court of the Subordinate Judge of Rajahmundry by the Imperial Bank of India, respondent 1. The Bank sued to enforce specific performance of an agreement entered into by respondents 2 and 3 with the Bank to secure repayment of moneys advanced to them. Respondent 2 is the father of respondent 3. They and the appellants, who are the minor sons of respondent 3, constitute an undivided family. In 1923 respondents 2 and 3 started a business, and for this purpose opened an account with the Bank. On 14th August 1923 in pursuance of an arrangement with the Bank, which was willing to finance them, they executed a document in the following terms:

In consideration of the Imperial Bank of India advancing us sums of money from time to time we hereby undertake not to alienate or in any way

1. Rajayya v. Satyanarayanamurthi, 1934 M W N 812.
2. Arumugha Chetty v. Muthu Kounden, (1919) 6 A I R Mad 75=52 I C 525 = 42 Mad 711= 37 M L J 166 (F B).
3. Brij Narain v. Mangla Prasad, (1924) 11 A I R P C 50=77 I C 689=51 I A 129 = 46 All 95 (P C).
4. Lal Bahadur v. Ambika Prasad, (1925) 12 A I R P C 264=91 I C 471=47 All 795 = 28 O C 371=52 I A 413 (P C).

transfer or mortgage any of our immovable property as per schedule attached and which at present is not mortgaged to anyone. We hereby agree when called upon to do so to execute legal mortgage of these properties, with or without possession or conveyance to the said Bank as the Bank may require, so long as we are indebted to the Bank. This agreement to be so in force till cancelled by us by a registered letter.

From time to time the Bank lent money to respondents 2 and 3 without calling upon them to execute any mortgage in its favour. By 1931 respondents 2 and 3 had become heavily indebted to the Bank and in that year the Bank obtained two decrees against them in respect of advances. The first decree was for a total sum of Rupees 25,482-11-0, made up of Rs. 5070-1-0 due on a promissory note dated 19th December 1930, and Rs. 20,412-10-0 due on three hundis dated respectively 30th March 1930, 5th November 1930 and 29th November 1930. The second decree was for Rs. 5099-3-0, due on a hundi dated 30th October 1930. In December 1930 the Bank demanded that respondents 2 and 3 should execute a mortgage to secure their indebtedness, but this demand was not complied with, and on 5th April 1932 the Bank sued for specific performance of the agreement which I have just quoted. The suit was decreed and the sons of respondent 3 were held to be liable to the extent of their interests in the family properties. They have appealed, and contend that there can be no decree for specific performance so far as they are concerned, because the mortgage which the Court ordered to be executed was not in law a mortgage for an antecedent debt. As this question is of importance and as the decision in 1934 M W N 812[1] would appear to be in conflict with certain decisions of the Privy Council, the following question has been referred to us :

> Whether money advanced to the father, in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower ?

In delivering the judgment of the Privy Council in 39 All 437,[5] Lord Shaw said that the issue of the father could only be bound where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate. The judgment concluded with the following statement :

> In truth in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence.

This judgment was considered by a Full Bench of five Judges of this Court in 42 Mad 711[2] and there Wallis C. J. expressed the opinion that their Lordships only meant

> that if the so called antecedent debt was incurred so shortly before the execution of the mortgage, say two hours or two days, as to establish that it was incurred on the credit or security available by the joint family immovable assets, such a debt is not an antecedent debt and therefore the mortgage which is executed for such a so-called antecedent debt will not affect the sons' shares.

Viewing the decision of the Privy Council in this light, the Court held that if a Hindu father borrows money on the security of the family estate and later gives another mortgage the first debt constitutes an antecedent debt, notwithstanding that it was secured on the family estate. In 46 All 95,[3] the Judicial Committee expressed their entire agreement with the views of Wallis C. J. in 42 Mad 711,[2] and in order to prevent misconception in future on this and connected questions stated the following propositions of law :

> 1. The managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity ; but 2. If he is the father and the reversioners are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. 3. If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. 4. Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. 5. There is no rule that this result is affected by the question whether the father who contracted the debt or burdens the estate, is alive or dead.

The fourth proposition would appear to be an embodiment of the concluding portion of Lord Shaw's judgment, where he expressed the opinion that the transaction must be one which cannot be regarded as a cloak for a breach of trust. If the debt and the mortgage are not part of the same transaction, but are independent of one another the mortgage will be binding on the issue of the mortgagor. In 1934 M W N 812,[1] Krishnan Pandalai J. sitting with

5. Sahu Ram Chandra v. Bhup Singh, (1917) 4 A I R P C 61 = 39 I C 280 = 44 I A 126=39 All 437 (P C).

Curgenven J. observed that if a man advanced a loan to a father in a joint Hindu family and agreed with him to take a mortgage for the loan and subsequently in pursuance of that agreement does take the mortgage, the mortgage cannot be said to be for a debt antecedent to the original loan. This statement of the law is very wide and may give rise to misconception. The mortgage may be independent of the debt despite the fact that the agreement between the parties contemplated the furnishing of security if called for. If the money is lent on the express condition that a mortgage will be executed later and a mortgage follows, the debt cannot be said to be independent of the mortgage, but if the arrangement is merely that the debtor shall give security, if and when required, the position is very different. It may never be required and probably will not be called for, if the creditor remains satisfied with the debtor's personal liability. If it is required because the creditor at a later date has his suspicions of the debtor's stability or for some other reason it cannot be said that the advancing of the money and the subsequent mortgage are part and parcel of the same transaction.

Now, what is the position in the present case? The Bank did advance moneys to respondents 2 and 3 and continued to lend moneys entirely without any security. For several years the Bank was satisfied with the undertaking given by respondents 2 and 3 not to alienate their properties. It is true that respondents 2 and 3 had undertaken to provide security when called upon to do so, but this does not alter the fact that moneys were advanced without security. When security was called for, there was a debt really in existence. In our opinion it cannot be said that there was here a breach of trust on the part of respondents 2 and 3 or that the Bank was a party to a colourable transaction. In other words it cannot be said that the debt was any part of the mortgage, or to use the words of Lord Dunedin in 46 All 95,[3] "part of the transaction impeached." In this country an agreement to mortgage creates no charge, and this is of importance in this connexion. For the reasons stated, we would answer the reference in this sense. If the agreement is merely to execute a mortgage, if and when called upon, and the money is lent on this understanding the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning in 42 Mad 711,[2] but the debt will constitute an antecedent debt within the meaning of Hindu law. The agreement must be a genuine agreement and not a device for evading the law.

Madhavan Nair J. — I agree.

Varadachariar J. — I agree. There is a real distinction between cases in which the lender and the borrower contemplate the giving of security only as a future possibility and cases in which from the outset the parties contemplate only a mortgage loan. In the former case, the lender is prepared to start with only the personal liability of the borrower and conceivably may never call for the execution of a mortgage at all. Security is, in such cases, ordinarily called for only when in course of time it is found that the borrower has not been repaying his dues with the promptness with which he was expected to repay or is getting into financial difficulties. When, for such reasons, the creditor calls for the execution of a mortgage, there will be in existence an indebtedness which has for some time been outstanding merely on the personal liability of the borrower. This debt can at that very moment be recovered from the whole of the joint family property of the debtor —including the shares of his sons—and it is to avert proceedings to that end that the debtor will be called upon to give a security. It does not seem reasonable in such a case to speak of the 'antecedency' of the debt as illusory; nor can it be said that there was no 'bona fide debt' or that it was 'colourably incurred for the purpose of forming a basis' for the mortgage (per Stanley C. J. in 31 All 176[6] at page 190).

If, as observed by Lord Shaw in 39 All 437,[5] a further condition should be insisted on, before binding the son's share by the father's mortgage, namely that at the time of advancing money the lender should not have had in view the 'credit obtainable from immovable assets belonging to the joint family,' the position might be different; but this condition can no longer be insisted on, in view of the Full Bench decision in 42 Mad 711[2] and of the decision of the Judicial Committee in 46 All 95.[3] It is true that in 46 All 95[3] at p. 104 their Lordships speak (in proposition No. 4)

6. Chandra Deo Singh v. Mata Prasad, (1909) 31 All 176=1 I C 479=6 A L J 263 (F B).

of the debt being 'not part of the transaction impeached'; the transaction referred to in this passage is the mortgage itself. The proposition has evidently been so worded with a view to give effect to the observations of Lord Shaw at the end of the judgment in 39 All 437[3] at page 440, when referring to a father 'at the end of his personal resources,' his Lordship instanced the case of a money lender advancing money to him 'relying upon an understanding express or implied' to give security.

Apart from attempts to evade the law, it may, even in cases where only a mortgage loan was contemplated, happen that there is some interval of time—long or short—between the advance of the money and the execution of the mortgage bond; e. g. because the requisite stamp papers are not immediately available or details as to survey numbers etc., relating to the property to be mortgaged have to be obtained or one of the persons who has to join in executing the mortgage is not available or the mortgagee is able to find only a portion of the money required and the execution of the document is postponed till he is able to find the balance. In these cases, it may well be said that notwithstanding the interval, the loan and the mortgage are part of one and the same transaction. 1934 M W N 812[1] will, on its facts, be found to fall in this group; because in that case, the original arrangement itself was for a mortgage loan of Rs. 5000 but the lender was able to find only Rs. 3000 immediately. The execution of the mortgage deed was postponed pending the advance of the balance of Rs. 2000 and in the meanwhile the first advance of Rupees 3000 was acknowledged by the execution of a promissory note.

C.R.K./B.D. *Reference answered.*

---

* A. I. R. 1938 Madras 893

PANDRANG ROW J.

In re Koganti Appayya and others
Appellants.

Criminal Appeals Nos. 650, 705 and 717 of 1937 and 48 of 1938, Decided on 5th May 1938, against order of Court of Session, West Godavari Division, D/- 1st November 1937.

(a) Criminal P. C. (1898), Sec. 162 — Statements oral or otherwise made to police officer during course of investigation of offence are inadmissible in evidence.

Statements, oral or otherwise made to a police officer during the course of his investigation of a case are not admissible in evidence under S. 162, although such police officer may not be acting under Ch. 14 or investigating under Sec. 156 or S. 157 : *A I R 1928 Mad 1028, Rel. on; 35 Mad 247, Held overruled by A I R 1928 Mad 1028.*

[P 894 C 2]

*** (b) Criminal Trial — Confession — Statements to police by each of several accused, during course of investigation, not amounting to confession of any crime —Statements taken together showing that accused were engaged in criminal conspiracy to commit offence and sought to be used to prove that fact — They amount to confessions.**

Although statements made to a police officer, by each of the several accused separately, during the course of an investigation of an offence, do not amount to a complete confession of any crime, nevertheless when such statements when taken together show that the accused who made them were engaged in a criminal conspiracy to commit the offence and are sought to be used for the purpose of establishing that fact, they amount to confessions made to a police officer and are not admissible in evidence. [P 894 C 2]

(c) Criminal Trial — Accomplice — Person instigating another to commit crime with intention of catching him in the act of committing crime—Instigation by him amounts to abetment of offence — He is to be regarded as accomplice when offence has been committed as result of instigation — At any rate his evidence is to be viewed with caution.

Even if the object of a person who instigates another to commit a crime is to catch him in the act of committing the crime, instigation by him nevertheless amounts to an abetment of the offence and the instigator or abettor must be regarded as an accomplice when the object of the instigation is to make the offender commit the offence and the person who was instigated actually commits the offence. In any case even if such witnesses are not to be regarded as accomplices in the strict legal sense, nevertheless their conduct is such that their evidence requires to be viewed with caution : *19 Bom 363 and A I R 1929 Lah 436, Ref.* [P 895 C 2]

K. S. Jayarama Aiyar, A. Lakshmayya, A. Narasimha Aiyar for N. Rama Rao — *for Appellants.*

K. Venkataraghavachariar for Public Prosecutor — *for the Crown.*

Judgment. — These appeals are from the judgment of the Sessions Judge of the West Godavari Division dated 1st November 1937 in S. C. No. 20 of 1937 on his file. The first appeal is by accused 4 who is in jail. The next two appeals are by accused 2 and 3. The last appeal is by the public prosecutor and it is an appeal from the acquittal of accused 5 in the case. There were five accused in the case of whom accused 1 as well as accused 5 were acquitted, and no appeal has been filed against acquittal of accused 1.

I shall first deal with the appeal by accused 4. So far as he is concerned, the evidence is overwhelming that he was found in possession of materials for counterfeiting Government currency notes of ten rupees denomination at Nidadavole Station when he was arrested. Several blocks containing engravings of the note were found inside his banian pocket when he was searched in the presence of mediators most of whom are quite respectable and against whom nothing can be said. So far as his conviction under S. 489-D, I. P. C., is concerned, there can be no doubt that the evidence fully supports it.

It may be mentioned in this connexion that when he was asked to plead to the charges, he stated that he would tell the truth and what happened, whatever the result may be, and when warned that he was not to be taken as an approver and that he was not bound to say anything except to plead to the charge, he said that "the offences were committed by other accused. I was also with them." It is therefore clear that he had really no defence worth mentioning and as already observed his conviction under S. 489-D is obviously right. Whether the conviction under the first count of conspiracy is right or not will be considered when the cases against accused 2 and 3 are dealt with. Accused 2 and 3 have been convicted of conspiracy as well as of abetment of the possession of counterfeiting materials by accused 4. As regards the charge of abetment, there is really no meaning in it. It is not explained how the possession of counterfeiting materials by accused 4 was abetted by any of the other accused. Unless the charge of conspiracy holds good, there is nothing in the charge of abetment of possession of counterfeiting materials by accused 4. The substantial charge against accused 2 and 3 is that of conspiracy, the conspiracy being to sell counterfeiting materials to P. W. 5 who was employed by the police to act as a sort of decoy to persons who were suspected to be engaged in making and using counterfeiting materials. The offence of conspiracy rests entirely on the evidence of P. Ws. 1, 3 and 5 of whom P. Ws. 1 and 3 are a Sub-Inspector and a Head Constable attached to the C. I. D. and P. W. 5 as already observed is a decoy employed by the C. I. D. for the purpose of detecting counterfeiting cases. The evidence of conspiracy is mainly that of P. W. 1 though there is some evidence relating to it given by P. Ws. 3 and 5.

Objection was taken during the course of the trial to the admission of evidence of statements made by the accused to P. W. 1 in the course of his investigation. The objection was overruled by the learned Judge apparently on the ground that P. W. 1 was not acting under Ch. 14, Criminal P. C., and that he was not investigating under S. 156 or S. 157 of the Code. The other objection that the statements amounted to confessions made to a Police Officer was also overruled on the ground that the statements did not amount to confessions. I am of opinion that both these objections were sound and should have been allowed. There can be no doubt that P. W. 1 was investigating an offence at least after July 1936 when he received information that accused 2 was actively engaged in making blocks and forged notes. It was held in 35 Mad 247[1] that the statements made to a C. I. D. officer must be deemed to be statements made in the course of investigations by him though in that case the statements being oral, it was held that S. 162 would not apply. This view however has been overruled by the Full Bench decision in 51 Mad 967,[2] according to which oral statements no less than written statements come within the purview of S. 162, Criminal P. C.

As regards the other objection, there can be no doubt that the statements were relied upon for the purpose of fastening guilt on the persons who made them, and though the statements taken separately may not amount to complete confession of any crime, nevertheless the statements taken together show that the accused who made them were engaged in criminal conspiracy and it was for the purpose of establishing this fact that the statements were sought to be used. It is therefore obvious that the statements did really amount to confessions made to a Police Officer. A number of documents such as police diaries have been admitted wholesale in evidence by the learned Judge in the course of the trial, namely Exs. E to E-4, O-3 and O-4. Exs. Q, R, S, DD and FF and BBBB. The learned Public Prosecutor does not defend this wholesale introduction of police diaries

1. Emperor v. Nilakanta, (1912) 35 Mad 247=14 I C 849=13 Cr L J 305=22 M L J 490=1912 M W N 207.
2. Thimmappa v. Thimmappa, (1928) 15 A I R Mad 1028=112 I C 682=29 Cr L J 1098=51 Mad 967=55 M L J 351 (F B).

as evidence during the trial, and it is obviously indefensible. There can be no doubt that the case against accused 2 and 3 in particular has been seriously prejudiced by the admission of such inadmissible evidence during the trial, and I have little doubt that it was the admission of these documents that was mainly responsible for the opinions expressed by some of the assessors against accused 1 and 2 and 3. The only admissible evidence really is that of P. Ws. 1, 3 and 5 so far as it relates to the conduct of the accused, apart from the statements said to have been made by them. The evidence as to the conduct of these accused does not show beyond doubt that they were engaged in a criminal conspiracy. Even apart from this, it must be remembered that P. Ws. 1 and 3 as well as P. W. 5 though engaged really in detecting counterfeiting cases, were actually instigating persons who were suspected to be in possession of counterfeiting materials to sell them for a consideration; in fact the case for the prosecution was that all the time P. W. 1 was engaged with the assistance of P. W. 5 in obtaining a seller of counterfeiting materials, and that finally a bargain was struck whereby Rs. 3300 was to be paid as the price of the blocks in question.

It has been contended that these persons have been really investigating the commission of the very offence in respect of which the accused are charged as conspirators. It is urged that these witnesses come under the category of accomplices and that their evidence cannot therefore be accepted or acted upon in the absence of material corroboration. The question is not an easy one to decide namely whether P. Ws. 1, 3 and 5 were acting as accomplices or acting merely as spies. The decision in 19 Bom 363[3] which was followed in A I R 1929 Lah 436[4] supports the contention of Mr. K. S. Jayarama Aiyar on behalf of the appellant. On the other hand, the learned Public Prosecutor relies on the ruling in 38 Cal 96[5] which is followed in A I R 1936 Nag 245.[6] It is stated that there is no reported cases decided by this High Court dealing with this point. It seems to me that the motive of the person who instigates is not the only determining factor; in other words, even if the object of the person who instigated another to commit a crime is to catch him in the act of committing the crime, instigation by him nevertheless amounts to abetment of the offence, and the abettor must be regarded as an accomplice when the object of the instigation is to make the offender commit the offence, and the person who was instigated actually commits the offence. In any case even if these witnesses are not to be regarded as accomplices in the strict legal sense, nevertheless their conduct has been such that their evidence requires to be viewed with caution. So far as their evidence concerns accused 1 and 5, it has not been accepted by the learned Sessions Judge.

The principal witness for the prosecution is P. W. 1 and he is described by the learned Judge as the principal actor in the drama. His story has not been accepted so far as it implicates accused 1 and 5 and that story is a very material portion of the story related by him in his evidence. It is not possible to say that while the material portion which relates to accused 1 and 5 cannot be accepted, the rest of it can be accepted without doubt or hesitation. That portion of the story which relates to accused 1 and 5 also implicates the other accused. It is in my opinion not safe to act upon his evidence. A good part of it is untrustworthy and cannot be acted upon. If the conviction of accused 4 depended on the evidence of these witnesses, that also could not stand. But his conviction under S. 489-D rests not on the evidence of P. Ws. 1, 3 and 5 but on the evidence of the mediators and others who were present when counterfeiting materials were found actually in his possession. Even otherwise, the evidence which implicates accused 2 and 3 is not of a strong character. The learned Sessions Judge refers to certain telegrams and letters which passed between the parties but most of them had not been proved satisfactorily; for instance Exs. B and G-2 which are pressed against accused 2 have not been proved to be in the handwriting of accused 2. So far as Ex. B is concerned, the Government Expert is of opinion that it is not his handwriting, and as regards Ex. G-2 the opinion that it is in the handwriting of accused 2 was given with some hestitation or misgiving.

3. Queen-Empress v. Javacharam, (1895) 19 Bom 363.
4. Harura Singh v. Emperor, (1929) 16 A I R Lah 436=1929 Cr C 3=118 I C 544=30 Cr L J 941=30 P L R 603.
5. Emperor v. Chaturbhuj Sahu, (1911) 38 Cal 96 =8 I C 119=15 C W N 171.
6. Govinda Balaji v. Emperor, (1936) 23 A I R Nag 245=1936 Cr C 1039=167 I C 521=38 Cr L J 423=I L R 1937 Nag 181.

As regards accused 3, reliance is placed on Exs. TT, K-3 and H-3. Ex. TT contains a correction which is left unexplained, the correction being in another handwriting. The language employed in these and other documents is so vague that it is impossible to say that they refer to any projected sale of counterfeiting materials or to the commission of any other crime. Substantially the defence of these two accused was that they were employed as police informants by P. W. 1 to assist him in getting information as to the persons who were in possession of counterfeiting materials. In other words, their defence was that they were actively assisting P. W. 1 and P. W. 5 to discover the real offenders who were responsible for making and using counterfeiting materials and to bring the latter into touch with the former. It is alleged that they knew P. W. 1 for some time and knew him to be a C. I. D. Head Constable. No doubt P. W. 1 was posing as one Suryanarayana, the supposed brother of P. W. 5, for the purpose of infusing confidence among persons who were suspected to be in possession of counterfeiting materials. But the defence of accused 2 and 3 was that this was known to them to be a pose and that they knew the real personality of P. W. 1 and knew him to be a C. I. D. Head Constable engaged in the investigation of counterfeiting offences. If there is any truth in this defence, it is obvious that accused 2 and 3 are as innocent as P. W. 1 himself. They were engaged along with him and to assist him in unearthing the conspiracy and the entire evidence against them is easily explained away once it is found that they were really assisting P. W. 1 in his investigation.

So far as accused 2 is concerned, the fact that he was assisting P. W. 1 in his investigation appears to be established by certain admissions made by some of the prosecution witnesses: for instance P. W. 15 says that the first thing which accused 2 did when he was arrested along with others was to cry out "why do you arrest me, I am one of you." It is not suggested that P. W. 15 is not telling the truth when he gives this evidence, and if it is true that the second accused cried out in this manner immediately on his arrest, along with the other accused, it renders highly probable his defence that he was really assisting P. W. 1 all the time. It is not likely that he would have thought of this defence and made this cry if that was not the case. P. W. 7 says that accused has told him that P. W. 1's name was Appa Rao, his assumed name being Suryanarayana and that he once heard accused 2 calling him by his real name, Appa Rao, when they were going to a coffee hotel. No doubt this witness was attempted to be treated as a hostile witness by the Public Prosecutor though the attempt failed. There is also evidence for the defence, namely the evidence of D. Ws. 2 to 5 to the effect generally that P. W. 1 was well known as the Head Constable of the C. I. D. in Nuzvid. On the whole therefore it appears to be more likely than otherwise that accused 2's defence that he was only assisting P. W. 1 in his enquiry is true. If so it is obvious that he cannot be regarded as being one of the conspirators. Accused 3's version has not been supported to the same extent by evidence, but the evidence against him is easily explained away on this basis, that is to say, he was only assisting P. W. 1 to get into touch with the person or persons who were in possession of counterfeiting materials. In any case the evidence against him is quite insufficient, in my opinion, to support a conviction for conspiracy. In fact there is no good reason to suppose there was any conspiracy so far as any of the accused other than accused 4 were concerned.

It follows from what I have said above that the convictions of accused 2 and 3 must be set aside and the conviction of accused 4 also under the count of conspiracy and the sentence imposed on him under S. 120-B should also be set aside. The appeal of accused 4 is otherwise dismissed. The appeals of accused 2 and 3 are allowed and their convictions and sentences are set aside and they are acquitted. So far as the appeal by the Public Prosecutor against accused 5 is concerned, there is no substance in it; the acquittal of accused 5 was right and that appeal is dismissed.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 897

ABDUR RAHMAN J.

Ellappa Chettiar — Appellant.

v.

S. A. Sesha Aiyer and another — Respondents.

Second Appeal No. 995 of 1933, Decided on 5th November 1937, against decree of Sub-Judge, Dindigul, in A. S. No. 36 of 1932.

Promissory Note — Promissory note executed by *A* in favour of *B*—Agreement between parties that *A* should pay future instalments of chit fund which were originally to be paid by *B's* brother and should get credit for the same towards promissory note—Suit on promissory note by endorsee who was not holder in due course—*A* held entitled to credit for amount paid by him.

In cases of negotiable instrument, any equities which have to be pleaded should generally arise out of the very transaction itself and must not arise out of the transactions which are either collateral or independent in character *(1830) 10 B & C 558 and 5 Mad 108, Rel. on.* [P 897 C 2]

A executed a promissory note in favour of *B*. It was agreed that certain future instalments of a chit fund, which were to be paid originally by a brother of *B* should be paid by *A* who would get a credit for the amount paid by him towards the promissory note when the chit was closed. *B* endorsed the promissory note to *C*. Before that time all except the last instalments were paid by *A* and the last instalment was also paid but only after the endorsement. *C*, the endorsee, who was not a holder in due course brought a suit on the promissory note and in that suit *A* pleaded that he was entitled to a credit for the amount paid by him towards the instalments :

Held that though the transaction was originally independent of the promissory note, *B* by agreeing with *A* that money paid by him would actually be credited towards the promissory note had attached equities to the bill itself and thus provided a mode of partial discharge. *C* the endorsee not being a holder in due course stood in the shoes of *B* and was liable to the same equities to which *B* would have been liable. *A* was therefore entitled to get a credit for the amount paid by him towards the instalments : *(1854) 10 Ex 572, Rel. on.* [P 897 C 2; P 898 C 1]

Held also that as all except the last instalments were paid before the note was endorsed, the contract had not remained merely executory. Moreover the agreement by *A* to pay future instalments towards the chit fund should be taken as an accord and satisfaction to the extent of the amount which he had undertaken to pay and which *B* had agreed to accept towards the partial discharge of the promissory note. [P 898 C 1, 2]

K. V. Krishnaswami Iyer and G. Thyagaraja Iyer — *for Appellant.*

K. Rajah Iyer, K. S. Ramamurthy and S. Venkatachala Sastri — *for Respondents.*

Judgment.—The only point which has been argued in this appeal relates to the maintainability of defence raised on behalf of defendant 1 in answer to a suit by the endorsee of a promissory note executed by defendant 1 in favour of defendant 2. The appellant's counsel contends that the plaintiff is not legally bound by the agreement arrived at between the defendants inter se, (a) as it related to a collateral transaction, and (b) as it was executory in character and could not be considered to be equivalent of an effective discharge. It might be stated at the outset that although an attempt was made, to start with, to show that the plaintiff was a holder in due course but in view of the finding of the lower Appellate Court and on a correct construction of S. 9, Negotiable Instruments Act, this contention was given up in the end and it was conceded that if defendant 1 could raise a defence against defendant 2, he, i. e. defendant 1, would be entitled to do the same against the plaintiff. The plea raised on behalf of defendant 1 was to the effect that in pursuance of an agreement arrived at between the original parties to the promissory note, certain future instalments of a chit fund, which were to be paid originally by a brother of defendant 2, had been agreed to be paid by defendant 1, and that he was to get a credit for the amount paid by him towards the promissory note in suit when the chit was closed. It was pleaded that defendant 1 had paid a sum of Rs. 405-11-6 towards the chit fund and consequently was entitled to a credit for the same in the suit.

The lower Appellate Court has come to a finding that the agreement pleaded on behalf of defendant 1 was established and that as defendant 1 had paid the amount mentioned above, he was entitled to get a credit for the same. These are findings of facts and were not challenged before me. The counsel for the appellant placed his reliance in support of his contention on (1830) 10 B & C 558[1] and 5 Mad 108[2] at p. 112. It is true that the authorities cited above lend support to the argument, that in cases of negotiable instruments, any equities which have to be pleaded should generally arise out of the very transaction itself and must not arise out of the transactions which are either collateral or independent in character. This must also be admitted that the transaction in this case, which

1. Burrough v. Moss, (1830) 10 B & C 558=109 E R 558.
2. Van Ingen v. Dhunna Lall, (1882) 5 Mad 108.

related to the chit fund was originally an independent transaction and had nothing to do with the promissory note in suit. Had the case rested there, the appellant would have been on safe grounds. But by entering into a contract with the drawer that the money paid by him would actually be credited towards the promissory note in suit, defendant 2 has attached equities to the bill itself and thus provided for a method of partial discharge. He cannot now be permitted to say that the original transaction, towards which the payment was eventually made by the drawer in pursuance of the contract, was wholly independent of the promissory note in suit. If any authority is required for this proposition, it would be found in (1854) 10 Ex 572.[3] It is hardly necessary to add that the plaintiff not being a holder in due course would stand in the shoes of defendant 2 and must be liable to the same equities to which he, i. e. defendant 2, would have been liable.

As for the next contention, it must be stated that all the instalments excepting the last one of Rs. 45-11-6 were already paid by defendant 1 before the promissory note in suit was endorsed to the plaintiff. In that sense, the contract had not remained merely executory. It was however argued that the plea raised by the defendant was that he was entitled to a credit of the amount paid by him only when the chit was closed and inasmuch as the plaintiff could be subjected to these equities only which existed at the time of transfer, the amounts paid by him before the date of transfer could not be taken into consideration at all for the simple reason that the chit had not been closed by then. This contention is also, in my opinion, devoid of any force. It has been found by the lower Appellate Court "that plaintiff and defendant 2 were acting in unison and that the endorsement is (was) the result." In view of this finding it must be held that the plaintiff had complete knowledge of the defect in defendant 2's title and was taking the promissory note subject to all equities arising in pursuance of the contract arrived at between defendant 1 and defendant 2. Defendant 1 had already discharged a major portion of the liability so far as the payment to the chit fund was concerned and even if it be assumed that he could not ask for a credit of the amounts paid by him until the last instalment was paid, he could in any case do so as soon as he made the last payment in that connexion. This he had done and having done so is entitled to get a credit for the amount paid by him. Moreover, a promise to do something in future can be a sufficient consideration for either a complete or partial discharge of an existing liability and there is no reason to hold that the agreement by defendant 1 to pay the future instalments towards the chit fund should not be taken to be as an accord and satisfaction to the extent of the amount which he had undertaken to pay and which defendant 2 had agreed to accept towards the partial discharge of the promissory note. Since the undertaking by defendant 1 was carried out it is hardly necessary to consider what the result would have been if he had failed to do so. For the reasons given above, I would dismiss the appeal with costs. Leave asked for and refused.

C.R.K./D.S. *Appeal dismissed.*

3. Oulds v. Harrison, (1854) 10 Ex 572=24 L J Ex 66=3 C L R 353=3 W R 160=102 R R 717.

---

* A. I. R. 1938 Madras 898

LEACH C. J. AND MADHAVAN NAIR J.

V. R. K. M. Kumarappa Chettiar — Petitioner.

v.

K. M. V. R. Chidambaram Chettiar and another — Respondents.

Civil Revision Petn. No. 1297 of 1937, Decided on 4th April 1938, from decree of the Dist. Court, Ramnad at Madura, in C. M. A. No. 39 of 1936.

(a) Provincial Insolvency Act (1920), S. 9(1)(c) — Three months under, is not period of limitation but condition for adjudication — Period expiring when Court is closed—Petition for insolvency cannot be presented when Court re-opens after vacation.

The period of three months fixed by S. 9 (1) (c) of the Act is not a period of limitation but constitutes a condition to an adjudication and consequently where the alleged act of insolvency has taken place more than three months prior to the presentation of the petition, it cannot be set up as ground for adjudication, even though the period of three months may be expiring on a day when the Court is closed : *A I R 1935 Mad 857 (F B), Foll.* [P 899 C 1]

*** (b) Provincial Insolvency Act (1920), S. 35 —Judge in insolvency can revise order of adjudication, if it was passed without jurisdiction —Court has no discretion in the matter.**

If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the

order of adjudication, S. 35 clearly empowers the Court to annul the adjudication in revision, though the Provincial Insolvency Act does not confer upon the Court the wide powers given by S. 8, Presidency Towns Insolvency Act, which allows the Court to review, rescind or vary any order made by it under its insolvency jurisdiction. The Court has no discretion in the matter.

[P 899 C 2]

V. Ramaswamy Iyer — *for Petitioner.*

V. Rajagopala Iyer and T. V. Ramiah — *for Respondents.*

Leach C. J. — On 22nd January 1935 P. L. S. P. L. Palaniappa Chettiar, respondent 2, was adjudicated an insolvent on the petition of K. M. V. R. Chidambaram Chettiar, respondent 1, by the Subordinate Judge of Devakottah. The adjudication was based on a transfer of immovable property dated 23rd February 1934, which was said to constitute a fraudulent preference. The petition for adjudication was filed on 3rd July 1934, that is more than three months after the transaction. Therefore the transaction, even if it constituted a fraudulent preference could not be made the basis of an insolvency petition by reason of S. 9 (1) (c), Provincial Insolvency Act. The reason given for filing the petition beyond three months was that the Court was closed for the summer vacation and it was not possible to file it before 3rd July 1934, but the fact the Court was closed made no difference, as a Full Bench of this Court has pointed out: 58 Mad 794.[1] That was a case where the petition was filed on 29th June 1931, the re-opening day after the Court's vacation and the act of insolvency was a deed of sale said to have been executed fraudulently on 28th February 1931. The Court considered that the period of three months fixed by Sec. 9 (1) (c), Provincial Insolvency Act, was not a period of limitation but constituted a condition to an adjudication and consequently where the alleged act of insolvency had taken place more than three months prior to the presentation of the petition it could not be set up as a ground for adjudication.

Before respondent 2 was adjudicated by the Subordinate Judge of Devakottah, an adjudication order had been passed against him by the District Court of Tharravadi in Burma and his estate in Burma was being administered in insolvency by that Court. On 7th November 1935 the present petitioner applied to Subordinate Judge of Devakottah for an order cancelling the adjudication. The application was made under S. 35, Provincial Insolvency Act, which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court, that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing annul the adjudication. The petitioner is a creditor and his object in seeking the annulment of the adjudication by the Subordinate Judge of Devakottah was to ensure that the proceedings in Burma should not be interfered with. The learned Subordinate Judge granted the application and annulled the adjudication in view of the decision in 58 Mad 794.[1] From that order there was an appeal to the District Judge who considered that the Subordinate Judge was wrong in annulling the adjudication, his reason being that the order adjudicating the insolvent might have been wrong, and was wrong in the light of 58 Mad 794,[1] but there was no appeal and, therefore, it ought not to be disturbed. Accordingly he reversed the order of the Subordinate Judge. The order of the District Judge now comes before us on an application for revision.

In the first instance the application came before Burn J., but it was placed before a Bench because the learned Judge was doubtful whether S. 35, Provincial Insolvency Act, gave authority to a Judge sitting in insolvency to revise, on the ground of want of jurisdiction, his own order or an order of a predecessor adjudicating a person insolvent. If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order, S. 35 clearly empowers the Court to annul the adjudication. It is true that the Provincial Insolvency Act does not confer upon the Court the wide powers given by Sec. 8, Presidency Towns Insolvency Act, which allows the Court to review, rescind or vary any order made by it under its insolvency jurisdiction, but S. 35 is sufficient for the purpose of this case, and leaves the Court no discretion in the matter. The corresponding Section in the Presidency Towns Insolvency Act is S. 21, in which the word 'may' is used, and therefore gives the Court a discretion. What we have to ascertain in

1. Chenchuramanna v. Arunachalam, (1935) 22 A I R Mad 857=158 I C 1=58 Mad 794=69 M L J 283 (F B).

this case is whether the Court acted without jurisdiction when it passed the order of adjudication. The answer must be that it did. More than three months had elapsed from the date of the alleged fraudulent transfer to the date of the presentation of the petition and these facts were before the Court. There being no act of insolvency on which an adjudication order could be passed, the Court had no jurisdiction to adjudicate.

A point which was not taken in the lower Courts has been taken before us and we will deal with it. When the case was in the list for hearing on 18th March 1938 it was postponed at the instance of the advocate for the respondent as he wished to set up that there were other grounds for adjudication than the alleged fraudulent preference. All the necessary papers are now before us and it does appear that in para. 5 of the petition respondent 1 did allege that respondent 2 had, with a view to defeat and delay his creditors, secreted his jewels and moveable properties and had "absented himself from the reach of his creditors." But in the next paragraph there was the definite allegation that respondent 2 had given a fraudulent preference in favour of one P. L. P. P. V. R. Veerappa Chettiar on 23rd February 1934, and in para. 7 it was stated:

> The said transfer is an act of insolvency and as this Honourable Court was closed in May and June this application is filed to-day.

The prayer for adjudication then followed. Para. 7 clearly shows that the act of insolvency relied on was the alleged fraudulent preference, but as the adjudication order was passed by consent, the learned advocate for the respondents says that it should be deemed to be based also on the allegations in para. 5 of the petition. He is in difficulty here, because in the counter-affidavit which his client filed in opposition to the petition under S. 35, Provincial Insolvency Act, his client said (paragraph 8):

> I submit that the respondent in I. P. No. 40 of 1934 has been adjudicated as an insolvent upon a definite act of insolvency and upon the admission of the respondent it is not now open to the present applicant to question or set aside that order.

On his own showing the adjudication was upon one definite act of insolvency. The only definite act of insolvency was the fraudulent preference set out in para. 6 of the petition for adjudication. Moreover, not a word was said in the Subordinate Judge's Court about other acts of insolvency and in the memorandum of appeal to the District Court it was not alleged that the order of the Subordinate Judge's Court was bad, because there were other acts of insolvency. In these circumstances we are unable to regard the adjudication as being based on other grounds than that of a fraudulent preference. The adjudication being on that ground alone and the transfer attacked having taken place more than three months before the presentation of the petition, the Court had, as I have already said, no jurisdiction to pass the order of adjudication.

For these reasons the petition will be allowed and the order of the District Court set aside. It follows that the adjudication is annulled; but this order will, of course, not affect the insolvency proceedings in Burma. The petitioner is entitled to his costs here and in the Court below.

C.R.K./V.B.B. *Petition allowed.*

A. I. R. 1938 Madras 900

PANDRANG ROW J.

In re Donald Dixon — Petitioner.

Criminal Revn. Case No. 438 and Petn. No. 406 of 1937, Decided on 7th January 1938, from Judgment of Court of Session, Coimbatore Division, D/- 21st July 1937.

Criminal Trial—Evidence—Prosecution witnesses likely to turn hostile—Public Prosecutor's duty — Court however must arrive at truth by lawful means—Either party not prepared to call witnesses who can depose on relevant facts—Court must call such witnesses—If trial Court fails, Appellate Court must do it.

There may be some doubt as to the duty of the Public Prosecutor in calling prosecution witnesses who know facts but are likely to turn hostile, but there is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak to important relevant facts; and if the trial Court fails to do it, the Appellate Court should avail itself of the power conferred by S. 428, Criminal P. C. [P 901 C 2; P 902 C 1]

Nugent Grant, N. Somasundaram and S. Govind Swaminathan — *for Petitioner.*

T. S. Anantharaman — *for the Crown.*

Order.—This case arises out of the conviction of one Donald Dixon of an attempt to commit murder by the Assistant Sessions Judge of Coimbatore on a fresh trial ordered by the Additional Sessions Judge of Coimbatore. His appeal to the Sessions

Judge of Coimbatore was dismissed. The facts of the case are very simple. The petitioner is a young man of about 24 years who lives with his brothers and his father in an estate called Dixyland near Kotagiri. It is now admitted that the occurrence took place not in the reserve forest as originally stated, but in the private estate of the petitioner and his family. In short, the account given by the prosecution first witness, the person who was shot, was as follows: He was going along a certain path when he saw the petitioner coming with a gun accompanied by two Irulas. The Irulas ran away and P. W. 1 asked the petitioner for his shooting license. When the latter was within 5 or 6 feet of him, it is said that the petitioner said to P. W. 1, "Get away, I will shoot you," and actually aimed the gun at him whereupon P. W. 1 bolted. When he was about 40 yards away from the petitioner he is said to have received gunshot wounds in the back, in his thighs, etc. P. W. 1 is a forest guard who was appointed to this particular locality only a short time before the occurrence, that is to say a month or two before the occurrence. He says he knew the petitioner having seen him once about 25 days before the occurrence. He is said to have identified the petitioner at the identification parade held the next day at the hospital. He is also said to have told P. Ws. 2, 3 and 4 that it was Dixon's son who shot him. This description of course is not of much value because Dixon has at least three sons. The prosecution case therefore admittedly rests entirely on the evidence of the Forest Guard P. W. 1.

It is not seriously disputed that the guard was actually shot at and received the injuries in question on 25th June 1936 in the estate. The real question that arose for decision was whether the petitioner was the person who was responsible for the injuries, or in other words, whether it was he that aimed the shot at the guard, and whether he did so wilfully or accidentally. No doubt, if the story of P. W. 1, the forest guard, is to be believed, it was a deliberate shooting and the petitioner was responsible for it. It is not as if the forest guard was the only person who was present at the occurrence. According to the prosecution case itself, there were two Irulas whose identity was established and a Badaga also known, who were present at the place of occurrence just before it took place if they did not actually see the occurrence. They were examined at the previous trial, the two Irulas as P. Ws. 9 and 10 and the Badaga as P. W. 4. They were not examined at the retrial on the ground that they had definitely turned hostile. In other words, it was said by the prosecution that these three witnesses if examined would have given evidence adverse to the prosecution. This important fact has not been given its due weight by the trial Court, and the same remark has to be made as regards the appreciation of this fact by the Appellate Court. No particular motive is alleged as to why the Badaga witness should not have given true evidence in the matter.

There is another person, namely one Ramachandra Chetty, to whom the guard is said to have made his first report or complaint about his being shot. According to the guard he had told Ramachandra Chetty that it was Dixon's son who shot him, but Ramachandra Chetty's evidence in the committing Magistrate's Court was that the guard merely said that somebody shot him and that he did not know who it was that shot him. It is not therefore correct to say, as the learned Sessions Judge has said in his judgment, that Ramachandra Chetty could not say anything more than what was spoken to by P. Ws. 2, 3 and 4. As a matter of fact his evidence, if he had been examined, would have shown that the guard's evidence could not be true because to the first person whom he met after he was shot, he was unable to say who shot him. If Ramachandra Chetty had been examined at the trial and if his evidence had been to the same effect as in the committing Magistrate's Court, there can be very little doubt that the whole case for the prosecution would have been left in such grave doubt that the accused must have been given the benefit of the doubt and acquitted. The bearing of the omission to examine this witness during the trial on the question of the veracity of the only witness of the occurrence who was examined has not been appreciated by the Courts below. They appear to have thought that the only question for them to consider was whether it was the duty of the prosecution to have examined the Irulas, the Badaga and Ramachandra Chetty or not, and they did not consider whether it was not a part of their own duty to have them examined in order to arrive at the truth. There may be some

doubt as to the duty of the Public Prosecutor in a case of this kind for the rulings on the point are not uniform though numerous, but there is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons neither party is prepared to call witnesses who are known to be in a position to speak to important relevant facts.

The present case is one in which it was pre-eminently necessary for the trial Court to have examined at least the Badaga and Ramachandra Chetty as witnesses of its own accord even though the prosecution did not call them nor the defence, for the purpose of deciding the all important question whether the Guard's evidence could be safely acted upon or not; and the Appellate Court should have availed itself of the power conferred by S. 428, Criminal P. C. The failure to do either has had this result, namely that the conviction is based entirely on the evidence of the Guard which could not have possibly been made the basis of a conviction if the other witnesses referred to above had been examined and their evidence had been believed by the Court. Without their being examined the Court was not in a position to say whether what they were going to say was true or not. The Courts have barred the door against the truth and closed an important avenue leading to the truth, and I have no doubt the result has been a miscarriage of justice, because after going through the evidence I am of opinion that no Court should have convicted the petitioner in the light of the evidence in the case.

The assessors who heard the evidence were unanimously of the opinion that the case was not proved and they gave reasons in support of their opinion, reasons which are weighty and sufficient to support their opinion. Neither the reasons nor the opinions appear to have been given their due weight by the Courts below. The probabilities of the case also are in my opinion against the version that the Guard was deliberately or wilfully shot at by someone, and that it was the petitioner who shot him and not some one else, e. g. some other son of Dixon. It is probable that because Dixon and his sons were suspected to be in the habit of shooting in the reserved forest without license and the Forest Department was on the look-out to catch them in the act that suspicion fell on some son of Dixon or other almost immediately after the shooting. The probabilities are that this suspicion was instilled into the mind of the Forest Guard, P. W. 1, by P. W. 2, another Forest Guard who had been in the locality for a much longer time. It seems to me as if Ramachandran Chetty's evidence in the committing Magistrate's Court is true, and that the allegation that it was Dixon's son who fired the shot was first made only after the injured guard had an opportunity of talking over the matter with P. W. 2. There is no doubt that after the Sub-Assistant Surgeon, P. W. 3, came to P. W. 2's house where P. W. 1 was lying, Dixon's son was mentioned as the person who shot P. W, 1. There was sufficient time and opportunity for this suggestion to be made by P. W. 2 to the injured guard, P. W. 1, and it is not at all unlikely that it was made. Neither the status nor the character of P. W. 2 is such that this suggestion has to be dismissed summarily.

Originally the case for the prosecution was that the occurrence took place in the Pambarai Reserve Forest. It is now admitted that the occurrence took place in Dixyland at a spot at least two furlongs away from this reserve. It is impossible to believe that any mistake could have been made honestly by the injured guard about this not only because as a forest guard he must know where his reserve begins, but also because it is clear from the circumstances established in this case that no man even ignorant of the limits of the forest reserve could have possibly mistaken the place where the occurrence took place as part of any reserve forest, for, there were lime trees etc., at the scene of occurrence which could not possibly escape any one's notice. The explanation that the forest reserve was mentioned at first by mistake is to my mind entirely unacceptable. In my opinion the scene of occurrence was given out purposely as Pambarai Reserve Forest, because it was only on that basis that the prosecution case could be rested, namely that the guard asked the petitioner for his shooting license and that thereupon the latter threatened to shoot him. If the occurrence had been stated to have taken place in private land, the guard could not with any plausibility have said that he had asked for the shooting license. It would appear that

the subsequent investigation by the police clearly showed that the occurrence took place not in the reserve forest but in the Dixy-land; there were unmistakable signs which showed that Dixy-land was the scene of occurrence, notably the guard's own equipment which he had thrown away while running away from the scene of occurrence after he was shot, and it would also appear that the official supervisor of the guard, one Kuttikrishna Menon, who however was not examined in the case, told the guard (P. W. 1) in the hospital the very next day that he had made a mistake about the place of occurrence. The significance of the fact that the original complaint of the guard mentioned the forest reserve as the scene of occurrence was not realised by the Courts below who too readily accepted the revised version and the explanation of mistake, and ignored the fact that an element of falsity had been introduced at the very outset by the guard in his complaint. The complaint was very short and nevertheless in a most material particular it was obviously false. The explanation of mistake being inadmissible, the only alternative is that it was deliberately made to appear that the scene of occurrence was the reserve forest where it did not occur. A witness who is prepared to make a false report as regards such an important particular as the place of occurrence is certainly capable of implicating somebody who was not really known to him as being responsible for the alleged crime.

Finally it seems to me that the utter absence of any motive for the act would show that the shooting was more likely to have been accidental than otherwise. The fact that the guard was shot in the back also makes it very unlikely that the shooting was deliberate or constituted an attempt to murder him. There are a number of other reasons in support of the conclusion to which I have come, namely that the conviction of the petitioner is one which is inconsistent with any reasonable appreciation of the evidence in the case. It is however not necessary to pursue this discussion any further because I am convinced, whether there is a point of law or not involved in this case, that the conviction of the petitioner is unjust and should not be allowed to stand. The petition is therefore allowed and the conviction of the petitioner is set aside as well as the sentence imposed upon him, and the petitioner is acquitted. The bail bond executed by him is cancelled.

C.R.K./B.D. *Conviction set aside.*

A. I. R. 1938 Madras 903

BURN AND LAKSHMANA RAO JJ.

T. V. Srinivasa Ayyangar — Appellant.

v.

V. Jagannatha Ayyangar and another — Respondents.

Second Appeal No. 1232 of 1932, Decided on 28th July 1938, against decree of the Dist. Court, Madura, in A. S. No. 179 of 1931.

Madras Hereditary Village Offices Act (3 of 1895), S. 13—Right of suit given by S. 13 is not inconsistent with continuance of power of control given to District Collector by S. 3 of Regulation 7 of 1828.

The right of suit which is given by Sec. 13, Madras Hereditary Village Offices Act, is not in any way inconsistent with the continuance of the power of "superintendence, control and revision" given to the District Collector by S. 3 (Third) of Subordinate Collector's and Revenue Malversation Regulation. The District Collector's power of revision created by the Regulation, unless it is expressly taken away, must be held to continue. [P 903 C 2]

K. Rajah Ayyar — *for Appellant.*

K. V. Sesha Ayyangar—*for Respondent.*

Judgment. — We agree with the learned District Judge that there is no conflict between Regulation VII of 1828 and Act III of 1895. The right of suit which is given by S. 13 of Act III of 1895, is not in any way inconsistent with the continuance of the power of "superintendence, control and revision" given to the District Collector by S. 3 (Third) of Regulation VII of 1828. S. 1 (First) of the Regulation expressly states that it applies to "all the powers granted to Collectors by the Regulations now in force, or that may hereafter be enacted." It is only by virtue of this Regulation that a Revenue Divisional Officer gets authority to exercise the powers of a "Collector" under Act III of 1895. Consequently the District Collector's power of revision created by the same Regulation, unless it is expressly taken away, must be held to continue. This appeal is accordingly dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1938 Madras 904

PANDRANG RAO J.

G. N. Subba Rao and others —

Petitioners.

v.

Anna M. Venkatachalapathi Aiyer —

Respondent.

Criminal Revn. Case No. 701 and Petn. No. 659 of 1937, Decided on 5th May 1938.

(a) Penal Code (1860), Ss. 500, 182, 211 — Presentation of petition to Sub-Inspector of Police making certain allegations, alleged to be false, against a person and praying for protection amounts, if at all, to offence under S. 182 or S. 211 and not under S. 500 — Accusation made in good faith — Case falls within Exception 8 to S. 500.

Presentation of a petition to a Sub-Inspector of Police by the residents of a certain locality making certain allegations against a person, which are alleged to be false and praying for protection against him amounts to, if at all, to an offence of giving false information to a public officer or of making a false accusation, punishable under S. 182 or S. 211 of the Penal Code and does not amount to an offence of defamation within the meaning of S. 500. It cannot be said that the offence of defamation is also committed simply because, some part of the information or accusation may be found to be defamatory. Again, where the accusation has been made in good faith the case falls within Excep. 8 to S. 500, and good faith has to be presumed when the complainant himself admits that he does not know the accused personally and there is no evidence of any express malice or enmity : *19 Bom 340 ; A I R 1917 Cal 708 and A I R 1935 Rang 163, Rel. on.* [P 904 C 2 ; P 905 C 1]

(b) Criminal P. C. (1898), S. 342 — Persons making petition to Sub-Inspector making certain allegations, alleged to be false against a person, prosecuted under S. 500, Penal Code —No evidence adduced by prosecution showing that accused had signed petition — Gap in prosecution cannot be filled by examination of accused under S. 342.

Where certain persons presenting a petition to a Sub-Inspector of Police making certain allegations against a person are being prosecuted under S. 500, I. P. C., in order to prove publication, the prosecution must prove their signatures on the petition. Where there is no evidence on the prosecution side to the effect that the accused had signed the petition, the gap in the prosecution cannot be filled by examining the accused persons under Sec. 342, Criminal P. C., and thus eliciting from them as to whether they had signed the petition and the prosecution cannot be permitted to rely on the admission so obtained : *36 Mad 457 and A I R 1936 Mad 426, Rel. on.* [P 905 C 1]

K. S. Jayarama Iyer and O. V. Baluswami — *for Petitioners.*

R. Krishnaswami Ayyangar — *for Respondent.*

K. Venkataraghavachari for Public Prosecutor — *for the Crown.*

Order. — The petitioners, nineteen in number, have been convicted of the offence of defamation and sentenced under S. 500 I. P. C., to pay a fine of Rs. 20 each and in default of payment to suffer simple imprisonment for one month. The defamation consisted in the presentation of a certain petition to the Sub-Inspector of Police by the residents of a certain locality in Madura against the complainant alleging that he was in the habit of getting drunk and abusing people and threatening to do evil by the use of black art and praying for protection against the complainant. There can be no doubt that the so-called defamation was the presentation of a petition to a public officer with the intention of protecting the interests of the people who sent the petition. That fact stands out unmistakably, and this outstanding fact has been practically ignored by the learned Magistrate. The case clearly fell under Exception 8 which declares that

> it is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation.

It is not pretended that the Sub-Inspector was not a person having lawful authority over the complainant in the present case with respect to the subject-matter of the accusation contained in the petition made to him. Good faith has to be presumed in view of the fact that it is admitted by the complainant that he does not know the accused personally and in the absence of any evidence of any express malice or enmity. Apart from the merits of the case which even on a superficial examination would have convinced any Magistrate that there was really no substance in the charge of defamation, it is argued that the Magistrate was incompetent to take cognizance of the offence inasmuch as the offence, if at all, was one of giving false information to a public officer or of making a false accusation—an offence punishable under S. 182 or S. 211, I. P. C.; offences of this nature cannot be taken cognizance of by a Magistrate in the absence of a complaint by the public servant concerned or of some authority to whom the public servant is subordinate : *see* S. 195, Criminal P. C. I am of opinion that this contention is well founded. Where it is clear that the publication was to a person in authority and was really intended to give information about some offences with a view to get redress or protection,

the offence if any must be only the furnishing of false information or the making of a false accusation. It cannot be said that the offence of defamation is also committed simply because some part of the information or the accusation may be found to be defamatory and false. The point to my mind is quite clear and it is hardly necessary to refer to the authorities relied upon by Mr. K. S. Jayarama Aiyar, namely 19 Bom 340,[1] 44 Cal 970[2] and A I R 1935 Rang 163.[3]

Another ground of attack is that there is really no evidence of publication by the petitioners inasmuch as their signatures in the petition have not been proved by the prosecution. This is a serious defect. Apparently the Magistrate thought this difficulty could be cured by examining the accused themselves as to whether they had signed the petition in the hope that they would admit it. In any case, there could have been no other reason for asking them in the course of the examination under S. 342 whether they had signed the petition, as there was no evidence whatever on the side of the prosecution as to the effect that they had signed it. It is obvious that the gap in the prosecution evidence cannot be filled in this manner by examining the accused persons under S. 342, Criminal P. C. It is enough in this connexion to refer to 36 Mad 457[4] and 1936 M W N (Cr Rul) 22.[5] The examination of the accused for this purpose was contrary to law, and the prosecution cannot be permitted to rely on admissions obtained from the accused in these circumstances. The prosecution has failed to prove that these accused have signed the petition. It follows that the present petition must be allowed and the convictions of the petitioners and the sentences imposed on them should be set aside and the fine if paid should be refunded.

C.R.K./R.M. *Petition allowed.*

1. In re Nagaraji Trikamji, (1895) 19 Bom 340.
2. Profulla Kumar v. Harendranath, (1917) 4 A I R Cal 708=38 I C 761=44 Cal 970 = 18 Cr L J 377=25 C L J 445=21 C W N 253.
3. Swee Ing v. Koonhan, (1935) 22 A I R Rang 163 = 1935 Cr C 626 = 156 I C 598 = 36 Cr L J 970.
4. Jeremiah v. Vas, (1913) 36 Mad 457 = 12 I C 961=(1911) 2 M W N 576=22 M L J 73.
5. Rangappa Goundan v. Emperor, (1936) 23 A I R Mad 426 = 1936 Cr C 509 = 161 I C 663=59 Mad 349=37 Cr L J 471=70 M L J 447=1936 M W N (Cr Rul) 22.

A. I. R. 1938 Madras 905

STODART J.

In re *Ponnambala Mudali*—Petitioner.

Civil Revision Petn. No. 1577 of 1937, Decided on 22nd April 1938, from order of Court of Dist. Munsif, Tindivanam, D/. 17th May 1937.

Civil P. C. (1908), O. 21, R. 86 — Initial deposit only can be forfeited — Rule regarding payment of cost of stamp being new and party's attention not being drawn to new rule by clerk of Court, party failing to deposit cost of general stamp — Initial deposit held should not be forfeited.

It is not the whole of purchase money but only the initial deposit of 25 per cent. that can be forfeited. As for the initial deposit the Court has discretion to order its forfeiture if the party had not deposited the cost of the general stamp to be affixed to the sale certificate. But having regard to the fact that the new rule requiring payment of the cost of the stamp is fairly recent and also to the fact that the clerk of the Court who issued the challan should have drawn the party's attention to the new rule and asked him to pay the small sum necessary to defray the cost of the stamp, the Court should not order forfeiture of the initial deposit. [P 905 C 2]

T. E. Ramabhadrachariar — *for Petitioner.*

Government Pleader — *for the Crown.*

Order. — Petitioner bought some property in court-auction. The whole of the purchase money paid by him was forfeited under Rule. 86, O. 21, Civil P. C. He now asks me to revise the order of forfeiture. Only the initial deposit of 25 per cent. could in any case be forfeited. To that extent the District Munsif's order is wrong. As for the initial deposit the District Munsif certainly had discretion to order its forfeiture since the party had not, along with the balance of the purchase money, deposited the cost of the general stamp to be affixed to the sale certificate. But having regard to the fact that the new rule requiring payment of the cost of the stamp was fairly recent, having been in force for only six months and also to the fact that the clerk of the Court who issued the challan should have drawn the petitioner's attention to the new rule and asked him to pay the small sum necessary to defray the cost of the stamp, I think the Court need not have ordered forfeiture of the initial deposit and though this is a case in which this Court would not ordinarily interfere, I think it is right that the District Munsif's order be set aside and that the whole sum including the 25 per cent.

initial deposit be returned to the petitioner subject to such deductions as are prescribed. Both parties do bear their own costs of this petition.

C.R.K./D.S. *Order set aside.*

A. I. R. 1938 Madras 906

VENKATARAMANA RAO J.

Mamidi China Venkata Sivayya — Appellant.

v.

Nekkanti Suryanarayana — Respondent.

Appeal No. 64 of 1936, Decided on 28th April 1938, against appellate order of Sub. Judge, Narasapur, D/. 20th March 1936.

(a) Provincial Insolvency Act (1920) — Preamble — Policy of Act — Distribution of insolvent's property should be proportionate amongst creditors — So also efforts of diligent execution creditors are not to be frustrated.

Provisions of the Insolvency Act have been enacted to secure the object underlying the following principles : (1) It is the policy of the law of insolvency that when a debtor commits an act of insolvency, there must be an even distribution of his property among his creditors and no creditor of his should be entitled to receive more than a rateable proportion of the amount realized from the property of the insolvent and available for distribution equally with other creditors ; (2) it is the policy of the law not to frustrate the effect of a diligent execution creditor and deprive him of the fruits of his execution. [P 907 C 1]

(b) Provincial Insolvency Act (1920), Ss. 28, 51—Sale of property is not prohibited till date of adjudication — Creditor however is not entitled to benefit of sale — Bona fide auction-purchaser is saved under S. 51 (3).

By the combined operations of Ss. 28 and 51 it is clear that a sale of the property until the date of the order of adjudication is not prohibited in spite of the presentation of and the admission of the insolvency petition, but the creditor is not given the benefit of the remedy had by him. But the law protects the title of the bona fide auction-purchaser to the property sold in auction because of S. 51 (3). If therefore a purchaser can say that the purchase was made in good faith, in spite of the fact that there has been an order of adjudication subsequent to the sale, his title to the property will remain unaffected. Therefore the doctrine of relation back of the title of the Official Receiver is subject to the exception enacted in S. 51 (3) : *A I R 1936 Mad 819, Rel. on.* [P 907 C 2]

(c) Provincial Insolvency Act (1920), S. 52— Executing Court is to deliver property only on application.

The duty which is enjoined on the executing Court under S. 52 is to deliver the property to the receiver if an application is made in that behalf. But if no application is made, it is bound to proceed with the sale of the property. There is nothing in the Section to indicate that the executing Court is prohibited from doing what it is obliged to do and its power to sell the property remains "unaltered and unaffected" : *(1892) 1 Q B 772, Rel. on.* [P 908 C 1]

(d) Provincial Insolvency Act (1920), S. 51 (3)—Sale of property—Decree-holder knowing insolvency proceedings can proceed with sale and purchase property — Notice of insolvency does not impute want of good faith—Sale price however cannot be set off against decree.

There is nothing in the provisions of the Insolvency Act, to preclude a decree-holder from proceeding with the sale with the knowledge of the insolvency and purchase the property himself. Notice of insolvency to the decree-holder cannot connote to him want of good faith. The only disability under which he lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase money into Court just like any other stranger purchaser and share in the sale proceeds rateably along with other creditors : *A I R 1938 Mad 718, Disting.; A I R 1936 Mad 819; A I R 1925 Lah 158 and 34 All 628, Rel. on.* [P 909 C 1]

M. Appa Rao — *for Appellant.*

K. Bhimasankaran — *for Respondent.*

Judgment.—The question in this appeal relates to the validity of a sale of immovable property in execution of the decree in O. S. No. 290 of 1934 on the file of the District Munsif's Court of Narasapur obtained by the appellant against one Nekkanti Suryanarayana and his two sons. The property was sold on 2nd October 1935 and purchased by the appellant, the decree-holder himself. An application was made by the said Nekkanti Suryanarayana, judgment-debtor 1, to set aside the sale alleging that there were material irregularities and fraud in the conduct of the sale in consequence whereof the property did not fetch a fair price. He also impeached the sale on the ground that before the date of the sale he had filed an application in the Sub-Court of Narasapur for his being declared an insolvent, that the said petition was admitted and an interim receiver appointed, that he applied to the Court (the District Munsif of Narasapur) to stop the sale but the Court declined to do so and the sale was therefore in contravention of S. 52, Provincial Insolvency Act. The learned District Munsif, on a consideration of the evidence adduced, came to the conclusion that there was no fraud or material irregularity in the conduct of the sale, that the price realized at the time of the sale was a reasonable price and in regard to the second objection he held that there was no substance in it. The learned Subordinate Judge in appeal concurred in the view of the

learned District Munsif in regard to the finding as to the material irregularity and reasonable price but he was of the opinion that the sale was in contravention of S. 52, Provincial Insolvency Act, and therefore he allowed the appeal and set aside the sale. It is this order that is being attacked in this civil miscellaneous second appeal. So far as the questions of material irregularity and fraud are concerned, there are concurrent findings of fact and they cannot be challenged in second appeal.

The question therefore for consideration is whether the sale is invalid. It is contended that once an interim receiver has been appointed and the fact of such appointment is brought to the notice of the executing Court, it is bound to stay the sale and a sale held after such notice is invalid and the purchase at any such sale with notice of the insolvency could not be held to be a purchase in good faith. To test the soundness of this contention it will be necessary to examine the relevant provisions of the Provincial Insolvency Act bearing on the matter. They are Ss. 28, 51 and 52. In construing these provisions two principles have to be kept in view: (1) It is the policy of the law of insolvency that when a debtor commits an act of insolvency, there must be an even distribution of his property among his creditors and no creditor of his should be entitled to receive more than a rateable proportion of the amount realized from the property of the insolvent and available for distribution equally with other creditors. (2) It is the policy of the law not to frustrate the effort of a diligent execution creditor and deprive him of the fruits of his execution. I think the provisions of the Insolvency Act have been enacted to secure the object underlying these principles. Under S. 28 (2), Provincial Insolvency Act, on the making of an order of adjudication, the whole of the property of the insolvent vests in the Court or in an Official Receiver appointed by the Court but until then the property of the insolvent is not divested from him and every creditor is free to have recourse to all available remedies against the debtor for realization of his debt. The Section clearly provides that the disability of the creditor to have any remedy against the property of the insolvent is only after the order of adjudication. This is clear from the expression "thereafter" in the Section. Even then it is not an absolute disability imposed by the Act but only subject to the provisions of the Act as indicated by the words "except as provided by this Act." From the provisions of S. 28 (2), it is clear that a decree-holder can attach and bring the property to sale and have the property sold till the date of the order of adjudication. The question therefore is if, before the date of the order of adjudication, the property is sold and the sale proceeds are deposited into Court, what are the rights of a creditor, the purchaser and the receiver in regard to the property and the sale proceeds?

I shall now turn to Ss. 51 and 52 of the Act. S. 51 says that where execution of a decree has issued against the property of a debtor, a creditor shall not be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition. By virtue of this provision the creditor can only claim the sale proceeds of a sale in execution of the decree obtained by him only if they have been realized before the date of the admission of the petition. But for this provision, it will be open to the Official Receiver to contend that the creditor is not entitled to the sale proceeds because by virtue of the provisions of S. 28 (7) of the Act, the property must be deemed to have vested in him from the date of the presentation of the petition and hence by virtue of the statutory title thus conferred on him he will be the person entitled to the sale proceeds of the property which in law belong to him. By the combined operations of Ss. 28 and 51 it is clear that a sale of the property until the date of the order of adjudication is not prohibited in spite of the presentation of and the admission of the insolvency petition, but the creditor is not given the benefit of the remedy had by him. But the law protects the title of the auction-purchaser to the property sold in auction because S. 51 (3) provides that

> a person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver.

If therefore a purchaser can say that the purchase was made in good faith, in spite of the fact that there has been an order of adjudication subsequent to the sale, his title to the property will remain unaffected. Therefore the doctrine of relation back of the title of the Official Receiver is subject to the Exception enacted in S. 51 (3): *vide*

Cornish J's observations in 59 Mad 928[1] at p. 941. It is unnecessary for me now to consider for the purpose of this case whether a purchaser in good faith can acquire good title to the property sold even after the order of adjudication, because in this case the property has been sold before the date of the order of adjudication.

The question now arises as to the scope and operation of S. 52 of the Act. I may here mention a few facts and dates. The petition for insolvency was made after the order for sale was passed and the date of sale was fixed for 30th September 1935, but the petition was admitted and an interim receiver appointed on 30th September 1935 under Sec. 20 of the Act. The interim receiver did not make any application as required by S. 52 of the Act to deliver to him the property which was being brought to sale and the only application that was made was by the insolvent to stay the sale. The Court refused to stay the sale and the sale was held and at such a sale the property was purchased by the decree-holder. The question on these facts is, is the purchase by the decree-holder invalid? I have already stated that neither S. 28 nor S. 51 prohibits the sale until the date of the order of adjudication nor does S. 52, because what that Section says is before the property is brought to sale if notice is given to the executing Court that an insolvency petition by or against the debtor has been admitted, the Court shall on application direct the property to be delivered to the receiver. The duty which is enjoined on the executing Court is to deliver the property to the receiver if an application is made in that behalf, and I shall assume for the purpose of this case that the 'receiver' in S. 52 includes an interim receiver. But if no application is made, what should the executing Court do? It is bound to proceed with the sale of the property. There is nothing in the Section to indicate that the executing Court is prohibited from doing what it is obliged to do and its power to sell the property remains "unaltered and unaffected": *vide* the observations of Lord Esher in (1892) 1 Q B 772[2] at p. 780 on the analogous Ss. 45 and 46, Bankruptcy Act of 1883. Therefore the sale by the Court is prima facie valid. The questions that now fall to be decided are, does the auction-purchaser get a good title to the property and who is entitled to the sale proceeds? These questions turn upon the other provisions of the Insolvency Act and they have been already adverted to, viz. Ss. 28 and 51. In a recent decision reported in 59 Mad 928,[1] Venkatasubba Rao and Cornish JJ., upheld a sale in favour of a purchaser, even though the sale was held after an application was made under S. 52 by the Official Receiver and refused, on the ground that the purchaser acquired valid title under S. 51 (3) of the Act. But the present case is a stronger one in that no application has been made by either the Official Receiver or by the judgment-debtor to direct delivery of the property and I am of the opinion that the application for stay of the sale is not in conformity with the provisions of S. 52.

Therefore the question is, is the appellant a purchaser in good faith within the meaning of S. 51 (3) of the Act? So far as the sale is concerned, it was for a proper price and there was no irregularity or fraud in the conduct of the sale and no bad faith was attributed to the decree-holder. All that is asserted is that the fact of his purchasing the property with notice of the insolvency is enough to negative the existence of good faith. I am not inclined to agree with this contention. In 59 Mad 928[1] the learned Judges were inclined to the view that the mere fact that the purchaser had notice of the insolvency cannot connote want of good faith on the part of the purchaser. They further held in that case that a purchase made on the faith of a Court's order would negative all inferences of bad faith. No doubt, in that case the auction-purchaser was a stranger but I do not think, having regard to the plain language of the Section, any difference ought to be made between a decree-holder purchaser and a stranger auction-purchaser. S. 51 (3) says "a person". If, in pursuance of a valid order of Court, the decree-holder purchases the property with the leave of the Court entitling him to bid, I do not see any reason why the fact of his being a decree-holder should lay him under a disability to purchase the property. The only question is one of good faith. If he has purchased the property in good faith, there is no reason why the purchase by him should not be upheld.

1. Muthan Chettiar v. Venkituswami Naicken, (1936) 23 A I R Mad 819=170 I C 510=59 Mad 928=71 M L J 170.

2. Trnstee of Woolford's Estate v. Levy, (1892) 1 Q B 772=61 L J Q B 546=66 L T 812 = 40 W R 483=56 J P 694.

The fact that he had notice of insolvency would not in my opinion indicate any absence of good faith on his part. Good faith implies honesty and there is nothing to indicate here that the purchase was dishonest or colourable or fraudulent. There is nothing in the provisions of the Insolvency Act to preclude a decree-holder from proceeding with the sale with the knowledge of the insolvency : *vide* 34 All 628[3] and 6 L L J 232.[4] The only disability under which he lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase money into Court, just like any other stranger purchaser and share in the sale proceeds rateably along with the other creditors. This position has not been disputed by Mr. Appa Rao and I think rightly. I do not see why the mere fact of knowledge of insolvency should preclude the decree-holder from proceeding with the sale of the property. It may be that no order of adjudication would be made at all, and if he should only stay his hand in the meanwhile, some other creditor might also attach the property and completely deprive him of the advantage of his having taken proceedings earlier. It may be by staying his hand and postponing the sale, the property might not fetch a fair price at a subsequent sale and it will be more advantageous to have an immediate sale and get a fair price and even though he may be deprived of the fruits of the execution, he will be entitled to get a fair dividend by reason of the property fetching a good price. Neither in principle nor in reason does it seem to me that notice of insolvency should operate as a bar to a decree-holder proceeding with the sale of the property. A recent decision of Pandrang Row J. in A. A. O. No. 123 of 1936 (A. I. R. 1938 Mad 718)[5] has been cited before me. The facts in that case are different, because the learned Judge found that the circumstances of that case warranted a finding of absence of good faith. I do not find the learned Judge laying down that mere knowledge of the insolvency imports bad faith. On the other hand he observes thus :

It may be that where the fact of the pending insolvency is brought to the notice of the Court and the Court nevertheless proceeds with the sale, as happened in 59 Mad 928,[1] the mere knowledge of the insolvency possessed by the purchaser may not be sufficient to show that the purchaser acted in bad faith or did not act in good faith. But that is not the case here.

I do not think the learned Judge intended to lay down any principle in conflict with the view which I have now expressed. Further, in this case it is only the father that has become an insolvent and his share alone would vest in the Official Receiver and the shares of his sons would not vest in him. Prima facie, the decree-holder would be entitled to bring to sale the sons' share in the property. Under such circumstances, it would be more advantageous to bring the entire property to sale and that is probably the reason why the interim receiver did not choose to interfere thinking that he might claim the proceeds of the sale without interfering with the sale. I am therefore of the opinion that the sale held on 2nd October 1935 is perfectly valid and that the appellant has acquired good title to the property. I accordingly set aside the order of the learned Subordinate Judge and restore that of the District Munsif with costs throughout. Leave to appeal is refused.

C.R.K./B.D. *Order set aside.*

---

3. Sri Chand v. Murari Lal, (1912) 34 All 628 = 16 I C 183=10 A L J 252.

4. Ralla Ram v. Ramlabhaya Mal, (1925) 12 A I R Lah 158=80 I C 509=6 L L J 232.

5. Palamma v. Official Receiver of Nellore, (1938) 25 A I R Mad 718=(1938) 1 M L J 781.

A. I. R. 1938 Madras 909

LAKSHMANA RAO J.

District Magistrate, Kurnool —
Referring Officer.

v.

Chandra Tirumal Reddy and others —
Respondents.

Criminal Revn. Case No. 428 and Case Referred No. 13 of 1938, Decided on 12th July 1938, referred by District Magistrate, Kurnool, D/- 12th June 1938.

Criminal P. C. (1898), S. 528—Costs.

A Magistrate has no power to award costs in applications under S. 528. [P 909 C 2]

Public Prosecutor — *for the Crown.*

Order. — The view of the Joint Magistrate is untenable and he has no power to award costs in applications under S. 528, Criminal P. C. The reference is therefore accepted and the order as to costs is set aside. The amount if levied will be refunded.

C.R.K./R.M. *Reference accepted.*

A. I. R. 1938 Madras 910

HORWILL J.

In re Syed Mustafa Sahib and others
Petitioners.

Criminal Revn. Case No. 775 and Petn. No. 727 of 1937, Decided on 25th March 1938, from Judgment of Sub-divisional First Class Magistrate, Salem, in C. A. No. 61 of 1937.

(a) Madras District Municipalities Act (5 of 1920), S. 178 — To sustain conviction under S. 178, persons charged must be owners or occupiers of lands abutting on roads.

Section 178 is primarily intended for the proper maintenance of private streets. It would seem necessary, in order to sustain a conviction under S. 178, that the persons charged are owners or occupiers of the lands abutting on the roads.

[P 910 C 2]

(b) Madras District Municipalities Act (5 of 1920), S. 339 — To sustain conviction under S. 339, persons charged need not be owners of land abutting on roads — Failure to carry out agreement with Municipality is sufficient to make them liable.

For a conviction under S. 339 it would not be necessary to show that the persons charged against have any ownership in the land abutting on the road. On a failure to carry out the terms of their agreement with the Municipality after receiving notice, they would be liable under S. 339.

[P 910 C 2]

(c) Madras District Municipalities Act (5 of 1920), Ss. 178, 339 — Three persons charged under Ss. 178, 339 — Their cases should be tried separately—Accused however not suffering any prejudice by three cases being joined together — High Court will not interfere in revision.

Where three persons are charged under Ss. 178 and 339, District Municipalities Act, for failure to comply with an order of the Municipality, their cases should be kept distinct, evidence let in in each case separately, and conclusions drawn on the evidence let in in each particular case. Where however the accused have not suffered any prejudice by the three cases being clubbed together, the High Court will not interfere in revision.

[P 911 C 1]

K. S. Jayarama Iyer and C. K. Venkatanarasimhan — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order.—The three petitioners have been convicted under Ss. 178 and 339, District Municipalities Act, for failing to comply with an order of the Municipality requiring them to metal the streets and lanes constructed on their site and to do other things undertaken to be done by the petitioners when the issue of a license was sanctioned to them by the Municipality to erect houses and to sell them. The petitioners jointly petitioned the Municipality to grant them sanction to sell certain plots of land as building sites and they undertook to metal the roads, cut side drains, and to make provision for scavenging lanes. Roads were laid but nothing else was done. On 24th February 1937 notices were sent to the petitioners requiring them to do what they had undertaken to do on pain of prosecution. The petitioners soon afterwards wrote to the Municipality offering to give up the roads and making them over to the Municipality. The Municipal Council sanctioned the taking over of the roads; but they were never formally taken over because it was discovered that the petitioners did not metal the roads and put them in a condition to be taken over by the Municipality. Several notices were issued to them but with no effect. Three cases were laid against the three petitioners for disobeying the orders. The Sub. Magistrate has convicted them and the convictions have been confirmed in appeal.

Section 178 appears to be primarily intended for the proper maintenance of private streets; and the Municipality is given power, in case the streets are not in a satisfactory condition, to issue notices requiring the owners or occupiers of buildings or lands fronting or abutting the streets to carry out the necessary repairs. The persons who are liable under this Section seem to be the owners or occupiers of the houses or lands abutting the streets and not the owners of the streets themselves. It would therefore seem necessary, in order to sustain a conviction under this Section, that the petitioners are owners or occupiers of the lands abutting the roads. Evidence has been let in to that effect and no objection has been taken to it in the Courts below. The petitioners were also charged under S. 339, and for a conviction under that Section it would not be necessary to prove that the petitioners had any ownership in the land abutting the road. They were bound to metal the road and to carry out the various stipulations contained in their agreement with the Municipality and upon failure to do that after receiving notice, they would be liable under S. 339.

Objection has been taken to the trial on the ground that various breaches of the agreement have been taken together in the charge; but I do not see any objection to that, because the agreement must be taken as a whole and except as to the laying out of roads the petitioners have done nothing to satisfy the agreement. A more important objection is that the Magistrate has

adopted the objectionable practice in trying the three cases together and recording evidence in all the cases together. Where there are three cases, those three cases should be kept distinct, evidence let in in each case separately, and conclusions drawn on the evidence let in in each particular case. However in considering whether the revision petition should be allowed on that ground, one has to consider whether the petitioners suffered any prejudice by these three cases being clubbed together. In most cases of improper clubbing together of cases it would undoubtedly be held that the accused had suffered prejudice by being called upon to meet three cases at the same time; but the present case is particularly simple. It was only necessary to produce a few documents and to examine one witness. I have little doubt that the three petitioners could have been tried together in one case; and I do not think that their defence has been rendered more difficult because the case against them has been split up into three parts—one against each person. The accused applied together to the Municipality for permission to divide their lands into plots for house sites and to sell them; and they seem at all times to have acted together. In the particular simple circumstances attending this case, I do not find sufficient reason to interfere in revision. The petitions are accordngly dismissed.

C.R.K./R.M. *Petitions dismissed.*

---

* A. I. R. 1938 Madras 911

ABDUR RAHMAN J.

Shahabuddin Sahib — Petitioner.

v.

Tota Venkatachalam Chettiar — Respondent.

Civil Revn. Petn. No. 480 of 1936, Decided on 22nd April 1938, from decree of Court of Small Causes, Trichinopoly in S. C. S. No. 3626 of 1935.

(a) Negotiable Instruments Act (1881), S. 9 — To determine whether assignee is holder in due course, promissory note payable on demand cannot be considered to have matured on date of its execution—Promissory note payable on demand assigned — Time between its execution and assignment very short— Promissory note cannot be considered to have matured on date on which it is assigned and assignee is holder in due course.

It cannot be contended that the promissory notes, which are payable on demand cannot be negotiated after their execution so as to make their holders to be holders in due course under any circumstances. For the purpose of determining whether a person is holder in due course, a promissory note which is payable on demand cannot be regarded as having matured on the date on which it came into existence. The date of its maturity would depend upon the circumstances of each case. In the case of such a promissory note, one of the safe guides would be to ascertain if a demand had been made and refused. The length of the time for which the promissory note has not been paid would also be a relevant factor in order to ascertain if the promissory note was a stale one. If it has been in the hands of the holder for an unreasonable length of time, the transferee may be considered to be put on inquiry, but if there is nothing which may give any legitimate cause for suspicion, the ordinary presumption under Sec. 118 (d) would have to be raised in his favour. [P 912 C 2 ; P 913 C 1]

Where only 16 days have been passed between the date of the execution of the promissory note in suit and the date of its transfer to assignee, it is highly improbable that the assignee can suspect, that a demand was made by his assignor and refused by the promisor. Hence the promissory note in suit cannot be considered to have matured on the date on which it was transferred to assignee and therefore the assignee is holder in due course. [P 913 C 1, 2]

*** (b) Contract Act (1872), Sec. 23—Person executing promissory note in favour of creditor of third person to release him from debts — Consideration is legal — Transaction cannot be avoided simply because promisee knows that motive of promisor for execution of promissory note was debtor's agreement to give evidence in certain case in favour of promisor.**

It is true that a promissory note executed in consideration of giving evidence is unenforceable whether the statement which a person may have promised to give be either true or false : *4 M H C R 7 ; A I R 1914 Mad 366 ; (1886) 1 Ex 213 ; (1819) 106 E R 628 and 18 M L J 456, Rel. on.* [P 913 C 2]

If however the object and consideration are found to be legal and valuable, the transaction cannot be avoided simply because the promisee happens to know the reason for which the promisor had executed the promissory note in his favour. [P 914 C 1]

Where therefore a person has executed a promissory note in favour of the creditor of a third person in order to release him from the debts, the object and consideration of the promissory note are legal and the transaction cannot be avoided merely because the promisee knows that the promisor executed the promissory note in consideration of that third person's agreement to give evidence in favour of the promisor in a certain case instituted by him : *A I R 1930 All 357, Rel. on.* [P 914 C 1]

Besides this, as the promisee or his assignee would not be required to establish the nature of the contract between the debtor and the promisor in order to succeed on the promissory note executed by the promisor in promisee's favour, promissory note cannot be held to be contaminated with an illegality : *(1919) 2 K B 544, Ref.* [P 914 C 2]

Moreover under S. 120, Negotiable Instruments Act, the maker of the promissory note cannot be

permitted to deny its validity as against the assignee of promisee who has been held to be a holder in due course. [P 914 C 2]

B. Pocker — *for Petitioner.*

S. Amudhachari — *for Respondent.*

Order.—The facts which have led up to this revision may be briefly stated. One Anthonimuthu owed some money to Gnanaprakasam Pillai for which the latter had secured two decrees against the former. The defendant was an agent to the aforesaid Gnanaprakasam Pillai for the purpose of collecting his outstandings. When he went to realize the debts due to Gnanaprakasam Pillai he discovered that Anthonimuthu could give useful evidence in a case which he intended to institute against some third person, with whom I am not concerned here. An arrangement was thus arrived at between the defendant on the one hand and Anthonimuthu on the other, under which the latter promised to depose in the defendant's favour and the former agreed to discharge the debts due to Gnanaprakasam Pillai by the latter. It appears that the defendant was not in a position to pay the debts due to Gnanaprakasam Pillai at the moment. He consequently paid a sum of Rs. 100 only in cash and after deducting Rs. 50 which would have been due to him for his commission on realization of the debts due from Anthonimuthu, he executed a promissory note on 29th August 1935 (Ex. A) in favour of Gnanaprakasam for Rs. 580. Gnanaprakasam agreed to this and released Anthonimuthu from his decrees and certified payment to the Court. Gnanaprakasam then served the defendant with a notice on 7th September 1935 (Ex. 1), under which he was asked to discharge his liability by 15th September, failing which, it was so mentioned in the notice, the promissory note would be assigned. It appears however that the promissory note was assigned in favour of the plaintiff a day before the time given in the notice for payment, i. e. on 14th September 1935 and the assignee filed this suit on its basis, which was decreed by the lower Court. The defendant has now come up to this Court and has urged the dismissal of the suit on the grounds that the plaintiff was not a holder in due course and inasmuch as the promissory note was executed for an illegal consideration, it could not be enforced in a Court of law.

Three reasons were given by Mr. Pocker to show that the plaintiff was not a holder in due course: (1) that as the promissory note was payable on demand, it should be deemed to have matured on the date on which it was executed and an assignment on a subsequent date would not place the plaintiff in a position better than that of his assignor; (2) as a demand was made by Gnanaprakasam Pillai on 7th September 1935, an assignment subsequent to that date could be of no avail to the plaintiff, who would be subject to such equities as existed at the time of transfer, and (3) as a notice of dishonour was given by the defendant to Gnanaprakasam Pillai on 13th September, the holder took the instrument subject to the vice with which the bill was tainted at the time of the transfer.

The learned counsel for the petitioner has placed his reliance on S. 9, Negotiable Instruments Act, in support of his first objection. It is true that the language of the Section lends some support to the argument advanced by him, but I do not think it would be seriously contended that the promissory notes, which are payable on demand could not be negotiated in such a manner as to make their holders to be holders in due course under any circumstances. It would come as a rude shock to the commercial community in India, if they discovered that the legal position in regard to such promissory notes happens to be what has been contended for before me. The contention raised by Mr. Pocker is based on the supposition that promissory notes of this kind must be taken to have matured on the date on which they are executed. The date on which limitation would start in regard to these notes could not be a safe guide to come to a conclusion that even for this purpose they should be presumed to have matured on the date on which they were executed. There is nothing in the Negotiable Instruments Act which would warrant such a conclusion. On the contrary, the ordinary presumption under S. 118 (d), Negotiable Instruments Act, is that every transfer of a negotiable instrument was made before its maturity and there is no reason why this presumption should not be extended to promissory notes which are payable on demand. I am therefore of the opinion that for this purpose a promissory note which is payable on demand cannot be regarded as having matured on the date on which it came into existence. The date of its maturity would, I feel, depend upon the circumstances of each case. In the case of such a promissory note, as has been men-

tioned above, one of the safe guides would be to ascertain if a demand had been made and refused. The length of the time for which the promissory note has not been paid would also be a relevant factor in order to ascertain if the promissory note was a stale one. If it has been in the hands of the holder for an unreasonable length of time, the transferee may be considered to be put on enquiry, but if there is nothing which may give any legitimate cause for suspicion, the ordinary presumption referred to above would have to be raised in his favour. The date of the execution of the promissory note in suit and the date of its transfer to the plaintiff are therefore material and it is highly improbable that the plaintiff could suspect that during an interval of sixteen days, which had passed between the date of the execution of the promissory note and its transfer to the plaintiff, a demand was made by his assignor and refused by the defendant. I would therefore hold that the promissory note in suit could not be considered to have matured on the date on which it was transferred to the plaintiff.

As for the second reason which has been urged by the learned counsel on behalf of the petitioner, it appears that the demand was made by Gnanaprakasam Pillai under which the defendant was asked to pay his dues on or before 15th September 1935 (Ex. I). The promissory note was, as stated above, assigned on 14th September and the mere fact of the demand would not be sufficient to enable me to hold that it had matured before the expiry of the time given for payment. Moreover there is no evidence on the record from which I could infer that the plaintiff had any knowledge of the demand made by Gnanaprakasam Pillai on 7th September 1935.

As for the third reason, the notice of dishonour by the defendant to Gnanaprakasam Pillai had not been produced on the record and no secondary evidence of the same has been given. But from Gnanaprakasam Pillai's reply to that letter which is on the record (Ex. II-a) it appears that it was delivered to him on 16th September 1935. The notice of dishonour must therefore be deemed to have been conveyed to Gnanaprakasam Pillai on that day and not earlier; but as pointed out above the promissory note had already been transferred on 14th September 1935. This contention must also be repelled. The result is that the plaintiff would not be affected in the circumstances by S. 59, Negotiable Instruments Act. He has been found by the lower Court to be an indorsee for consideration and there is nothing on the record to show that he had any cause to believe the existence of any defect in the title of the assignor. He must therefore be presumed to be a holder in due course as defined in S. 9 of that Act.

The next ground which has been urged on behalf of the petitioner is that the promissory note was for an unlawful consideration. The petitioner's learned counsel has relied on 4 M H C R 7[1] and 1914 M W N 322[2] in support of his contention. There is no doubt that a promissory note executed in consideration of giving evidence is unenforceable, whether the statement which a person may have promised to give be either true or false. There would be no consideration if the evidence which he had undertaken to give be true, as it would then be a promise to perform a public duty which he is bound by law to discharge; but if the evidence be false the consideration would be positively vicious and illegal. In the first case, there would be no consideration at all and in the latter case the consideration would be unlawful. It has therefore been urged that the consideration for the promissory note in suit being either non-existent in the eye of law or being illegal, the transfer of the same would be void and would confer no title in the plaintiff to recover. Mr. Pocker has cited two English cases, (1886) 1 Ex 213[3] and (1819) 106 E R 628=3 B & Ald 179[4] and a Madras case, 18 M L J 456,[5] to substantiate his contention. They are authorities for the proposition that any one who contributes to the performance of an illegal act with a knowledge that the subject-matter of his contract is intended to be illegally applied cannot recover on the contract. This proposition may be correct and even incontrovertible so far as it goes. But the question is, if it has any application to the facts of this case.

1. P. Sashannah Chetty v. Ramaswami Chetty, (1868) 4 M H C R 7.
2. Addiraja Shetty v. Vittil Bhatta, (1914) 1 A I R Mad 366=23 I C 540=1914 M W N 322.
3. Pearce v. Brooks, (1886) 1 Ex 213=35 L J Ex 134=12 Jur (N S) 342=14 L T 288=14 W R 614.
4. Cannan v. Bryce, (1819) 3 B & Ald 179=106 E R 628.
5. Pannichand v. Nanoo Sanker Tawker, (1908) 18 M L J 456=4 M L T 107.

It has been found by the lower Court that the money was due to Gnanaprakasam Pillai for which decrees had already been passed in his favour and which were certified by him, as a decree-holder to have been duly satisfied on the receipt of the promissory note executed by the defendant. Anthonimuthu's release from the decretal debts would undoubtedly furnish a good consideration for the promissory note in suit. The question then is if, as found by the lower Court, Gnanaprakasam's knowledge of the defendant's motive for executing the promissory note would vitiate the transaction. It is clear that Gnanaprakasam was not to benefit by the contract entered into between Anthonimuthu and the defendant. I have already held that the consideration which had emanated from Gnanaprakasam, namely the release of Anthonimuthu from his decretal debts, was a valuable one. The object of the contract in substituting the defendant for Anthonimuthu cannot be said to be illegal. If the object and consideration are legal, the contract cannot be avoided under S. 23, Contract Act. Gnanaprakasam's knowledge of the defendant's motive in executing the promissory note cannot be held to make it unenforceable at his instance. Motive should not be confused with the object and consideration of a contract. They are essentially different. If the object and consideration are found to be legal and valuable, the transaction cannot be avoided simply because the promisee happens to know the reason for which the defendant promisor had executed the promissory note in his favour. As pointed out by Mukerjee J. in A I R 1930 All 357[6]: "a contract cannot be vitiated, as a collateral contract happens to be unenforceable at law."

It would therefore follow that even if Anthonimuthu had agreed to give false evidence in favour of the defendant, the illegality of the consideration of the contract between Anthonimuthu and the defendant would not affect the validity of the transaction between the defendant on the one hand and Gnanaprakasam on the other. There is nothing on the record to show that Gnanaprakasam Pillai was a party to this arrangement between Anthonimuthu and the defendant. Nor has it been proved or found that Gnanaprakasam knew that the evidence to be given by Anthonimuthu was false. A priori the same result would follow if the evidence which Anthonimuthu had agreed to give was true, as in that case there would be no consideration for the contract but this would not affect the legality of the contract between the defendant and the promisee.

Let me consider the case from a different point of view. It has been held in (1919) 2 K B 544,[7] that the consideration would be considered to be contaminated with illegality if the plaintiff requires any aid from the illegal transaction to establish his case. Let me see if the plaintiff or his assignor Gnanaprakasam Pillai would be required to establish the nature of the contract between Anthonimuthu and the defendant in order to succeed on the promissory note executed by the defendant in Gnanaprakasam's favour. It is obvious that he would not be required so to do. Judging from this test also, promissory note in suit cannot be held to be contaminated with an illegality. Moreover, under S. 120, Negotiable Instruments Act, the defendant who is the maker of the promissory note in suit cannot be permitted to deny its validity as against the plaintiff who has been held to be a holder in due course. In addition to this, since the plaintiff has been found to be a holder of the promissory note for consideration he would be entitled to recover the amount either from his transferor or any prior party, which would in this case include the defendant. For the foregoing reason, the revision fails and is dismissed with costs.

C.R.K./D.S. *Revision dismissed.*

6. Dehra Dun Mussoorie Electric Tramway Co. Ltd. v. Official Liquidator, (1930) 17 A I R All 357 = 126 I C 819 = 52 All 406 = 1930 A L J 139.

7. Wild v. Simpson, (1919) 2 K B 544 = 88 L J K B 1085 = 121 L T 326 = 63 S J 625 = 35 T L R 576.

* A. I. R. 1938 Madras 914

KING AND STODART JJ.

Vadrevu Sankaramurthi and another — Appellants.

v.

Vadrevu Subbamma — Respondent.

Second Appeal No. 1227 of 1932, Decided on 8th August 1938, against decree of Sub-Judge, Amalapuram, in A. S. No. 103 of 1929.

*** Hindu Law — Maintenance—Daughter-in-law—No right in father-in-law's self-acquired property bequeathed by will.**

A widowed daughter-in-law does not acquire a legal right to maintenance out of the self-acquired

property of her father-in-law which had been bequeathed by will: *22 Mad 305, Expl. and Disapproved; A I R 1924 Cal 364 and A I R 1929 All 751, Not foll.; 23 Bom 608; 25 Bom 263; A I R 1933 Bom 135 and A I R 1926 Lah 198, Rel. on; 11 All 194, Ref.* [P 915 C 1; P 916 C 2]

K. Bhimasankaran — *for Appellants.*

V. Viyanna — *for Respondent.*

Judgment.—This appeal raises an important question regarding the right of maintenance. The respondent is the widow of one of the sons of one Surayya. Her husband died in 1920. In 1923 Surayya became a Sanyasi after executing and registering a document described as a will (Ex. 4-C). In that will he bequeathed his self-acquired properties to his grandsons (defendants 3 and 4 in the suit) who are respectively the sons of Surayya's two other sons (defendant 1 and defendant 2). Surayya handed over his properties to his grandsons, and thereafter disappeared out of their lives. In 1926 the respondent sued the four defendants for maintenance and in both the Courts below she has obtained a decree for maintenance against defendants 3 and 4, which is also charged upon the property acquired by them under Ex. 4-C. Defendants 3 and 4 have now filed this second appeal, and in our opinion the appeal must succeed. The construction of Ex. 4-C need not delay us long. Though it appears to have been treated throughout the trial and the first appeal as a will which spoke from the day on which Surayya renounced his civil rights, we think it should be more properly styled a gift deed which came into effect when possession of the properties was actually given to the appellants, but whether it be a will or a gift deed, we think the principles upon which any rights of the respondent to maintenance are or are not affected by it are the same.

We begin the discussion of the question before us by enunciating two propositions of law which are well-established and have not been contested: (i) a widowed daughter-in-law has no legal right to maintenance from her father-in-law out of his self-acquired property but only what is called a moral right, and (ii) but if on her father-in-law's death that property descends by inheritance to his heirs her moral right becomes a legal right at the moment of his death, as against them and as against the property which they have so inherited. The point which now arises for determination is: "Does she acquire a similar legal right against the devisee or donee of self-acquired property or against the property itself if it descends not by inheritance but by will or gift? Now in discussing this matter the first thing which strikes us is that the second proposition of law which has been enunciated above is a very startling one, and we immediately ask ourselves the question "Why should an estate which is unburdened in the hands of one owner become burdened in the hands of a second owner who acquires it from him?" This is contrary to all general provisions of law, and it must be due to some peculiarity in the nature of the death of a Hindu and of succession to his property. The answer is given in 11 All 194[1] at page 208 in these words:

> An essential element of the son's right of inheritance from his father is the spiritual benefit which in the contemplation of the Hindu law the son confers upon the soul of the deceased father. Therefore the son inheriting the self-acquired property of his father takes that property subject to such moral obligations as are conducive to the spiritual benefit of his father, and that such moral obligations become legal obligations as against the son who holds his father's property by inheritance.

Now it is true, of course, that this may not be the only answer, but throughout the long arguments in this case that was the only answer that the learned advocate for the respondent could give, or that appears in the authorities which he brought to our attention. Let us therefore examine whether this answer can be pressed into service in the case of a will or gift. It seems to us obvious that it cannot. It is impossible to argue that there is anything in the nature of the transference of property by will or by gift which requires that the legatee or donee should take any thought for the spiritual welfare of the testator or donor. The legatee or donee may be a stranger, may be a Mahomedan, may be a Christian, may be anybody; and, as has happened in this case, the donor may expressly say that his widowed daughter-in-law is not to be maintained. The essence of the idea of inheritance is that only the heir-at-law can succeed—the essence of the idea of a will or a gift is that the testator or donor is disposing personally and at his own will and pleasure, of the property which he possesses. The Bombay High Court, it may here be mentioned, has consistently held the view that the widow acquires no legal right in circumstances like the

1. Janki v. Nand Ram, (1889) 11 All 194=1889 A W N 30 (F B).

present: *see* 23 Bom 608[2] at p. 611, 25 Bom 263[3] and A I R 1933 Bom 135[4] and has drawn a clear distinction between the acquisition of a father's property by inheritance and by other means such as a will.

There is however an important pronouncement in a case in Madras (which has been followed in Calcutta and Allahabad) and it is necessary to discuss this before finally disposing of this appeal. The case is reported in 22 Mad 305[5] and Subramania Aiyar J. is there dealing with the very question which is now before us, viz. whether a widow acquires a legal right to maintenance out of the self-acquired property of her father-in-law which had been bequeathed by will. What the learned Judge says is this:

> The better conclusion is perhaps that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator he could by his will, have directed that she should get no maintenance out of his estate. But in cases like this, her claims to maintenance originating from the status acquired by her marriage, becomes a legal right independently of his volition and comes into existence at the same moment as the dispositions in favour of the volunteer become operative. It is consequently difficult to see how the latter could affect the former. It is not however necessary to put our decision in favour of the appellant on this ground.

It will at once be clear from this quotation that what Subramania Aiyar J. says, though deserving of the very greatest respect, does not lay down the law in the full sense of that term. It is expressly made obiter dictum and is prefaced by the word 'perhaps' which can hardly suggest that the learned Judge had finally made up his mind. We ourselves are again with great respect, unable to follow him. He does not cite any test or any authority in support of his statement of the law. He does not say why the right to maintenance is independent of the volition of the testator. His argument really in our opinion amounts to this, that the right to maintenance is charged upon the testator's self-acquired property, and that he cannot get rid of the charge. But if the widow has no legal claim against him during his lifetime it cannot be charged on his property. We return to what we said when considering the distinction between inheritance and the passing of property by will or gift, and repeat that we can see no valid reason why the right of a Hindu to dispose of his self-acquired estate should be in any manner restricted.

The rulings in A I R 1924 Cal 364[6] and A I R 1929 All 751[7] in our opinion merely accept and follow 22 Mad 305[5] without attempting any analysis or examination, and cannot advance the case of the respondent any further. On the other hand, we are fortified in our conclusion by 1926 Lah 198,[8] where it is laid down without qualification (though without, it is true, considering specifically the case of a will) that 'a man has absolute right under the Hindu law to dispose of his self-acquired property in any way he chooses.' For these reasons we think that the decrees of the Court's below cannot be supported. The appeal is allowed and the plaintiff's suit dismissed with costs throughout. The plaintiff must pay the court-fee due to Government on her plaint.

C.R.K./B.D. *Appeal allowed.*

2. Yamunabai v. Manubai, (1899) 23 Bom 608=1 Bom L R 95.
3. Bai Parvati v. Tarwadi Dolatram, (1901) 25 Bom 263=2 Bom L R 894.
4. Bhagirathibai v. Dwarkabai, (1933) 20 A I R Bom 135=144 I C 4=35 Bom L R 44.
5. Rangammal v. Echammal, (1899) 22 Mad 305=9 M L J 14.
6. Gopal Chandra v. Kadambini Dasi, (1924) 11 A I R Cal 364=73 I C 235.
7. Jeot Ram v. Mt. Lauji, (1929) 16 A I R All 751=119 I C 253.
8. Mt. Bhagwanti v. Thakur Mal, (1926) 13 A I R Lah 198=91 I C 476.

A. I. R. 1938 Madras 916

HORWILL J.

Vaiyapuri Chettiar — Petitioner.

v.

Municipal Commissioner, Salem — Respondent.

Criminal Revn. Case No. 885 and Petn. No. 829 of 1937, Decided on 4th May 1938.

Madras District Municipalities Act (5 of 1920), Ss. 177 and 339 — S. 177 applies only against person who entered into contract under S. 176 — Person to whom notice had been sent under S. 177 parting with ownership — He will not be convicted if he has shown that he was prevented from complying with terms laid down by Municipality.

Far from S. 177 restricting the action to the present owner, it clearly intends to have application only against the person who entered into the contract under S. 176. If by reason of parting with the ownership an accused person to whom a notice has been sent under S. 177 is unable to comply with the order, then on general principles a Criminal Court would doubtless refuse to convict,

provided that he has been prevented in any way from complying with the terms laid down by the Municipality. [P 917 C 1]

R. S. Srinivasachari and K. V. Rajagopalan — *for Petitioner.*

D. S. Sivakaminathan for Public Prosecutor — *for the Crown.*

Order. — The petitioner has been convicted under Ss. 177 and 339, District Municipalities Act, in that he failed to carry out the order of the Municipality of Salem to connect the roads on a plot which originally belonged to him with the Trichinopoly main road and to fill up pits in a certain road. Under Sec. 176, District Municipalities Act, the Municipality can grant permission for the construction of private streets and it may lay down conditions under which that permission is accorded. Under Sec. 177 it is prescribed that if any person makes or lays out any street referred to in S. 176 otherwise than in conformity with the orders of the Council, the Municipality may issue a notice calling upon him to carry out his agreement within a certain specified reasonable time. If he fails to do so, the Municipality can take action under S. 177 (2). S. 339 makes punishable any neglect or refusal to do an act in compliance with any proper order of the Municipality; so that reading S. 177 with S. 339 a person can be punished who, like the petitioner, has been given sanction under S. 176 to construct a private road and who has not complied with the conditions laid down by the Municipality when that sanction was accorded.

It is argued that S. 177 can apply only to the present owner and not to a person who long ago parted with his rights; for it cannot be expected that any person should do work to property in which he no longer has an interest. Far from S. 177 restricting the action to the present owner, it clearly intends to have application only against the person who entered into the contract under Sec. 176. If by reason of parting with the ownership an accused person to whom a notice has been sent under S. 177 is unable to comply with the order, then on general principles a Criminal Court would doubtless refuse to convict; but the petitioner has not shown in the present instance that he has been prevented in any way from complying with the terms laid down by the Municipality. Moreover, I think the learned Public Prosecutor is right when he says that although the petitioner has sold all the house sites, yet he is still the owner of the roads. The learned advocate for the petitioner has rightly pointed out that in the original notice issued under S. 176 the petitioner was not called upon specifically to erect a culvert as he was in the notice under Sec. 177. If however the petitioner had connected in a reasonable manner all his private roads with the main road in accordance with the terms of his contract, then he might be in a position to plead that he could not be called upon to erect the culvert. However that question does not arise in the present application.

It has further been contended that the action against the petitioner was barred by limitation under S. 347, as under that Section a charge must be brought within three months of the commission of the offence. The petitioner received his first notice Ex. D on 15th August 1936; but it appears that in response to that notice he sent a petition on 2nd September 1936 to the Municipality, presumably protesting against the terms of the notice. A reply Ex. E was then sent to him and the latter part of that reply is of the nature of a notice; for the petitioner was directed to comply with the conditions of the license granted to him within a month of the receipt of that order (viz. Ex. E dated 9th September 1936). In default a prosecution was threatened. The offence was committed on 9th October 1936, when the month which was allowed to him under Ex. E had expired; and the prosecution was launched in December—well within the three months allowed by S. 347. Finally, it has been argued that the Criminal Court should have refused to convict in view of the fact that the prosecution was launched as long as eight years after the notice under S. 176 was issued. Although I do not think that the explanation which the learned Public Prosecutor has thought fit to give on behalf of the Municipality is altogether satisfactory, yet undoubtedly the petitioner did deliberately disobey the terms of the agreement entered into by him and continued to disobey the order throughout the many years that had intervened between the date of the order under S. 176 and the launching of the prosecution. I do not consider therefore that the petitioner was entitled to any special consideration. The petition is therefore dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1938 Madras 918

LEACH C. J. AND MADHAVAN NAIR J.

Laldas Lakshmi Das and another — Appellants.

v.

J. D. Italia — Respondent.

Appeal No. 31 of 1938, Decided on 6th May 1938, from order of Gentle J., D/- 18th March 1938.

Arbitration — Parties agreeing that dispute between them would be referred to arbitration — Subsequently one party accusing other of fraud — Party charged with fraud can ask Court to decide matters affecting his honesty in open Court—Court has discretion to stay arbitration proceedings.

Where two parties have agreed that dispute between them should be referred to arbitration and subsequently one of the parties accuses the other party of fraud and invokes arbitration clause, the party charged with fraud has the right to ask the Court that matters which affect his honesty and integrity should be decided in open Court and the Court has discretion to stay arbitration proceedings : *(1880) 14 Ch 471, Rel. on.* [P 918 C 2]

V. T. Rangaswamy Iyengar and K. Ramaswamy Iyengar—*for Appellants.*

N. T. Shamanna — *for Respondent.*

Leach C. J. — The appellants are a firm of merchants carrying on business in Madras. For the period from 1st August 1936 to 31st July 1937 the respondent acted as their 'guarantee' broker in the purchase of groundnuts. The terms of the respondent's employment were embodied in a written agreement, which provided that in the event of any dispute arising under the agreement the dispute should be referred to arbitration in Bombay. The respondent was to be responsible for the weight, quality and refraction of the purchases made by him in the mofussil and the appellants were to be at liberty to refuse any lot of inferior quality despatched to them by him. By refraction was meant allowance for dirt and damaged and half damaged seeds. The arrangement between the parties was that the respondent should issue certificates of quality before despatching goods to the appellants in Madras. On arrival of the goods the appellants had them examined and if it was found that they were not of the quality stated by the respondent he was responsible for the difference in value. After the agreement had been concluded differences arose with regard to the amount claimed by the respondent as his commission, and the appellant accused the respondent of having fabricated documents with reference to the quality of goods supplied by him. On 29th November 1937 the appellants gave notice to the respondent of their intention to invoke the arbitration clause of the agreement, and on 17th December their advocate wrote to the respondent's solicitor informing him that they had nominated a gentleman residing in Bombay as their arbitrator and calling upon him to nominate his arbitrator within seven days. On receipt of this letter the respondent filed the suit out of which this appeal arises. His reason for doing so is that as there have been grave charges of fraud made against him—in fact the appellants went to the length of filing a criminal complaint against him—the questions of issue between him and the appellants should be decided in open Court and not in private arbitration proceedings. Accordingly he applied to the Court for an order staying the arbitration proceedings. On the other hand, the appellants applied for an order staying the suit pending the decision of the arbitration. These applications came before Gentle J. on 18th March 1938. The learned Judge decided that this was a case which should be tried in open Court and he directed the arbitration proceedings to be stayed. The appeal is from that order.

The learned advocate for the appellant properly concedes that the Court has discretion to stay the arbitration proceedings, but he says that this is not a case in which this discretion should be exercised in favour of the respondent's application. The sole question which we have got to decide is whether the learned Judge exercised the discretion vested in him properly. We have no hesitation in holding that the discretion which he did exercise was exercised wisely. The questions at issue between the appellants and the respondent involve serious allegations of fraud, and the respondent has the right to ask the Court that matters which affect his honesty and integrity should be decided in open Court. In this connexion I will quote a passage from the judgment of Jessel M. R. in (1880) 14 Ch 471[1] to be found at p. 476 of the report:

> Though I quite agree it is within the discretion of the Court to say, where one of the two partners desires it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desire it? Where the party charged with the fraud

1. Russell v. Russell, (1880) 14 Ch 471 = 49 L J Ch 268=42 L T 112.

desires it, I can perfectly understand the Court saying 'I will not refer your character against your will to a private arbitrator.' It seems to me in that case it is almost a matter of course to refuse the reference.

These observations have full application here. There is no substance in this appeal and it must be dismissed with costs which will be taxed in the ordinary way.

C.R.K./D.S. *Appeal dismissed.*

---

* A. I. R. 1938 Madras 919

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Vr. L. Vr. S. Petheperumal Chettiar and others — Appellants.

v.

V. Al. V. Ramaswami Chettiar and others — Respondents.

Appeal No. 257 of 1933, Decided on 26th January 1938, against decree of Sub-Judge (Addl.), Devakottah, in O. S. No. 10 of 1931.

*** Contract — Undue influence — Certain amounts mutually payable between two persons—One of them shortly after coming of age but taking competent advice, dispensing with production of accounts and agreeing to receive gross sum in lieu of balance that might be found payable to him—He cannot subsequently repudiate agreement and claim that settled account should be re-opened.**

Where fiduciary relation is established, it is settled law that the person in fiduciary position should affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. That the weaker party had just come of age is another factor, which also makes it necessary to go into the question whether he had such protection as to secure to him a free and unfettered judgment, independent of any sort of control : *A I R 1928 Mad 6, Rel. on.* [P 920 C 1]

There were certain amounts mutually payable between two persons. One of them shortly after coming of age but taking competent advice entered into a settlement with the other. The settlement proceeded upon the ground that the amount payable to him and the amount payable by him should be set off one against another. He dispensed with the production of the accounts, and agreed to receive a gross sum in lieu of the amounts that might be found payable to him :

Held that having done this, he could no longer repudiate the arrangement and claim that the settled account should be re-opened : *5 M I A 372 (P C) and (1905) 1 Ch 140, Rel. on.* [P 920 C 2]

T. L. Venkatarama Iyer — *for Appellants.*

M. Patanjali Sastri and N. G. Krishna Iyengar — *for Respondents.*

Venkatasubba Rao J.—We have heard Mr. Venkatarama Iyer fully and do not propose to call upon the respondents. The plaintiff-appellant complains that he is not bound by the arrangement evidenced by Exs. A to F, the outcome of a settlement entered into between himself and defendant 1 (defendants 2 and 3 are the brothers of the latter and need not be specially mentioned), on the ground that it is vitiated by undue influence and coercion. The facts are fully set out in the lower Court's judgment, which we do not propose to recapitulate. The material facts which need be stated are these. Defendant 4 is the mother of the plaintiff and aunt (the mother's sister) of defendant 1. At the time of the death of the plaintiff's father in 1918 there was a partnership which was being carried on. Defendant 1 and his brothers were partners in that firm entitled to a certain share. The plaintiff's father was a sub-partner possessing a fractional interest in the last mentioned share. The business of the firm was continued subsequent to the death of the plaintiff's father. There was some other concern belonging to the deceased father, which after his death passed into the hands of the defendants' family. The plaintiff was living with his mother, who dealt with his estate and had various sorts of dealings with defendant 1. There was a promissory note outstanding, which had been executed by her on 11th August 1927 in his favour. The plaintiff came of age on 31st July 1930 and the settlement in question took place on 9th August of the same year. Defendant 1 required the plaintiff to renew the promissory note which was about to get barred and said that if his request was not complied with, he had no alternative but to file a suit upon it. It was at this juncture that the settlement in question took place. There were then several accounts to be settled between the parties. The plaintiff owed defendant 1, besides the amount due on the promissory note mentioned above, other sums also. That the amount due by him in the aggregate was about Rs. 40,000 is not denied. There were amounts payable to the plaintiff's estate by defendant 1 not only in respect of the partnership to which reference has been made, but also under other headings. The settlement proceeded upon the ground that the amount payable to the plaintiff and the amount payable by him should be set off, one against the other, that in addition defendant 1 should pay the plaintiff a sum of Rs. 1000 and that the account should be treated as finally closed.

Mr. Venkatarama Iyer contends that such a settlement cannot be held binding on the plaintiff. The positive case set up of undue influence and coercion does not require serious notice. The question then for decision is, whether in view of the situation of the parties and by reason of the accounts not having been investigated, the plaintiff becomes entitled in law to impeach the transaction. There are two things to be said in favour of the plaintiff. First, he had just attained the bare age of majority and transactions with persons of that sort are jealously watched by the Courts, and secondly, the parties stood in fiduciary relationship, as there was undoubtedly a duty cast on defendant 1 (who occupied the position of a surviving partner) to make a full disclosure of the state of the account. Where fiduciary relation is established, it is settled law that the person in fiduciary position should affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. That the plaintiff had just come of age is, as stated above, another factor, which also makes it necessary to go into the question whether he had such protection as to secure to him a free and unfettered judgment, independent of any sort of control : *see* the judgment in the case decided by one of us in 53 M L J 842.[1]

That the plaintiff had competent and independent advice cannot be denied. He was assisted by three experienced men of his community, (one of them being his brother-in-law and the other two his dayadis), who intervened on his behalf and in his interest. They are euphemistically termed 'mediators', but that they were intent upon safeguarding his interests alone, there can be no doubt. There was a fourth person interested in the plaintiff, who also joined in the discussions which led to the settlement. The plaintiff's mother was near the spot where the negotiations took place and was consulted. It has also been abundantly proved that there was neither importunity nor persuasion on the part of defendant 1; on the contrary, he was prepared to produce the accounts and wanted some little time but the plaintiff and his advisers would brook no delay. The plaintiff though young was, as the lower Court points out, very shrewd and what is more, there was a secret understanding between him and the so-called mediators, that once his indebtedness was wiped out as the result of the documents that were to come into existence, he should repudiate the arrangement and file a suit claiming an account. That the plaintiff has not come to the Court with clean hands, is a part of his own case as the secret understanding is set up by him in his plaint. Of the three mediators one died before the trial and the remaining two were examined for him and admit that they gave this dishonest advice to the plaintiff. On these facts it is perfectly clear that the settled account cannot be re-opened. As stated by the Judicial Committee :

> If . . . persons meet and agree not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay and the other is content to receive . . . it is obvious that the production of vouchers is entirely out of the question . . . for the very object of the parties is to avoid the necessity for producing those vouchers : 5 M I A 372[2] at p. 395.

This is precisely what happened here. The plaintiff dispensed with the production of the accounts, and agreed after taking competent advice to receive a gross sum in lieu of the amounts that might be found payable to him. That the right to disclosure can be waived is quite clear. The plaintiff in effect stated : I do not wish that there should be a prolonged scrutiny of the long standing accounts. I want the sum payable to be fixed at once in the presence of the mediators and I am prepared to take it in lieu of what is due to me. Having done this, he can no longer repudiate the arrangement and claim that the settled account should be re-opened : (1905) 1 Ch 140.[3] That the plaintiff had excellent reasons for having chosen this course, is perfectly clear. There were questions of very doubtful nature (as the evidence shows) which could have been raised, and his advisers rightly thought it more prudent to enter into a settlement than litigate in a Court of law. The learned Judge in the Court below in his lucid judgment has discussed the matter fully and has applied to the facts found, the right principles of law. The appeal fails and is dismissed with costs. There is one matter which requires special mention. For the Rs. 1000 payable to the plaintiff under the settlement, a hundi was passed to him,

1. Narayana Doss v. Bucharaj, (1928) 15 A I R Mad 6=106 I C 315=53 M L J 842.

2. Henry McKeller v. John Wallace, (1851-54) 5 M I A 372=8 Moo P C 378=1 Sar 453 (P C).

3. Law v. Law, (1905) 1 Ch 140=74 L J Ch 169 =92 L T 1=53 W R 227=21 T L R 102.

which he thought fit not to cash, owing to the attitude adopted by him. Before we pronounced judgment, Mr. Patanjali Sastri has intimated that his clients defendants 1 to 3 are prepared to pay the amount due under the hundi, and we record that undertaking. The amount payable under the hundi will go in reduction of the costs payable to the respondents. The amount of costs and the amount due under the hundi will be set off one against the other and only for the balance due either party will be liable.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 921

WADSWORTH J.

Putta Venkatakrishniah—Appellant.

v.

Sheik Alli Sahib and others —

Respondents.

Second Appeal No. 318 of 1936, Decided on 26th July 1938, against decree of Temporary Sub-Judge, Cuddapah, in A. S. No. 47 of 1935.

(a) Court-fees Act (1870), S. 7 (iv-A) — Suit for possession — Cancellation of alienation document essential — Case comes under S. 7 (iv-A).

Where the alienation document is an insuperable obstacle to a prayer for possession so long as it has not been declared void or cancelled, the cancellation or avoidance of that document is an essential part of the relief sought and the case must come under Sec. 7 (iv-A). It is not of any avail to say that the prayer for possession is the main prayer. Possession is of course the ultimate object of the suit but the main difficulty in the way of attaining that object is the document of alienation which has to be removed. When once this document has been got rid of, possession follows as a matter of course, and the essential object of the suit, though not perhaps its ultimate object, is to get rid of the barrier which lies in the way of obtaining possession : *A I R 1936 Mad 470 and A I R 1928 Mad 816, Disting. ; A I R 1929 Mad 668, Rel. on.* [P 922 C 1]

(b) Court-fees Act (1870), S. 7 (iv-A)—Case under — Market value and not artificial value is the value on which court-fee is based.

The value upon which the court-fee is to be based under S. 7 (iv-A) is the actual market value and not the artificial value prescribed under S. 7 (v), Court-fees Act : *A I R 1935 Mad 863, Foll.; A I R 1932 Mad 605, Disting.* [P 922 C 2]

(c) Court-fee—Payment of — Order for payment of enhanced court-fee—Order contested until final adverse order — Time should be granted for payment of court-fee.

Where an appellant has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him. [P 922 C 2]

S. G. Rangaramanujam — *for Appellant.*

Kasturi Seshagiri Rao and Government Pleader — *for Respondents.*

Judgment. — This appeal raises a question of court-fees. The suit was brought to set aside certain alienations made by the guardian of the plaintiff, who is the appellant here, during the plaintiffs' minority and for possession of the properties alienated. The Courts below have held that the suit falls under S. 7 (iv-A), Court-fees Act, as amended in Madras and that it has to be valued on the basis of the value of the document which is sought to be set aside. The plaintiff himself valued it as a suit for possession under S. 7 (v) and paid the statutory valuation of ten times the assessment. It is argued in appeal firstly that there is a technical error in the order of the learned District Munsif in that instead of rejecting the plaint under O. 7. R. 11, Civil P. C., the suit was dismissed. I think that this clearly is an error due to inadvertence and that the rejection of the plaintiff's suit should not have been treated as a dismissal such as would bar the institution of a further suit within the period of limitation.

On the court-fee question it is argued that when the guardian of a minor improperly alienates the minor's properties and the minor after obtaining majority seeks to regain possession of those properties from the alienee, it is unnecessary for him to pray for the cancellation of the document of alienation executed by his guardian, but he can pray simply for possession ignoring the wrongful alienation. In support of this argument two cases have been cited. One is that in A I R 1936 Mad 470[1] in which Cornish J. held that a rajinamah decree passed against the members of a tarwad when the plaintiffs were minors and were improperly represented was not a decree which had to be avoided by the plaintiffs before they could claim possession and that therefore the suit brought for possession would not fall under S. 7 (iv-A). A similar decision is that in A I R 1928 Mad 816[2] where it is held that if a minor ignores a transaction by his guardian and sues for possession without trying to set aside that transaction, then S. 7 (iv-A), Court-fees Act, has no application. Neither of these

1. Abdullah v. Subramanyam, (1936) 23 A I R Mad 470=163 I C 203=71 M L J 383.

2. Veeraragavalu v. Sreeramulu, (1928) 15 A I R Mad 816=112 I C 96.

cases seems to me to have very much bearing on the facts of the present case where the alienation was clearly made by the lawful guardian of the plaintiff as such and the plaintiff has necessarily to attack that alienation as an essential preliminary to any proceeding for the recovery of possession. This difference has been pointed out by Venkatasubba Rao J. in A I R 1929 Mad 668[3] where the case last quoted is explained. It seems to me that where as in the present case the alienation document is an insuperable obstacle to a prayer for possession so long as it has not been declared void or cancelled, the cancellation or avoidance of that document is an essential part of the relief sought and the case must come under S. 7 (iv-A). It seems also that it is not of any avail to say that the prayer for possession is the main prayer. Possession is of course the ultimate object of the suit but the main difficulty in the way of attaining that object is the document of alienation which has to be removed. When once this document has been got rid of, possession follows as a matter of course, and the essential object of the suit, though not perhaps its ultimate object, is to get rid of the barrier which lies in the way of obtaining possession.

A further point relates to the question what is the proper way of valuing the property under S. 7 (iv-A). The Section itself does not prescribe any particular mode of valuation and there is a Bench decision of this Court, 56 Mad 212,[4] which incidentally is quoted by both the lower Courts though under the M L J "reference" (63 M L J 764[4]) in which it has been held with reference to a suit for the cancellation of a decree and possession that the method of valuation prescribed in S. 7 (v) should be imported into the special Sec. 7 (iv-A) and that the value should be ten times the assessment. If that ruling governs the present case, the court-fee paid by the plaintiff would be sufficient. There is however very grave reason to doubt whether the ruling of the Bench in the case just referred to has any application to cases in which the document to be cancelled is a sale deed or other document of transfer which itself specifies the value of the property. Venkatasubba Rao J. has held in 59 Mad 240[5] which was a case of a mortgage deed and sale deed, that the value upon which the court-fee was to be based was the actual market value and not the artificial value prescribed under S. 7 (v), Court-fees Act, and the learned Judge distinguishes the case in 56 Mad 212[4] and a similar ruling in an earlier case on the ground that they deal only with decrees. Since there is a clear decision of this Court on the specific matter which is now before me and since with great respect I see no reason to differ from the reasoning of the learned Judge in arriving at that decision, it seems to me that I should follow the decision of Venkatasubba Rao J. in 59 Mad 240[5] and hold that the lower Courts were right in requiring the plaintiff to pay the court-fee under S. 7 (iv-A) based on the actual value of the property as shown in the sale deed which the plaintiff seeks to avoid. The second appeal is therefore dismissed with costs of the respondents and of the Government Pleader (two sets).

I am asked to give time for the payment of court-fee. An objection is raised on the ground that time was granted in the first Court by an order passed nearly five years ago, that no time was sought for payment in the first Appellate Court and that it is not right to grant time here. It seems to me that since the appellant has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him. He will therefore be given two weeks from to-day within which to pay the deficiency. Failing payment, the order will be that the plaint is rejected.

C.R.K./B.D. *Appeal dismissed.*

3. Doraiswami v. Thangavelu, (1929) 16 A I R Mad 668=119 I C 38.

4. Venkatasiva Rao v. Venkata Narasimha Satyanarayanamurthi, (1932) 19 A I R Mad 605=139 I C 317 = 56 Mad 212 = 63 M L J 764.

5. Bali Reddi v. Khatipulul Sab, (1935) 22 A I R Mad 863 = 159 I C 263 = 59 Mad 240 = 69 M L J 458.

A. I. R. 1938 Madras 922

PANDRANG ROW J.

Pellur Venkatasubbamma and another — Appellants.

v.

Devvur Narayana Reddi and another — Respondents.

Appeal No. 8 of 1938, Decided on 8th August 1938, against order of the Sub-Judge, Nellore, D/- 6th November 1937.

Civil P. C. (1908), O. 38, R. 12—'Agriculturist'—Interpretation—Person possessing large extents of land cultivated by tenants is not agriculturist.

The word 'agriculturist' in O. 38, R. 12 must be interpreted in the same sense in which it is used in Ss. 60 and 61, Civil P. C., and means "a tiller of the soil who is unable to maintain himself otherwise." [P 923 C 1]

A person possessed large extents of land but most of it was cultivated by tenants :

Held that he could not be deemed to be an agriculturist. [P 923 C 1, 2]

K. Subramanian — *for Appellants.*

P. Chandra Reddi and R. Ramalinga Reddi — *for Respondents.*

Judgment.—This is an appeal from the order of the Subordinate Judge of Nellore attaching certain agricultural produce before judgment. The only point urged in this appeal by the appellants whose crop was so attached is that the attachment is in contravention of the provisions of O. 38, R. 12, Civil P. C., which is to the following effect :

Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

It is contended by the appellants that they are agriculturists and that the attachment of agricultural produce which was in their possession was opposed to the provisions of O. 38, R. 12, Civil P. C. This particular question does not appear to have been argued before the Court below and in any case the order appealed from contains no reference to it. The point is no doubt raised in the affidavits filed in the Court below. From these affidavits, I find it impossible to say that the appellants have succeeded in establishing their claims to be agriculturists. The same word is found in Ss. 60 and 61, Civil P. C., and the word "agriculturist" found therein has been interpreted by a recent Full Bench of this Court as meaning a tiller of the soil who is unable to maintain himself otherwise. Certainly, if this interpretation is applied to the appellants, they cannot be deemed to be agriculturists, because they possess large extents of land most of which is cultivated by tenants. It is however argued that the word 'agriculturist' found in O. 38, R. 12 must be interpreted in a sense different from the sense in which it is to be understood in Ss. 60 and 61 of the Code. I do not think there is any justification for making this difference in interpreting the same word found in different parts of the Code. It may be that certain words found in S. 60 were relied upon for the purpose of determining the meaning of the term 'agriculturist' but that does not mean the same word 'agriculturist' found in O. 38, R. 12 must mean something different from the 'agriculturist' referred to in Ss. 60 and 61. I am of opinion that the word must be interpreted in the same way throughout and it follows therefore the appeal here must fail. The appeal is accordingly dismissed with costs.

C.R.K./N.S. *Appeal dismissed.*

A. I. R. 1938 Madras 923

WADSWORTH J.

Rajahmundry Municipal Council — Appellant.

v.

Tripurari Mallayya — Respondent.

Second Appeal No. 527 of 1934, Decided on 8th August 1938, against decree of Sub-Judge, Rajahmundry, D/- 15th February 1934.

Madras District Municipalities Act (5 of 1920), S. 83—Property not choultry when tax accrues is liable to property tax even if it had been choultry in past.

If the property is a choultry when the tax accrues due, then the tax cannot be levied. If it is not a choultry on that date, being used for other purposes, then the tax is leviable even though in the past the property had been a choultry and might become one again in the future. The mere use of the income from property as an endowment of a choultry will not clothe the property with the character of a choultry. [P 924 C 2]

P. V. Rajamannar and K. Subba Rao — *for Appellant.*

Judgment.—This appeal raises the question of the interpretation of S. 83, Madras District Municipalities Act, which begins as follows :

The following buildings and lands shall be exempt from property-tax : (a) places set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes including hostels . .

We are not concerned with the latter portion of the Section.

The established facts are that the suit premises were dedicated for use as choultry, that the Civil Court permitted the trustee of the choultry to let one-third of the premises for rent and use this rent for the upkeep of the premises as a whole, and that under colour of that sanction, approximately one-half of the building has now been let for rent to tenants, the remainder being used partly as choultry and partly

as the residence of the trustee. The suit was brought by the Municipal Council (the appellant here) to establish its right to levy house-tax and latrine-tax on the portion of the building which has been let out to tenants.

Both the lower Courts have held that the property having been dedicated as a choultry remains a choultry even though used for other purposes and is not taxable by reason of S. 83. The learned District Munsif bases his decision on the precise words of the Section emphasizing the fact that the old Sec. 63 (1-a) of Act 4 of 1884 contains the clause, "to the extent to which they are used for public, charitable or religious, but not residential purposes" which clause has not been reproduced in S. 83 of the present Act and he argues therefrom that one must infer an intention to exempt choultries from taxation whatever be the nature of their user. This argument would have been stronger had S. 83 been more or less a reproduction of the old S. 69 (1-a). Actually it is an entirely different Section completely redrafted, though aimed at the same object. The learned Subordinate Judge argues in a different way but reaches the same result. He points out that the property had been dedicated for use as a choultry, that though it has been largely diverted from that use, the dedication remains and that the remedy is for persons interested to sue to put an end to the breach of trust. It seems to me that the remedy which lies open to persons interested to restrain the breach of trust is scarcely relevant to the consideration of the question whether this building is or is not a choultry exempted from taxation.

I do not think it permissible to infer from the various changes which have taken place in the wording of the provisions relating to exemption from property tax of religious and charitable buildings an intention on the part of the Legislature to exempt from taxation any building which had once upon a time been dedicated to such a purpose as a choultry, but has entirely ceased to be used for that purpose. To hold so would be to encourage breaches of trust and it would result in the curious position that when a charitable trust has been openly and continuously abused but no one has taken action to restrain the abuse, the person who enjoys the property in breach of trust would also enjoy the privilege in respect of immunity from taxation which he could only claim by virtue of the dedication which he himself has nullified by his conduct. In my opinion only very clear language in the statute would justify the Court in sanctioning such an immunity. Actually we have nothing in the shape of qualification of the term "choultries" in the provision exempting them from property tax. The natural interpretation of the Section surely would be that anything which is in fact a choultry is exempt from the tax. I see no reason to extend that exemption to a building which once was a choultry, but is no more a choultry, or to a building which is not but ought to be a choultry and might return to the state of being a choultry if and when circumstances change. The obvious course seems to me to be to look at the facts as they are at the time that the right to claim the tax accrues and to exempt from the tax any building which at that time in fact falls within the categories to which exemption is given. If the property is a choultry when the tax accrues due, then the tax cannot be levied. If it is not a choultry on that date, being used for other purposes, then the tax is leviable even though in the past the property has been a choultry and might become one again in the future. I need hardly say that the mere use of the income from property as an endowment of a choultry will not clothe the property with the character of a choultry. In this view I allow the appeal and give the plaintiff a decree for the amount claimed with costs throughout.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 924

PANDRANG ROW J.

P. Rami Reddy and others —
Petitioners.

v.

Chintha Chinna Narasi Reddy —
Respondent.

Criminal Revision Case No. 9 and Petn. No. 9 of 1938, Decided on 8th August 1938, from Judgment of Sub-Divisional First Class Magistrate, Jammalmadugu, in C. A. No. 42 of 1937.

Penal Code (1860), Ss. 159 and 160—Word "affray" interpreted — One party beating another—Latter remaining passive—Offence of "affray" held cannot be established.

To constitute an affray there must be a fight. Fighting connotes necessarily a contest or struggle for mastery between two or more persons against one another. A struggle or a contest necessarily implies that there are two sides each of which is

trying to obtain the mastery, so that unless there is some violence offered or threatened against one another, there could be no fight but only a mere assault or beating. [P 925 C 1, 2]

When members of one party beat members of another party and the latter do not retaliate or make any attempt to retaliate, but remain passive, it cannot be said that there was fighting between the members of the one party and the members of the other; and offence of affray cannot be said to have been established. [P 925 C 1,2]

P. Chandra Reddy and R. Ramalinga Reddy — *for Petitioners.*

Public Prosecutor — *for the Crown.*

Order. — The petitioners in this case have been convicted of affray and sentenced to pay fines. The convictions and sentences were confirmed on appeal by the Sub-Divisional Magistrate, Jammalmadugu. The only question argued in this case is whether one of the ingredients of the offence of affray, namely fighting by two or more persons, has been established: in other words, when members of one party beat members of another party and the latter did not retaliate or make any attempt to retaliate, could it be said there was fighting between the members of the one party and the members of the other. In this case, what happened was that the petitioners attacked and beat P. W. 2, because he had given evidence against them. When P. W. 1 remonstrated, he also was beaten and he fell down unconscious. P. W. 3 who interceded was hit with stones by two of the accused who have been acquitted. From this account of the offence given by the prosecution, can it be said there was fighting by two or more persons, the other ingredients of the offence, namely that the occurrence was in a public place and that it was likely to cause alarm to the public, being established. In a connected case, Horwill J. said that to constitute an affray, there must be a fight and it is not a fight when one side is aggressive and the other side is passive. It was on this ground that the petitioners in the connected case were acquitted in revision. I am of opinion that fighting connotes necessarily a contest or struggle for mastery between two or more persons against one another. A struggle or a contest necessarily implies that there are two sides each of which is trying to obtain the mastery, so that unless there is some violence offered or threatened against one another, there could be no fight but only a mere assault or beating. In these circumstances, I am prepared to follow the view adopted by Horwill J. in the connected case and find that there was no fighting in the present case. It was merely a case of beating by members of one party of certain members of another party for which no doubt they could have been charged and punished, but as the prosecution deliberately chose to amend the charge, and rest their case entirely on the charge of affray, the case must stand or fall by what the prosecution has done. The offence of affray not having been established, the petitioners were entitled to be acquitted of that charge. Their convictions and sentences under S. 160, I. P. C., are therefore set aside and they are acquitted. The fines if paid by them should be refunded.

C.R.K./N.S. *Conviction set aside.*

A. I. R. 1938 Madras 925

LAKSHMANA RAO J.

Sree Rajah Kakarlapudi Venkata Sudarsana Sundara Narasayya Garu and another — Appellants.

v.

Sree Rajah Kakarlapudi Butchi Kristnam Raju Garu and others — Respondents.

Second Appeals Nos. 133 to 138 of 1934, Decided on 5th April 1938, against decrees of Dist. Court, Vizagapatam, in A. S. Nos. 257 to 262 of 1931.

Madras Revenue Recovery Act (2 of 1864), S. 58—Apportionment of liability — Power of Civil Court—Apportionment should be proportionate.

Section 58 is no bar to the Civil Court apportioning the liability inter se as between the co-sharers of the common burden : *26 Mad 686 (F B); 36 Mad 493 and 24 M L J 405, Ref.* [P 926 C 2]

In the absence of a contract to the contrary the sharers are liable to contribute rateably : *A I R 1915 Mad 95, Ref.* [P 926 C 2]

B. V. Ramanarasu for N. Rama Rao — *for Appellants.*

K. Venkatarama Raju—*for Respondents.*

Judgment.—These second appeals arise out of six suits instituted by the respondents, the registered proprietors of the Panduru Mallavaram estate for recovery of the proportionate peishcush for Faslis 1327 to 1338 in respect of the lands belonging to the appellants in Mallavaram, and the material facts are that the villages of Panduru and Mallavaram originally formed part of the Uratla estate. The suit lands were gifted to the predecessor-in-title of

the appellants by the proprietrix of Uratla by Ex. 11, the deed of 1859, and the deed is silent regarding separate registration or payment of proportionate share of the peishcush. The villages of Panduru and Mallavaram were transferred to the predecessor-in-title of the respondents by Ex. A, the deed of 1875, and they were separately assessed and registered as one estate in the name of the transferee in the same year. The respondents purchased the estate in 1919 and applied to the Collector some time later for separate registration and assessment of the lands of the appellants in Mallavaram. The application was opposed and the parties were referred to a civil suit. Suits were then instituted by the respondents and they were decreed by the District Munsif of Yellamanchilli. The decrees were confirmed by the Subordinate Judge on 25th July 1928 and the suits out of which these second appeals arise were filed in 1929 for recovery of the proportionate peishcush in respect of Faslis 1327 to 1338. They were resisted on various grounds but decreed by the trial Court and the decrees were confirmed by the District Judge.

Hence these second appeals, and it was argued first that in view of S. 58 of Act 2 of 1864, which enacts that no Court of civil judicature shall have authority to take into consideration or decide any question as to the rate of land revenue payable to Government or as to the amount of assessment fixed or to be hereafter fixed on the portions of the divided estate, the Civil Court has no jurisdiction to apportion the assessment as between the co-sharers until the respective portions are separately registered and assessed under the provisions of Act 1 of 1876. But the respondents do not ask for the assessment of the land revenue payable by the appellants to the Government and as pointed out by the Chief Justice at p. 408 in 24 M L J 405,[1] which was relied upon by the appellants, the apportionment of the assessment as between two co-owners does not involve any question as to the amount of assessment as fixed or to be fixed by the Government. That a co-sharer of revenue paying estate who pays the whole revenue in order to save and does so save the estate from liability to be sold by the Government for realizing the revenue is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue as between the co-sharers, was laid down by the Full Bench in 26 Mad 686,[2] and as pointed out in 36 Mad 493,[3] even before the amendment of Ss. 82 and 100, T. P. Act, the burden of paying the land revenue is common to the parties whose lands are charged with the payment of the whole revenue. The liability inter se of the co-sharers of the common burden is not dependent on its apportionment by the Government, and the question admits of no doubt after the amendment of Ss. 82 and 100, T. P. Act. Further the Revenue Court is not competent to apportion the liability apart from or prior to separate registry of the lands, and this can only be done by the Civil Court. It follows therefore that S. 58 of Act 2 of 1864 is no bar to the Civil Court apportioning the liability inter se as between the co-sharers of the common burden and the objection to the jurisdiction of the Civil Court is untenable.

It was argued next that on the terms of Ex. 11, the deed of gift, the lands of the appellants are not chargeable with any portion of the peishcush but the deed does not exempt the donee from payment of any part of the land tax assessed on the entire estate nor does it postpone his liability to pay his share of the peishcush until separate registry of his portion as in 38 Mad 235.[4] In fact the deed is silent on the point and in the absence of a contract to the contrary the sharers are liable to contribute rateably. The right of the respondents to separate registration of the lands of the appellants has since been upheld by the High Court and Ex. A, the transfer in favour of the predecessor of the respondents, has no bearing on the question. There was no contract to the contrary between the parties or their predecessors-in-title, and it follows that the appellants are liable to contribute rateably.

It was contended next that the liability should be fixed with reference to the peishcush of Mallavaram village in which the lands of the appellants are situate but both

1. Muthammal v. Secretary of State, (1913) 24 M L J 405=19 I C 68=1913 M W N 307.

2. Rajah of Vizianagaram v. Rajah Setrucharla Somasikharaz, (1903) 26 Mad 686 (F B).

3. Amman Paruy Kyi v. Pakram Haji, (1913) 36 Mad 493=15 I C 262.

4. Gajapathi Kristna Chandra Deo v. Srinivasa Charlu, (1915) 2 A I R Mad 95=20 I C 445=38 Mad 235=25 M L J 433.

the villages are registered as one estate and the liability has to be fixed with reference to the charge on the entire estate. It was finally urged that even on this basis the amount fixed is not correct but the judgment of the trial Court shows that the value of the shares was assessed with reference to their income and though exception was taken in the written statements to the income specified in the schedules attached to the plaints, the objection was withdrawn at the trial. The amount of contribution has been fixed on the value of the shares assessed on the basis of such income and it was not shown how the amount fixed is not correct. The second appeals therefore fail and are dismissed with costs fixed at Rs. 200. Leave is refused.

C.R.K./B.D. *Appeals dismissed.*

---

* A. I. R. 1938 Madras 927

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Official Assignee, Madras — Appellant.

v.

P. Suryakanthammal and another — Respondents.

Appeal No. 65 of 1937, Decided on 4th May 1938, from Judgment of Wadsworth J., *Reported in A I R 1938 Mad 175.*

*** Presidency Towns Insolvency Act (1909), S. 58 (5)—Powers of Court for committing an agent for contempt are not limited by S. 58 (5)—It has power to commit for contempt person who deliberately obstructs lawful order of Court on insolvent's behalf :** *A I R 1938 Mad 175=175 I C 543, Reversed.*

It is wrong to say that the High Court's powers of committing for contempt an agent are limited by S. 59. The Court has the power to commit an insolvent who wilfully obstructs the Court and it has inherent power to commit a person who with full knowledge deliberately obstructs the lawful order of the Court on his behalf. When exercising insolvency jurisdiction the Court is still the High Court : *(1897) 1 Ch 545, Rel. on ; A I R 1938 Mad 175=175 I C 543,* **Reversed.**

[P 928 C 2]

M. S. Vaidhyanatha Iyer and K. P. Mahadeva Ayyar — *for Appellant.*

A. S. Nataraja Ayyar — *for Respondents.*

Leach C. J.—This appeal raises a question with regard to the right of the Court to commit to prison for contempt persons who have deliberately aided an insolvent in defying an order of the Court lawfully passed in the exercise of the insolvency jurisdiction. On 15th September 1936, one B. G. Sundaram Naidu was adjudicated insolvent. His assets included a house No. 45, Guruvappa Chetti Street, Chintadripet, in which he, his wife and his son were living. This property was mortgaged to one Lakshmi and in the course of the administration of the estate, the Official Assignee sold the property to the mortgagee. At the time of the sale, the insolvent and his family were occupying the upper floor of the house and the rooms downstair were in the occupation of tenants. On 3rd May 1937 the learned Judge sitting in Insolvency (Wadsworth J.) passed an order requiring the insolvent to vacate the premises on or before 7th of that month. The tenants vacated the room which they were occupying and the insolvent and his family vacated the upper floor but immediately he installed his wife, his mother and his son in the rooms downstair. On 8th June 1937, the Official Assignee complained of this fact in a report to the Court. On 19th July 1937, Wadsworth J. held that the insolvent was playing with the Court and gave him 24 hours to vacate the premises. He failed to comply with this order and on 20th July 1937 he was committed to jail for two weeks for contempt of Court. The insolvent appealed to this Court but his appeal was dismissed on 27th July 1937. On 30th July 1937 the Official Assignee presented a petition to the learned Judge stating that the insolvent's wife and others were in possession of the house as the agents of the insolvent, and asking for an order of the Court directing the bailiff to remove them from the premises. This application was heard by Wadsworth J. on 2nd August 1937. After the case had been called, the learned advocate who now appears for the respondents, the insolvent's wife and son, appeared in Court and having entered an appearance on their behalf asked that one week's time be given to him to file an affidavit in opposition to the order which the Official Assignee was seeking. The time asked for was granted and within the time allowed the insolvent's wife filed an affidavit in which she alleged that there had been an agreement between her and Lakshmi Ammal under which she was to be allowed to reside in the house until a sum of Rupees 3000 which she alleged she had advanced to Lakshmi Ammal had been repaid. The learned Judge dealt with the application of the Official Assignee on 9th August 1937. He did not believe this story and in his order stated that he had no doubt that the

wife was acting at the instigation of the husband. He held however that he had no power to commit her for contempt of Court. He considered that his powers of committing an agent for contempt were limited to the powers conferred by sub-s. 5 of S. 58, Presidency Towns Insolvency Act, which only refers to the delivery up to the Official Assignee of monies and securities. On this ground he dismissed the Official Assignee's application, and the present appeal is from the order of dismissal.

Before I discuss the law and the merits of the case, I will first deal with an objection taken by the learned advocate for the respondents that no appeal lies. He has cited the case in 3 Rang 605,[1] in which a Bench of the Rangoon High Court held that S. 8, Presidency Towns Insolvency Act, does not allow an appeal from an order passed in insolvency unless the order comes within O. 43, R. 1, Civil P. C., or is a judgment within the meaning of the Letters Patent. This decision has been criticised and it is in conflict with the decision of the Bombay High Court in 40 Bom 461,[2] where a much wider view was taken on the question of the right of appeal from an order passed in insolvency. It is unnecessary for the purpose of this case to consider which opinion ought to be accepted, because it is clear that the order here passed was a judgment within the meaning of Cl. 15 of the Letters Patent, Madras. The learned advocate for the respondents, has also said that the Official Assignee is not an aggrieved party within the meaning of S. 8, Presidency Towns Insolvency Act. I have been unable to follow up why he should not be regarded as an aggrieved party. He made an application to the Court in a matter which concerned the administration of an estate in insolvency. The Court refused to pass an order on the ground that its powers were of a very limited nature and the powers which it had, were not sufficient to commit an agent where the contempt was of an order relating to the delivery to the Official Assignee of immovable property. The Official Assignee says that the learned Judge had power to pass an order against the respondents and if this is so, he certainly is an aggrieved party. The learned Judge erred in his conclusion that his powers of committing for contempt an agent were limited by Sec. 58, Presidency Towns Insolvency Act. The Court has the power to commit an insolvent who wilfully obstructs the Court and I have no doubt that it has inherent power to commit a person who with full knowledge deliberately obstructs the Court on his behalf. When exercising insolvency jurisdiction the Court is still the High Court. In (1897) 1 Ch 545 [3] the Court of Appeal in England held that the Court has undoubted jurisdiction to commit for contempt a person who is not included in an injunction or who is not a party to the action but who knows of the injunction and aids and abets a defendant in committing a breach of it. Rigby L. J. observed (p. 558 of the report):

> That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time—for longer than any of us can remember—and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of the Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court. It is astonishing to me to find that jurisdiction questioned at this date.

There can be no doubt in this case that the insolvent's wife and his son are deliberately obstructing a lawful order of the Court and are doing so at the instigation of the insolvent. The son who is respondent 2 in this appeal is not mentioned in the learned Judge's order, but he is exactly in the same position as his mother and has relied on his mother's affidavit. As both respondents have with full knowledge of the position acted in deliberate defiance of the Court's order, I am of opinion that they are liable to be committed for contempt. In view of the fact that the learned Judge did not pass an order against them, I think however that they may be given a short period to vacate the premises. My learned brother agrees with the views I have expressed and we pass this order: The respondents will vacate the premises known as No. 45 Guruvappa Chetti Street, Chintadripet, Madras, by Monday 9th May 1938, failing which they will be committed to prison for a fortnight for contempt of Court. The Official Assignee is entitled to his costs, which we fix at Rs. 100.

C.R.K./D.S. *Order accordingly.*

1. Abdul Gaffor v. Official Assignee, (1926) 13 A I R Rang 64=93 I C 211=3 Rang 605.
2. Mahomed Haji Easack v. Abdul Rahman,, (1915) 2 A I R Bom 273=31 I C 507=40 Bom 461=17 Bom L R 989.
3. Seaward v. Paterson, (1897) 1 Ch 545=66 L J Ch 267=76 L T 215=45 W R 610.

A. I. R. 1938 Madras 929

VARADACHARIAR AND HORWILL JJ.

Siddavarapu Ramalinga Reddy — Appellant.

v.

Rachaputi Ramalingam Setty and another — Respondents.

Appeals Nos. 310 of 1934 and 197 of 1935, Decided on 25th March 1938.

(a) Partnership—Lease obtained by partnership for definite period — *B* becoming partner —Parties intending that partnership should last as long as duration of lease — No provision in lease for renewal — One partner *A* shortly before termination of old lease obtaining fresh lease of same land openly in competition with others — *B* held could not claim interest in new lease or claim it to be treated as asset of old partnership.

In the case of partners, the Indian Legislature has nowhere indicated an intention to enact an absolute rule of law or an irrebuttable presumption that renewal of lease obtained by one of them enures for benefit of other. Except in cases otherwise specially provided for by statute, a constructive trust can be held to arise only if the conditions of S. 88 or S. 90, Trusts Act, are satisfied. In other words it must be shown that one of the partners has 'availed himself of his character' to gain an advantage or that the partner has gained an advantage by entering into a transaction in which 'his own interests are or may be adverse' to those of the other partners. It may be that the clandestine character of the transaction is not an essential feature but the circumstance of concealment is material as leading to the inference that the partner was "taking advantage" of his position. The equity arising from the fiduciary obligation or duty subsisting between partners cannot be extended to cover every transaction entered into by one of them merely on the ground that there is some connexion between the partnership and the transaction complained of; it must be shown that the transaction was within the scope of the partnership or part of the business of the partnership or an undertaking in rivalry with the partnership or indeed connected with it in any proper sense : *Case law reviewed.* [P 935 C 1,2; P 936 C 1]

A partnership had obtained a lease for mica mining for a definite period. There was no provision for the renewal of the lease. One *B* became a partner with knowledge of the conditions of the lease. It was intended by the parties that the partnership should last as long as the duration of the lease which was for a definite period. Shortly before termination of the lease, a partner *A* obtained a fresh lease of the same land for himself. This lease was obtained by him in competition with other persons and it was not any consideration arising out of the old lease that enabled him to obtain the new lease. The negotiations for the new lease were carried on by him openly and no advantage was clandestinely obtained. The other partner *B* claimed an interest in the new lease and insisted that it should be treated as part of the assets of the old partnership :

Held that in obtaining the renewal the partner *A* could not be said to have availed himself of his character or of the advantage of the old lease. Further, as the lease was for a definite period it could not be suggested that in the matter of the new lease *A* placed himself in a position of conflict of duty and interest. Hence *B* was not entitled to claim an interest in the new lease or to insist that it should be treated as part of the assets of the old partnership. [P 937 C 1]

(b) Partnership Act (1932), S. 53—Partnership consisting of *A* and *B* carrying on mining business — Shortly before termination of lease and partnership *A* taking new lease of same land and sending notice to settle accounts of partnership which was terminating — *B* refusing to do so and obstructing *A* in working mine by using boiler which they were previously using — *B* held could not take advantage of S. 53 and *A* held entitled to damages.

A partnership consisting of *A* and *B* and carrying on mining business had a lease for certain period. Shortly before termination of the lease, *A* obtained a fresh lease and sent a notice to *B* asserting that the new lease was his own and asking him to come and settle the accounts of the partnership which according to *A* was terminating with the termination of the lease. By his reply *B* denied that the partnership was to come to an end and claimed that the new lease should be treated as one acquired for the benefit of the partnership. As *A* disputed this claim, *B* refused to agree to a settlement of the accounts of the partnership and obstructed *A* from working the mine by using the boiler which they had theretofore been using :

Held that to permit *B* in such circumstances to rely on S. 53 would amount to allowing him to take advantage of his wrong. But for the provision in S. 53, *A*, even as a common owner, was entitled to use the property subject to accounting to his co-owner for his share of the profits made by the use of the common property. Hence the obstruction caused by *B* was unlawful and entitled *A* to claim damages : *18 Cal 10, Rel. on.* [P 938 C 1]

Advocate-General, K. Krishnaswamy Iyengar and A. K. Sreeraman — *for Appellant.*

S. Srinivasa Iyengar, K. Umamaheswaran, R. Venkatasubba Rao and Alladi Ramaswamy — *for Respondents.*

Varadachariar J. — These appeals may conveniently be dealt with together, as was done in the Court below. In May 1929 the appellant, who was defendant 1 in both the suits, became a partner with the plaintiff in a mica mining business which the latter had been carrying on for some years. When the plaintiff started that business in 1924, he had two partners, namely defendant 2, who was entitled to a four annas share and P. W. 3 who was entitled to a six annas share. Defendant 2 was only a working partner while plaintiff and P. W. 3 were the capitalist partners. Among the lands which they took on lease for the purpose of opening mica mines in connexion with that business, was a block of land obtained under Ex. B for a term of five years from 7th October 1925. On a por-

tion of the land covered by this lease, they had opened a mine which they named the Nityakalyani Mine. For one reason or another, it was not possible for some years to work this mine to the best advantage; and in December 1928, P. W. 3 left the concern, assigning his six annas share (by Ex. D) to the plaintiff. The parties have put forward different versions as to the reasons that led to the plaintiff and defendant 1 becoming partners in 1929. It is no doubt noteworthy that under this arrangement defendant 1 agreed to advance the whole capital required for the working of the mine and to repay the moneys which the plaintiff had so far invested. But we agree with the lower Court that the arrangement was not the result of any financial difficulties of the plaintiff. This question does not however seem to us to be one of much importance, except as bearing upon a suggestion of defendant 1 that he accepted such an onerous obligation only because it was represented to him at the time and he was led to expect that the lease under Ex. B would be renewed or extended and that the partnership business would be continued even for a further term. When defendant 1 became a partner, defendant 2 sank into the position of a person remunerated by a share of the profits, it being expressly provided in Ex. M that he should not be liable for losses.

On 10th June 1930, the plaintiff obtained (under Ex. E) a fresh lease of most of the lands covered by Ex. B, for a term of 10 years commencing from the date of the termination of the lease under Ex. B. One of the principal questions for decision in the appeals is whether the defendants are entitled to claim an interest in this new lease. In August and September 1930, the position was left hazy, each party suspecting the other and neither of them taking up a definite position. Early in October 1930, the plaintiff sent a notice (Ex. K) to defendant 1 asserting that the new lease was his own and asking him to come and settle the accounts of the partnership which according to the plaintiff was terminating on 6th October 1930 with the termination of the lease under Ex. B. By his reply (K.2) defendant 1 denied that the partnership was to come to an end on 6th October 1930 and claimed that the lease under Ex. E, should be treated as one acquired for the benefit of the partnership. As the plaintiff disputed this claim, defendant 1 refused to agree to a settlement of the accounts of the partnership and on the night of 6th October 1930 obstructed the plaintiff from working the mine by using the boiler which they had theretofore been using. The plaintiff sought the aid of the magisterial authorities; but as they passed an emergent order restraining both parties from using the boiler or working the mine for a period of two months, the plaintiff instituted two suits on 24th November 1930, O. S. No. 67 of 1930 (out of which A. S. No. 197 of 1935 arises) for the taking of the accounts of the partnership on the footing that it had come to an end by efflux of time on 6th October 1930 and O. S. No. 68 of 1930 (out of which A. S. No. 310 of 1934 arises) for a declaration that the defendants were not entitled to claim any interest in the new lease, Ex. E, and for an injunction restraining them from interfering with the plaintiff's working of the mine. He also claimed damages in respect of the loss sustained by reason of defendant 1's obstruction.

Defendant 1 denied that the partnership between him and the plaintiff had come to an end on 6th October 1930. He had however no objection to the Court declaring the partnership dissolved, if accounts were to be taken on the footing that the new lease also formed part of the assets of the partnership. He disputed the plaintiff's claim to damages and also contended that the amount claimed was excessive. Defendant 2 had entered into a partnership arrangement with the plaintiff in respect of the new lease on 27th September 1930 (Ex. J). But, for some reason, he seems to have taken sides with defendant 1 when the disputes between the plaintiff and defendant 1 commenced. He accordingly filed written statements supporting defendant 1 in his main contentions. The learned Subordinate Judge held that the partnership between the plaintiff and the defendants terminated by efflux of time on 6th October 1930 and that the defendants were not entitled to the benefit of the new lease obtained by the plaintiff under Ex. E. He accordingly directed accounts to be taken in O. S. No. 67 of 1930 in the terms asked for by the plaintiff. In O. S. No. 68 of 1930 he gave the declaration and the injunction prayed for; he also directed defendant 1 to pay damages to the plaintiff at the rate of Rs. 1500 per mensem from 7th October 1930 to 17th April 1931 when the plaintiff was enabled to work the mine

in consequence of his appointment as receiver. Against the decrees passed in the above terms, defendant 1 has preferred these appeals.

The only point raised in A. S. No. 197 of 1935 is, that the Court below should have directed accounts to be taken on the footing that the lease under Ex. E formed part of the partnership assets. As this question arises for decision even in A. S. No. 310 of 1934, the decision on that point in A. S. No. 310 of 1934 will govern A. S. No. 197 of 1935 also. The learned Advocate-General, who appeared for the appellant, criticized some portions of the lower Court's judgment dealing with the defendant's version as to what happened when the partnership under Ex. M was entered into and when the new lease under Ex. E was obtained. But, as he did not seriously question the conclusions reached by the Court below on these points and as we are in substantial agreement with those conclusions, it will be sufficient to deal briefly with this part of the case.

In the reply notice (Ex. K-2) as well as in his pleadings and evidence in these suits, it was defendant 1's case: (a) that even in May 1929 the plaintiff represented to defendant 1 that the landlords would grant a renewal or at least an extension of the term of the first lease and it was on this understanding and by reason of that representation that defendant 1 entered into the partnership with the plaintiff; (b) that some time before the middle of 1930 there was an arrangement between the parties that in the new lease to be obtained they should have the same rights as in the old; (c) that in the matter of obtaining the new lease, the plaintiff negotiated on behalf of all the old partners, and (d) that when on 9th June 1930 defendant 1 went to the lessor's house, the plaintiff sent him away saying that in connexion with the new lease he would conduct himself as before and thus prevented defendant 1 from competing for the new lease. The plaintiff denied these allegations. We agree with the Court below that on these points the plaintiff's case is substantially true.

It is significant that no reference is made in Ex. M to the contingency of a renewal of the lease or of the extension of its term or to any other lease being taken; and in this respect it is in marked contrast with Ex. A. There can be little doubt even on defendant 1's own evidence, that if the business was to be continued after the termination of Ex. B, he expected this to be done on revised terms, especially in the matter of 'advances' (referred to by the witness as 'pettubadi'). Defendant 1's conduct in connexion with Ex. Y is also significant. In respect of contracts of sale with the Madras Mica Company, the practice was to enter into annual contracts; but Ex. Y was expressly limited to a period of about two months ending with 6th October 1930. The contemporaneous letter Ex. GG explains the reason for this course to be that the partnership was to expire on 6th October 1930. On the same date as Ex. Y, the plaintiff entered into another contract (Ex. Z) for sale of mica to the same Company for one year commencing from 7th October 1930 and Ex. GG, states that the plaintiff and defendant 2 were the only two people interested in this new contract. Defendant 1 is of course not a party to Exs. Z and GG; but these documents (read with the evidence of P. W. 7) are important as showing that plaintiff never concealed his ideas or intentions in the matter and it is difficult to believe that defendant 1 would not have become aware of them about this time. Even ignoring Exs. Z and GG, defendant 1 is not able to explain why (consistently with his hypothesis), Ex. Y came to be limited to the period ending with 6th October 1930. We are not prepared to accept his story that the matter of the contract Ex. Y was not talked over between the partners beforehand and that it was only when he signed Ex. Y that he noticed the limitation of the period to 6th October 1930. Defendant 2 deposes that it was talked over beforehand; and though no question was put to the plaintiff on this point, we accept the statement of defendant 2 as according with the probabilities. It must be remembered in this connexion, that defendant 1 admits that as early as on 11th June he became aware of the new lease having been obtained by the plaintiff. If, as he says, it was the original understanding or at least the arrangement in June 1930 that even after 6th October 1930, the partnership business should be continued, it is difficult to believe that defendant 1 would have agreed to or acquiesced in the course adopted by the plaintiff in connexion with Exs. Y and Z. Read in the light of the above considerations, Ex. H dated 4th August 1930 is also instructive. Defendant 1 refers therein to 'doubts' arising in his mind and asks defendant 2 whether anything has been mooted

in respect of defendant 2's share in the new lease. He adds :

> Let things take their own course in future. Within these two months, please see that as much quantity as possible is extracted.

This doubt and query and the further suggestion are more consistent with the hypothesis that between June and August 1930, defendant 1 was only expecting that the plaintiff would moot the subject of a new contract of partnership in connexion with the work to be done under the new lease than with the view that he believed that he had an interest as of right or by virtue of the old partnership in the new lease or in the business to be done under it. The oral evidence as to the events that happened in connexion with the obtaining of the new lease is not very satisfactory and we are constrained to say that the whole truth has not been disclosed. We are not prepared to believe defendant 1's version as to what happened on the morning of 9th June, in the lessors' house. We are also not prepared to believe that there was no real competition in the matter, on behalf of Rami Reddi. It is difficult to believe that Narasa Reddi and Mr. Sivaramiah (a leading vakil) would have come to the house of the lessors on the 9th morning on behalf of Rami Reddi, if the latter had no serious proposal to make. Nor are we convinced as to the truth of the story (though it is spoken to by P. W. 6) that when the lessors went to Mr. Sivaramiah's house that afternoon, Rami Reddi who had admittedly come there had no serious proposal to make. Even if we accept Rami Reddi's version that he did not proceed further because of his fear of a dispute with the plaintiff, it is sufficient to show that Rami Reddi did compete or intended to compete up to a particular stage.

We are not much impressed with the argument of the learned Advocate-General that the terms of Ex. E are less onerous to the lessee than those proposed in the draft of the 7th (Ex. O) and that accordingly there could have been no competition from others between the 7th and the 10th. The amount payable is no doubt reduced from 12 thousand to 10 thousand, but unlike Ex. O, Ex. E makes the whole amount payable by 7th April 1932 and does not give the lessee the option of throwing up the lease at the end of 5 years so as to avoid liability for one half of the rent. It must also be noted that Ex. E excludes all lands fit for cultivation and as explained by the plaintiff it is on this very ground that one of the lessors refused to complete Ex. O. We are not therefore satisfied that the terms of Ex. E are less onerous than those in Ex. O.

While we are satisfied that Rami Reddi did compete with the plaintiff in connexion with the lease of June 1930, it is not easy to decide what exact part defendant 1 took in that connexion. We are on the whole inclined to agree with the lower Court that defendant 1 must have been acting with Rami Reddi and his friends. It is clear from the evidence that defendant 1 and Rami Reddi were on very friendly terms and were jointly interested in several concerns. It is also clear that on several occasions the plaintiff had reason to suspect that defendant 1 was siding with Rami Reddi in the disputes between the plaintiff and Rami Reddi arising out of the business of the Lakshmiprasanna Mine which Rami Reddi and the plaintiff owned in common. While it may not be that there was serious estrangement between the plaintiff and defendant 1 on this score before the beginning of 1930, it seems reasonably certain that after April-May 1930, the relations were not by any means so cordial as to lead the plaintiff to desire the continuance of further business relations with defendant 1 after the termination of the existing partnership. We have already stated it as our conclusion that we are not satisfied that the plaintiff agreed to or did in fact negotiate the new lease on behalf of defendant 1 also. If in these circumstances defendant 1 was not merely aware of the attempts of various parties to get a new lease of what he knew to be a profitable mine but did in fact go to the lessors' house on 9th June, it seems to us more likely that he was co-operating with Rami Reddi's party and expected the matter to be talked over in Mr. Sivaramayya's house that afternoon. Before leaving this part of the case, we may note that certain letters relied upon by defendant 1 as bearing on some of the questions of fact above discussed were rejected by the lower Court as not reliable and the learned Advocate-General has not asked us to consider those letters.

Before us, the appellant's claim was mainly supported on the ground that, independently of any contract or understanding between the parties and apart from any proof of misconduct of the plaintiff or improper use of his position in con-

nexion with the procuring of the new lease, defendant 1 was entitled to the benefit of the new lease on the principle of equity embodied in S. 88, Trusts Act. Founding himself on an observation of Warrington J. in (1905) 1 Ch 620[1] at p. 625, and on certain remarks of Lord Lindley in his treatise on the Law of Partnership, the learned Advocate-General contended that when part of the assets of a firm consists of leasehold premises 'one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit.' He also relied on the statement of the law in Halsbury's Laws of England (Edn. 2 Vol. 24, Title 'Partnership' S. 863). On the other side, it was maintained that the rule of equity was not 'absolute' in the sense contended for on behalf of the appellant, that the equities depended on the facts and circumstances of each case and that a person claiming such equities must (in the terms of S. 88, Trusts Act) show either that one of the partners has 'availed himself of his character' to gain an advantage or that the partner has gained an advantage by entering into a transaction in which 'his own interests are or may be adverse' to those of the other partners. The learned counsel for the plaintiff contended that properly understood, the English authorities are not at variance with the rule embodied in S. 88 which leaves the question to be decided on the circumstances of each case; but he added that even if they should be found to lay down a stricter rule, this Court has only to apply the law as laid down in the Trusts Act: 9 Bom L R 606[2] at page 629.

It may be conceded that as regards renewals obtained by 'trustees', the principle of equity in favour of the cestui que trust was laid down in unqualified terms in Wh. & Tud. Leading cases[3] and the rule has ever since been adhered to. It is also true that in some of the authorities dealing with partners, the equity in favour of coparceners is considered to rest on an extension of the principle in Wh. & Tud. Leading cases,[3] and it has been sometimes stated in unqualified terms. But in view of the fuller discussion of the question by the Court of Appeal in (1903) 2 Ch 40[4] and by Parker J. (as he then was) in (1907) 1 Ch 195,[5] it does not seem to us right to take observations in any single case as an exhaustive statement of the rule or divorce such observations from the circumstances of the particular case. In (1857) 44 E R 593,[6] which Lord Lindley regards as important in that it shows that the equity is not confined to cases where the partner acts clandestinely, Turner L. J. observed that the authorities do not warrant the position

> that in no case can a partner during the continuance of a partnership contract for a new lease to be granted to himself of property which is in lease to the partnership, without the new lease being held to be subject to trusts for the benefit of the partnership.

The learned Lord Justice added:

> In order to give validity to such a transaction all the parties ought to be placed upon an equal footing.

Note also the observation of Sir William Grant in (1810) 34 E R 115[7] at p. 121 on the renewing partners placing the other partner 'on equal terms with them'. This way of stating the rule was evidently due to the fact that Turner L. J. took the principle of the decision in such cases to be 'the confidence which subsists between partners' and Sir Williams Grant laid stress on the unfair advantage which any other view would give to the partner who had obtained the renewal. But another principle of decision which has been emphasised in some cases is that one put by Knight Bruce L. J. in the course of the argument in (1857) 44 E R 593[6] in the following words:

> Does not the application of the rule depend on this —who were entitled to the interests, the existence of which gave facilities for obtaining a new lease.

In the application of the latter principle, something amounting to a presumption of law seems to have grown up in England—at first applied to cases where the lease was renewable by contract or custom but later extended even to leases not so renewable—that the renewal was obtained only because of the old lease. This conception was in (1728) 2 P W 511[8] embodied in the phrase as to 'coming from the same root'. In (1849) 41 E R 1278[9] at p. 1280, the Lord Chancellor observed:

1. Bevan v. Webb, (1905) 1 Ch 620=74 L J Ch 300=93 L T 293=53 W R 651.
2. Hasanali v. Esmailji, (1907) 9 Bom L R 606.
3. Keech v. Sandford, Wh. & Tud. Leading cases.
4. In re Biss; Biss v. Biss, (1903) 2 Ch 40=72 L J Ch 473=88 L T 403=51 W R 504.
5. Griffith v. Owen (1907) 1 Ch 195=76 L J Ch 92=96 L T 5=23 T L R 91.
6. Clegg v. Edmonson, (1857) 26 L J Ch 673=8 De G M & G 787=3 Jur (N S) 299=44 E R 593.
7. Featherstonhaugh v. Fenwick, (1810) 17 Ves Jun 298=11 R R 77=34 E R 115.
8. Rakestraw v. Brewar, (1728) 2 P W 511=Sel Ch Ca 55=Moseley 189=24 E R 839.
9. Clegg v. Fishwick, (1849) 1 Mag & G 293=1 H & P W 390=19 L J Ch 49=41 E R 1278.

The old lease was the foundation of the new lease, the tenant-right of renewal arising out of the old lease giving the partners the benefit of the new lease ; *at least the law assumes* it to be so, (the italics are ours).

In (1857) 44 E R 954[10] at p. 960, Turner L. J. himself referred to the renewed interest becoming subject to the quasi trust because the quasi trust attaching to the possession of the surviving partner 'draws with it the benefit resulting from the possession' held by the surviving partner. In (1903) 2 Ch 40[4] at p. 56, Collins M. R. stated the foundation of some of these cases to be the theory that

a renewal must be looked on as an accretion to or graft upon the original term arising out of the good will or quasi tenant right annexed thereto.

How this presumption or theory came to be applied even to cases where the original lease itself gave no right to renewal (by contract or custom) is explained in Ashburner's Principles of Equity, Edn. 2, p. 309. Adverting to the former custom among large landholders or ecclesiastical bodies, the learned author observes :

The owners of such a lease had no legal claim to a renewal but they had a hope or expectation of it, derived from and based upon their ownership of the original lease,

and it is added in the footnote that 'this hope or expectation was sometimes described as a tenant right' : see the distinction between college leases and private leases adverted to by Warrington J. in (1905) 1 Ch 620[1] at p. 627. The distinction made in the English cases, *see* (1905) 1 Ch 620,[1] between 'renewals' and 'purchases of the reversion' shows that it is not merely the 'incapacity' arising from fiduciary position but also the presumption above referred to that accounts for the terms in which the rule as to renewals obtained by one of the partners has been stated in most of the English cases : *see* observation of Romer L. J. and argument of counsel in (1903) 2 Ch 40[4] at page 53.

The question was discussed at some length before the Court of Appeal in (1903) 2 Ch 40,[4] in connexion with the claim of certain tenants-in-common (including an infant) to a renewal obtained by another tenant-in-common. Collins M. R. divided the cases into those where 'the presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted' and those which rest on the presumption that

a renewal must be looked on as an accretion to or graft upon the original term arising out of the good-will or quasi-tenant right annexed thereto.

Referring to mortgages, joint tenants and partners, the Master of the Rolls observed that in their case 'there is no presumption of law but at most a rebuttable presumption of fact' and he referred with evident approval to (1808) 12 R R 1[11] a mortgagee's case — where Lord Manners held that there was no basis for the presumption or in any event it was rebutted. On p. 58, he added that where a person is not 'under a personal incapacity to take a benefit, he is entitled to show that the renewal was not in fact an accretion to the original term'. Romer L. J. referred (on p. 60) to 'dicta of Judge's' and 'statements in text-books' which might lead to the 'supposition that if any person only partly interested in an old lease obtains from the lessor a renewal he must be held to be a constructive trustee of the new lease' and added that 'the authorities when examined carefully do not support any such general proposition.' He groups in different categories, the cases where the renewal has been held to be in trust for others, and refers in particular to the instances where on grounds of 'public policy' the person obtaining the renewal is not allowed to rebut the presumption that in obtaining the renewal he acted in the interests of all persons interested in the old lease. Where the person obtaining the renewal has not clearly occupied a fiduciary position, the learned Lord Justice stated the result of the authorities to be

that a person renewing is only held to be a constructive trustee of the renewed lease, if in respect of the old lease he occupied some special position and owed by virtue of that position a duty towards the other persons interested.

Dealing with partners he observed (on p. 61) that a partner "clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position and if by virtue of his position a partner obtained a renewed lease "he will be held to have acquired it on behalf of all the partners". Romer L. J. then goes on to quote (without disapproval) the observations of Turner L. J. in (1857) 44 E R 593[6] (already extracted). In (1907) 1 Ch 195[5] Parker J. (as he then was) clarified the position under the English authorities. The principle in Wh. & Tud., Leading cases[3] he observed

depends partly on the nature of leasehold property and partly on some fiduciary relationship or duty existing on the part of the person whom it is

10. Clements v. Hall, (1857) 2 De G & J 173=27 L J Ch 349=6 W R 358=44 E R 954.

11. Nesbitt v. Tradennick, (1808) 1 Ball & B 29= 12 R R 1.

sought to declare a trustee towards the persons who seek to have the trust declared.

As regards the 'personal incapacity' of the person obtaining the renewal to keep the benefit for himself, he distinguished between the cases where he is allowed and those in which he is not allowed "to show that in spite of the nature of the property, there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit". After referring to the judgment of Collins M. R. in (1903) 2 Ch 40,[4] the learned Judge added that

> when once the fiduciary relationship or duty is established on the part of the person obtaining the renewal, the onus of proving that there is nothing inequitable in his claiming to retain the benefit for himself rests with him.

The implication of this judgment clearly is that except in the case of trustees, there is no irrebuttable presumption in support of the equity: *see* A I R 1932 Bom 240.[12] It only remains to refer to (1906) A C 494[13] as establishing that the equity arising from the fiduciary obligation or duty subsisting between partners cannot be extended to cover every transaction entered into by one of them merely on the ground that there is some connexion between the partnership and the transaction complained of; it must be shown that the transaction was 'within the scope of the partnership' or "part of the business of the partnership or an undertaking in rivalry with the partnership or indeed connected with it in any proper sense". On a review of the relevant English authorities, it seems to us that the statute law in India has not substantially deviated from the rules of the English law, though here and there some slight differences may result from the way in which particular cases have been dealt with in the Indian enactments. It will be noticed that some cases of constructive trusts have been provided for in S. 88 while other cases have been dealt with in S. 90, Trusts Act. While acquisitions by mortgagees have generally been dealt with in S. 90, Trusts Act, one special class of acquisitions, viz. renewals of leases by mortgagees, has been provided for in S. 64, T. P. Act, which gives the mortgagor the benefit of the new lease "in the absence of a contract by him to the contrary": *see also* Illus. (d) to S. 3, Specific Relief Act. As regards renewals obtained by a tenant 'for life' Illus. (a) to S. 90, Trusts Act, provides in unqualified terms that the person so renewing "holds the renewed lease for the benefit of all those interested in the old lease". It is not clear whether it was the deliberate policy of the Legislature to enact an 'irrebuttable' presumption or rule of law in the case of tenants for life; if it was, it must be attributed to the adoption of the special principle stated in (1903) 2 Ch 40[4] at p. 56 that tenants for life

> can take only what the will or settlement under which they make title gives them . . . . and that their rights to such accretion are those which they have in the term and no greater and terminate with their life.

In the case of partners, the Indian Legislature has nowhere indicated an intention to enact an absolute rule of law or an irrebuttable presumption in respect of renewals obtained by one of them. It is not without significance that Illus. (d) and (e) to S. 88 refer only to cases where the partner uses funds belonging to the partnership or clandestinely stipulates for a personal benefit in a transaction negotiated by him on behalf of himself and his co-partners. Similarly, Illus. (a) and (b) to S. 258, Contract Act, only referred to cases in which the partner acted without the knowledge of his co-partners or obtained a secret commission. It may be, as observed in Lindley on Partnership that the clandestine character of the transaction was 'not an essential feature' of the decisions in (1810) 34 E R 115[7] and (1849) 41 E R 1278,[9] but as pointed out in 51 Cal 299[14] at p. 302, the circumstance of concealment is material as leading to the inference that the partner was 'taking advantage' of his position. Even the Indian Partnership Act of 1932 has not enacted or adopted any irrebuttable presumption in respect of renewals of leases by a co-partner. The decisions of the Judicial Committee in 5 Cal 198[15] (before the Trusts Act) and in 63 M L J 116[16] show that except in cases otherwise specially provided for by statute, a constructive trust can be held to arise only if the conditions of S. 88 or S. 90, Trusts Act, are satisfied.

Dealing with the first part of S. 88, the learned Advocate-General argued that in applying it to cases of renewals of leases,

12. Babani Sairoo v. Bulba Govind, (1932) 19 AIR Bom 240=137 I C 355=34 Bom L R 357.
13. Trimble v. Goldberg, (1906) A C 494=75 L J P C 92=95 L T 163=22 T L R 717.
14. Nagendrabala Dasi v. Dinanath Mahish, (1924) 11 A I R P C 34=51 Cal 299=51 I A 24 (PC).
15. Kishandatt Ram v. Mumtaz Ali, (1880) 5 Cal 198=6 I A 145=4 Sar 17=5 C L R 213 (PC).
16. Sorabjee v. Dwarkadas Ranchhoddas, (1932) 19 A I R P C 199=138 I C 557=59 I A 366=63 M L J 116 (P C).

we must in the light of the English authorities at least raise a presumption that in obtaining the renewal, the partner 'availed himself of his character' or of the advantage of the old lease. It is difficult to say that in the circumstances existing in this country, a general presumption to the above effect will be justified in cases where the lease is not renewable by contract or custom. We do not however pause to consider this point further because the facts in the present case are sufficient to rebut such presumption if any. The evidence shows that far from imagining that the old lease gave the plaintiff any particular claim for a renewal, the landlord started negotiations with one Venkatakrishnayya for a new lease. Even after the plaintiff approached them for a new lease, they had no hesitation in entertaining Rami Reddi's offer to negotiate for a lease for himself. Though we have no satisfactory evidence as to the terms offered by the competitors or as to the reason for their failure to secure the lease, the evidence establishes that it is not any consideration arising out of the old lease that enabled the plaintiff to obtain a new lease. The plaintiff asserts and P. W. 6 admits that the plaintiff asked for the new lease for himself and was given the same accordingly. The negotiations were carried on by the plaintiff openly and no advantage was clandestinely obtained. The learned Advocate-General suggested that the plaintiff must be regarded as the 'managing partner' and the observations in (1857) 44 E R 593[6] as to the position of a managing partner should be held applicable here. This suggestion is opposed to the provision in Ex. M vesting the management jointly in the plaintiff and defendant 1; and there is nothing in the evidence to suggest that the plaintiff took a more prominent or important part than defendant 1 in the management of the affairs of the partnership.

An attempt was made to argue that the admitted user of the new patta (obtained by the plaintiff from Government on 13th July 1930) for the deposit of Rs. 500 which had been made under the former lease amounted to the plaintiff availing himself of the advantage of his old position. This seems to us an unsubstantial or far-fetched argument. For one thing, such user in July 1930 cannot affect the character of a new lease obtained in June. The former deposit was made long before defendant 1 became a partner. It is true that this sum is included in the amount of Rs. 20,862.8.1 mentioned in Ex. M, but there is no reason to suppose that it forms part of the Rupees 6645.4.7 agreed to be advanced by defendant 1 under Ex. M rather than of the sum of Rs. 14,217.3.6 which the parties expected the plaintiff to receive from the sale proceeds of stock already consigned. According to the terms of Ex. M, defendant 1 must be held to have advanced the sum of Rs. 6000 odd under the arrangement that it was to be treated as his 'capital' for the Nityakalyani Mine and he cannot say that the particular sum of Rs. 500 deposited with the Government long before he became a partner was an amount in which he had an interest. In this view it is unnecessary to consider whether the last entry in Ex. R., whereby the plaintiff 'debited' himself with the sum of Rupees 500 was properly or improperly made.

In the alternative the learned Advocate-General contended that this case fell under the second part of S. 88 and the plaintiff entered into the new lease in 'circumstances in which his interests are or may be adverse' to those of his co-partner, defendant 1. In this connexion there was some discussion as to the 'scope' of the partnership under Ex. M as Mr. Srinivasa Ayyangar relied on (1906) A C 494[13] as indicating the test to be applied in determining whether in obtaining the renewal plaintiff adopted a course in which his duty and his interest came into conflict. In the lower Court, the question was dealt with as one relating to the duration of the partnership, *see* Issue 3 in O. S. 67, and the learned Judge held it 'to be likely that the parties intended that the partnership should continue so long as the lease (under Ex. B) endures.' Even looking at the question as one relating to the 'scope' of the partnership, we think the same must be the answer. Ex. M specifically refers to the old lease and nowhere refers to new leases being taken (unlike Ex. A). The provision about defendant 1 making all the advances required is certainly onerous and one-sided and is more intelligible on the hypothesis that the parties contemplated the arrangement to be a short and temporary one. Defendant 1's evidence clearly implies that in the new arrangement which he expected to be come to between himself and the plaintiff this clause about pettubadi required revision. The case is more analogous to what are referred to as partnerships in particular ventures than

to an indefinite partnership for a general business which is sought to be limited merely on the ground that the premises where the business was to be carried on had been taken on lease for a particular period of time. In this view, we see nothing to suggest that in the matter of the new lease, the plaintiff placed himself in a position of conflict of duty and interest. In the case of a partnership at will or for an indefinite term, it is possible to conceive of such a conflict as a partner may be tempted to give notice of dissolution with the very object of retaining for himself the benefit of a new lease which he hoped to or was trying to obtain: *see* (1886) 11 A C 298[17] at p. 309. That is not the position here.

It must be added that the evidence in this case establishes that the plaintiff and defendant 1 and other business men engaged in mica mining in the locality were in the habit of being interested in competing concerns even while they were partners in one concern or another; as this course must be deemed to have been followed with the knowledge and consent of each other, it cannot be suggested that the mere fact of the plaintiff obtaining a new lease before the partnership under Ex. M has come to an end was itself a breach of his duty as partner. Nor can it be said that in omitting to take defendant 1 as a partner in the new lease the plaintiff acted unfairly towards him, when it is remembered that by that time the relations between the parties had ceased to be cordial and they had lost confidence in each other. When it is remembered that even prior to June 1930 the plaintiff has had occasions to feel that defendant 1 was taking sides with Rami Reddi, he cannot be criticized for cutting himself away from defendant 1 when the latter's conduct during the negotiations leading up to the new lease was calculated, as it certainly was, to lead the plaintiff to think that defendant 1 had definitely thrown in his lot with Rami Reddi.

We accordingly agree with the lower Court that defendant 1 is not entitled to claim an interest in the new lease under Ex. E or to insist that it should be treated as part of the assets of the old partnership. Defendant 2 has not appealed against the decree of the lower Court; it is unnecessary to deal with his case separately. As desired by Mr. Duraiswami Aiyar we wish to make it clear that this litigation is not concerned with the rights of defendant 2 under Ex. J and this judgment does not therefore deal with those rights or with the plaintiff's contentions in respect of them. The lower Court has given an additional reason (in para. 27 of its judgment) for holding against defendant 1; viz. that he did not assert any claim to the new lease till 6th October 1930 and that the principle of the decision in (1857) 44 E R 593[6] accordingly applied. We think it right to say that if on the general question we had come to a conclusion in defendant 1's favour, we should have hesitated to concur in the finding that defendant 1 had lost his rights by his laches. The new lease was to come into effect only on 7th October 1930 and the appellant who asserted his right even before that date cannot be said to have waited with a view to see whether the new venture turned out to be profitable or not. It only remains to note a contention based by Mr. Srinivasa Aiyangar on the non-registration of Ex. M. He argued that by reason of the non-registration of Ex. M, the old lease never became the property of the partnership consisting of the plaintiff and defendant 1 and that no constructive trust can attach to the new lease except when the former lease was shown to be the 'property' of the firm. In the view we have taken on the main question, it is unnecessary to express any opinion on this contention or examine the answers urged by the learned Advocate-General on the strength of the admissions in the pleadings and the theory of part performance.

With reference to the claim for damages in O. S. No. 68, it was contended on behalf of the appellant (i) that the plaintiff was not entitled to any damages (ii) that the amount awarded was excessive and (iii) that in any event no damages ought to have been awarded except for the period of two months during which the plaintiff was prevented from working the mine by reason of the magisterial order passed in consequence of the appellant's obstruction. In support of the first contention it was urged that defendant 1 did not prevent the working of the mine but only the working of the boiler and this he was entitled to do, as the boiler was the common property of the partners. There is not much substance in this contention. It is not disputed that the obstruction caused by defendant 1 to the working of the boiler effectually prevented the working of the mine and it has not been suggested that within the period in question, it would have been possible for the

17. Neilson v. Mossend Iorn Co., (1886) 11 A C 298.

plaintiff to have made other arrangements for the proper working of the mine. As regards the claim of common ownership of the boiler, Mr. Srinivasa Ayyangar reiterated his answer that on account of the non-registration of Ex. M the boiler which originally belonged to the plaintiff did not become the property of the partnership, because as a 'fixture' its transfer must be held to be governed by the rules applicable to the transfer of 'immovable property'. As we are of opinion that even on the assumption of common ownership of the boiler, defendant 1's conduct was not justified, we do not think it necessary to deal with this argument of Mr. Srinivasa Ayyangar. It is no doubt recognized in S. 53, Partnership Act, that even after dissolution, any partner may restrain any other partner from using any of the property of the firm for his own benefit until the affairs of the firm have been completely wound up. Here the plaintiff invited defendant 1 by the registered notice Ex. K, (dated 2nd October 1930) to come and settle the accounts but defendant 1 would not agree to do so. To permit defendant 1 in such circumstances to rely on S. 53 will amount to allowing him to take advantage of his own wrong. If he chose to take the law into his own hands he must, it seems to us, do so at his peril. But for the provision in S. 53, the plaintiff even as a common owner was entitled to use the property subject to accounting to his co-owner for his share of the profits made by the use of the common property : *see* 18 Cal 10[18] and S. 37, Partnership Act. We accordingly hold that the obstruction caused by defendant 1 was unlawful and entitled the plaintiff to claim damages.

As regards the quantum of damages, the learned Advocate-General is not right in his contention that the lower Court has ignored the fact that the mica is still in the mine. It has assessed damages only with reference to the loss of profits. The plaintiff had only a limited term under the new lease and his profits will depend on what use he is able to make of the mine within that period. If for part of that period he is prevented from working the mine, he is entitled to complain that his probable profits have been diminished to that extent. As regards the rate, we see no reason to think that the lower Court has fallen into an error. It has taken into account all the available information and defendant 1 offered no evidence to the contrary in this matter. Nor do we see any reason to limit the award of damages to a period of two months, merely on the ground that the magisterial order extended only to two months. The plaintiff filed his suit within that period and though the petition for appointment of a receiver was filed only on 16th December 1930 the attitude taken up by defendant 1 in connexion with that petition does not suggest that he would have peacefully allowed the plaintiff to work the mine if he had attempted to do so on the expiry of the magisterial order. We do not think it was the plaintiff's duty to invite the trouble from defendant 1 by attempting to start work on the mine before the Court authorized him to do so.

The plaintiff has filed a memorandum of objections in A. S. No. 310 of 1934, claiming a higher amount by way of damages; but this has not been pressed. In the result, the appeals and the memorandum of objections are dismissed. In A. S. No. 310 of 1934 the appellant will pay respondent 1's costs. In A. S. No. 197 of 1935 the appellant will pay the costs of printing incurred by respondent 1 and the costs of purchasing the printed papers; otherwise in the appeal and in the memorandum of objections in A. S. No. 310 of 1934, there will be no order as to costs. In A. S. No. 310 of 1934 we allow to respondent 1 a second set of fees under the latter part of Rule 46.

C.R.K./D.S. *Order accordingly.*

18. Watson and Co. v. Ramchund Dutt, (1891) 18 Cal 10=17 I A 110=5 Sar 535 (P C).

---

* A. I. R. 1938 Madras 938

MADHAVAN NAIR J.

Boppana Prakasam — Petitioner.

v.

Maganti Nagabhushanam — Respondent.

Civil Revn. Petn. No. 1115 of 1937, Decided on 12-5-1938, from decree of Dist. Munsif, Ellore, in O. S. No. 587 of 1935.

*** Stamp Act (1899), S. 36 — "Admitted in evidence" — Endorsement by Judge that promissory note is insufficiently stamped and is allowed to go in—Endorsement bearing rubber stamp with initials of Judge — Document is admitted within meaning of S. 36 and its admissibility cannot be subsequently called in question.**

If a document is let in, whether after deciding the objection or not, it has been admitted in evidence within the meaning of S. 36, Stamp Act,

and the admissibility of it cannot therefore be called in question : *A I R 1929 Mad 622; A I R 1937 Mad 431 and A I R 1935 Mad 888, Rel. on.* [P 939 C 2]

The question for decision is not whether the person who initialled the endorsement is the clerk or the Judge, but the question is whether the document has been admitted in evidence. The words of S. 36 are clear. It does not explicitly say that there must be a judicial determination of the question. What it says is simply it must be admitted in evidence and if it is admitted in evidence as laid down in the rules of the Civil Procedure Code, the plain meaning of the words is satisfied. [P 940 C 1]

Where therefore on the back of the document it is endorsed by the District Munsif that the promissory note is insufficiently stamped and it was allowed to go in and it bears a rubber stamp with the initials of the Judge, the document is admitted and the admissibility of it cannot be called in question : *A I R 1929 Mad 522, Disting.; 12 M L J 351, Rel. on; A I R 1933 Mad 781, Not foll.* [P 940 C 2]

V. Rangachari — *for Petitioner.*

A. Lakshmayya — *for Respondent.*

Order. — In this petition, I am called upon to decide the question whether the suit promissory note is admissible in evidence. The lower Court held that it was inadmissible and this petition is to revise that order of the learned District Munsif. The question arose in the following circumstances: The plaintiff is the petitioner. He instituted a suit on a promissory note for Rs. 200. The defendant raised the contention that the suit note was a forgery. He also stated that the promissory note was insufficiently stamped and was therefore inadmissible in evidence under S. 35, Stamp Act. When the case came on for hearing the defendant did not appear. He asked for an adjournment which was refused. But he did not withdraw his appearance in the case. The learned District Munsif admitted the promissory note in evidence and decreed the suit. An appeal was preferred against this decision, but the learned Judge in appeal thought that the case was one which should have been adjourned by the learned Munsif. He therefore remanded the suit to the District Munsif giving time for the defendant to produce his evidence. When the case came before the District Munsif, the defendant pressed his objection that the suit note was inadmissible and he contended that the suit should be dismissed. As stated in the beginning a ruling was given by the lower Court accepting his contention. In this civil revision petition it is argued by the petitioner that once the insufficiently stamped promissory note has been admitted in evidence it is not open to the party concerned to raise the objection at a later stage that it is inadmissible and so the ruling of the lower Court is wrong. S. 36, Stamp Act, says :

When an instrument has been admitted in evidence, such admission shall not except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

The question for decision in the present case therefore is whether the suit promissory note "has been admitted in evidence." This question has come before this Court on very many occasions and has been dealt with by various learned Judges. I do not propose to discuss these decisions in detail. In all these cases the principle which the learned Judges applied in deciding the question was whether there was a judicial determination on the question whether the document was admissible in evidence or not. In some cases objection is raised, issue is framed and a decision given. In such cases there can be no doubt that the judicial mind of the Judge has been applied to a consideration of the question. But in very many cases what happens is that no objection is raised, no issue is framed and the document is let in evidence. The difficulty in deciding the question arises in cases of this kind. Even in such cases, the weight of the authority in this Court is in my opinion in favour of the position that if a document is let in, whether after deciding the objection or not, it has been admitted in evidence within the meaning of S. 36, Stamp Act, and the admissibility of it cannot therefore be called in question. The cases which support this position are A I R 1929 Mad 622,[1] A I R 1937 Mad 431[2] and A I R 1935 Mad 888.[3] The latter case is a decision of Pandrang Row J. and it may be distinguishable on the facts, but the principle is stated by the learned Judge as I have stated it above.

In the present case what happened was this: on the back of the document it is endorsed by the District Munsif that the promissory note is insufficiently stamped and it was allowed to go in. It bears a rubber stamp with the initials of the Judge. The learned counsel for the respondents argues that unless the document has been initialled by the Judge it cannot be said to have been admitted in evidence and in

1. Venkateswara v. Ramanathan, (1929) 16 A I R Mad 622=119 I C 472.
2. Satyavathi v. Pallaya, (1937) 24 A I R Mad 431=169 I C 641.
3. Abdul Wahab v. Anjaneyalu, (1935) 22 A I R Mad 888=159 I C 28.

support of that position, my attention has been invited to decision in 53 Mad 137.[4] In that case what happened was this: the District Munsif on a consideration of the insufficiently stamped document held that it was not duly stamped and therefore inadmissible in evidence and rejected it. Yet the document was admitted. The District Munsif's initials were affixed to the endorsement of admission by a rubber stamp. It was held by the learned Judges that if the trial Judge did not consider the admissibility of the document proved before him, the mere endorsement thereon under O. 13, R. 4, Civil P. C., does not preclude him from considering its admissibility at a later stage of the case. It is clear from the facts stated that the document was rejected by the District Munsif and yet it was allowed to go in. This feature distinguishes this case from the present one. In spite of the fact that the document bears the endorsement that it is insufficiently stamped, the learned District Munsif in the present case admitted it and I do not think the decision in 53 Mad 137[4] can apply to the present case. That, as already stated, was a case where the document was rejected. In this connexion attention may be drawn to the decision in 12 M L J 351.[5] That was also a case of an insufficiently stamped promissory note. The District Judge rejected the document. Nevertheless it was admitted in evidence. That case strongly supports the contention of the petitioner in the present case. I do not think, having regard to what has taken place in the present case, the decision in 53 Mad 137[4] is applicable.

To my mind the question for decision is not whether the person who initialled the endorsement is the clerk or the District Munsif, but the question is whether the document has been admitted in evidence. The words of S. 36 are clear. It does not explicitly say that there must be a judicial determination of the question in the sense the expression has been explained in some of the judgments. What it says is simply it must be admitted in evidence and if it is admitted in evidence as laid down in the rules of the Civil Procedure Code, the plain meaning of the words is satisfied. It may be said that such admission would lead to this: that a mere mechanical act of admission would amount to an admission of a document within the meaning of Sec. 36. I can quite see the force of this argument. But I have no doubt that the legislation when it enacted the law in S. 36 was quite alive to this position and it seems to me that the words "admitted in evidence" were deliberately used in order to avoid complicated enquiries regarding the admission and the difficulties necessarily attendant upon such enquiries. One finds in one's experience that questions of this kind are raised in promissory note suits which admittedly should be disposed of as quickly as possible and the policy of law as indicated in the Section is to allow admission of documents which have been admitted under the rules of the Civil Procedure Code.

Before concluding I might say that the decision in 65 M L J 673[6] supports the contention of the respondent. But as I have said, the long track of decision of this Court is to the effect that the mere admission of the document as in this case will amount to admission within the meaning of the words in S. 36, Stamp Act. I would therefore hold that the ruling of the Court that it was open to the respondent to raise the question as regards the admissibility of the document is wrong and that he should not have been allowed to raise the question. The case will now be disposed of by the lower Court in the light of the above observations. Of course I do not say anything about the other merits of the case. If the parties have evidence to adduce they will be at liberty to do so. The petitioner is entitled to his costs.

C.R.K./D.S. *Ruling set aside.*

4. Venkanna v. Parasuram Byas, (1929) 16 A I R Mad 522=120 I C 879=53 Mad 137=56 M L J 633.

5. Sugappa v. Govindappa, (1902) 12 M L J 351.

6. Sadasivier Krishnier v. Meenakshi Iyer, (1933) 20 A I R Mad 781=147 I C 369=65 M L J 673.

* A. I. R. 1938 Madras 940

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Karuppasami Goundan — Appellant.

v.

Ovala Kondama Naicker Aiyan and others — Respondents.

Letters Patent Appeal No. 78 of 1935, Decided on 20th April 1938, against Judgment of Varadachariar J., in S. A. No. 226 of 1931, D/. 6th March 1935.

*** Landlord and Tenant — Lease — Construction — Tenant agreeing to deliver to landlord stipulated amount of paddy—No covenant that rents would be paid out of crops — No charge held on crops for rent.**

Where in a lease of certain lands, executed by the tenant, he undertook to cultivate the land,

reap the crop and deliver to his landlord the stipulated amount of paddy, this did not mean that the lessee covenanted that the rent would be paid out of the crop actually reaped by him. The undertakings given by the lessee could be regarded only as an assurance that the rent would be paid. The landlord had therefore no charge on the produce of the land for the amount of rent.

[P 941 C 2]

R. Krishnaswamy Iyengar — *for Appellant.*

S. Nataraja Iyer — *for Respondents.*

Leach C. J. — The appellant sued in the Court of the District Munsif of Palni to recover a sum of Rs. 990 claimed to be due by respondent 3 as the equivalent of rent in kind of certain agricultural land. He also claimed a decree for this amount against respondents 1 and 2 on the ground that he had a charge on the produce of the land for the amount due for rent and that they had wrongly removed the produce in collusion with respondent 3. The District Munsif held that the appellant was entitled to a decree against all the respondents and this decision was concurred in by the Subordinate Judge of Dindigul on appeal. A second appeal followed to this Court and the case came before Varadachariar J. who held that the appellant was not entitled to a decree against respondents 1 and 2, as in his opinion there was no charge. The appeal depends entirely on the construction to be placed on the lease, Ex. B, which is dated 1st September 1925. I will quote the relevant passages in the lease:

As I have taken on lease the undermentioned nanja land belonging to you, for a period of three years commencing from this date, agreeing to deliver 60 (sixty) salagais of paddy of peria samba or Nellore samba per year, each salagai consisting of 40 vallams calculated on the basis of your vallams containing Madras pucca 3¼ measures, I shall plough in proper seasons and cultivate the said nanja and irrigate the same whenever water is required therefor. After the crops are fit to be harvested, I shall give you information, harvest them under your supervision, thrash them at the thrashing floor chosen by you, winnow them free from moisture, chaff, etc.. measure out at your door good and dry paddy in respect of the said lease before the 30th Masi of every year without there being any need on your part to remeasure it and obtain receipt from you. I shall also deliver 30 bundles of straw and obtain receipt. I shall myself bear the cart-hire for carrying the said lease paddy, that is 60 salagais of paddy and 30 bundles of straw, from the thrashing floor to your house .... If I thrash the crops without your permission or your watchmen according to the said terms, I shall be liable criminally and for loss on the civil side.

It is conceded, as it must be conceded, that there is here no separate covenant that the rent would be paid in kind out of the crops, but it is said that reading the document as a whole the undertakings of the tenant do amount to a covenant to pay out of the produce of the land. I find myself unable to read the lease in this way. That it was expected that the rent would be paid out of the produce of the land cannot be disputed. This is expected in all cases where land is let on a rental payable in kind. The form of lease in this case is the form which is commonly used in certain parts of the Madras Presidency, and what respondent 3 undertook to do was to cultivate the land, reap the crop and deliver to his landlord the stipulated amount of paddy. But this does not mean that the lessee covenanted that the rent would be paid out of the crop actually reaped by him. I regard the undertakings given by the lessee as being given by way of assurance that the rent would be paid. The learned advocate for the appellant has been unable to point to any authority in support of his contention that the words used amounted to a charge. Leases of this nature being common and having been used for many years it is significant that there is no authority to be found for the proposition now advanced. The learned advocate has referred us to a line of cases which say that if a man undertakes to make payment out of a particular fund there is a charge on that fund; and that line of cases might apply if respondent 3 had covenanted to make payment out of the paddy grown on this land. There was no such covenant and therefore there can be no charge. I agree entirely with the view of Varadachariar J. and would dismiss this appeal with costs in favour of respondents 1 and 2.

Krishnaswami Ayyangar J.—I agree.

C.R.K./N.S. *Appeal dismissed.*

A. I. R. 1938 Madras 941

BURN AND STODART JJ.

A. K. A. A. Audiappa Chetti and others — Appellants.

v.

Taluk Board of Devakottah and others — Respondents.

Second Appeals Nos. 836 to 842 of 1932, Decided on 29th March 1938.

(a) Second Appeal — Suit to recover tax levied under Madras Local Boards Act and for injunction restraining Board from levying it in future is not of small cause nature.

A suit to recover the tax levied under Local Boards Act and for a declaration that it was illegally levied and for an injunction restraining the

Board from levying it in future is not of a small cause nature: *A I R 1933 Mad 22, Rel. on.*

[P 942 C 2]

(b) Madras Local Boards Act (14 of 1920), S. 93 — Receipt of money within Local Board area by person within area out of income of his foreign money-lending business from his foreign agent amounts to receipt of income from money lending.

Receipt of money within the Local Board area by a person residing within the area out of the income of his foreign money lending business from his foreign agent, amounts to receipt of income from money lending within such area, within the meaning of S. 93. It does not make any difference that the profits accruing from the business are actually earned elsewhere and pass first through the hands of some agent or partner before they reach the hands of the principal. Even assuming that these remittances in some subtle way lose their character of "income from money lending" they still continue to be income from a certain definite source, which is not "lands or houses inside the local limits of the area" and hence the person is taxable in respect of those remittances on that ground also: *A I R 1932 Mad 509, Appr.*

[P 943 C 1]

(c) Madras Local Boards Act (14 of 1920), S. 93—Assessee must be assessed to half yearly tax within the half year to which tax relates.

The effect of S. 93 and S. 9 of Sch. 4, is that persons liable to the tax shall pay a half yearly tax on their professional income on being assessed to the tax in the manner laid down in Sch. 4, that is to say when the President has decided in which of the classes enumerated in the scale, each person falls. The assessee must be assessed to the half yearly tax within the half year to which the tax relates; in other words he cannot be assessed retrospectively. To allow the tax to be assessed after the close of the half year is inconsistent with the scheme of the Local Boards Act. Hence if the assessee is not assessed by the President for the first half year in that period he is not taxable for that period: *A I R 1930 Mad 200, Applied.*

[P 943 C 2; P 944 C 1, 2]

P. R. Srinivasan — *for Appellants.*

V. Ramaswamy Iyer—*for Respondents.*

Order. — It is necessary for the disposal of these second appeals to decide whether receipt of money within the Local Board area by a person residing within the area out of the income of his foreign business from his foreign agent, amounts to receipt of income within such area, within the meaning of S. 93, Madras Local Boards Act, and the Bench decision on the point in 55 Mad 853[1] was doubted in C. R. P. No. 1519 of 1931 which for that reason has been referred to a Bench. The second appeals will also be posted before a Bench.

In pursuance of the above order, the Court delivered the following:

Judgment.—These seven appeals depend on the same issues of law and fact. Plaintiffs are the appellants. The cause of action is that they were assessed to profession tax in respect of a certain kind of income in the year 1928.1929 by the Taluk Board, Devakottah. The Board is the respondent. The suits were to recover the tax and for a declaration that it was illegally levied and for an injunction restraining the Board from levying it on such income in future. The learned Subordinate Judge, Devakottah, reversing the trial Court's decree dismissed the suits. It is objected by the learned advocate for the respondents that under S. 102, Civil P. C., no second appeal lies, since the suits are of a small cause nature, being merely to recover small sums of money. But the suits are, in addition, and perhaps mainly, for an injunction restraining the Board from taxing in future a particular kind of income which according to the appellants is not taxable as professional income under the Local Boards Act. The same point was raised and overruled in S. A. No. 882 of 1928=36 M L W 659.[2] We overrule it again.

Admittedly appellants resided in the area of the Local Board for more than 60 days in each half year of the year beginning 1st April 1928 and ending 31st March 1929. Admittedly they received money by means of remittances from their places of business in Burma where they carried on the trade of money-lending. On these remittances the appellants were assessed to profession tax under Ss. 93 and 96 of the Act then in force, namely the Madras Local Boards Act 14 of 1920. They contend that this kind of income is not taxable under that Act and the principal question for decision in these appeals is whether the lower Appellate Court was wrong in holding that it was. The question has to be decided on a construction of the taxing Sections of the Act. The relevant Section is S. 93. It is as follows:

If the President of the District Board publishes a notification under S. 77, that a profession tax shall be levied in any local area, every person who within such area, and for the period laid down in S. 96, exercises a profession, art, trade or calling, or is in receipt of any income from money-lending or any source other than houses and lands inside the local limits of the area notified under S. 77, bringing him within one or more of the classes specified in Sch. 4, shall pay a half-yearly tax on his professional income, on the scale shown in the said schedule.

The case of the appellants is that the money derived from their money lending

1. Manickavasagam Chetti v. Union Board of Devakottah, (1933) 20 A I R Mad 92=138 I C 607=55 Mad 853=63 M L J 741.

2. Chockalingam Chettiar v. Taluk Board, Devakottah, (1933) 20 A I R Mad 22=140 I C 273 36 M L W 659.

business in Burma is income when it accrues in Burma to their agents or partners there but is not income when it, or part of it, is remitted to the appellants in Devakottah. Therefore they contend, they are not in receipt of any income from money lending in Devakottah. No authority is cited for this position. The remittances on which the appellants have been taxed are admittedly derived from their money-lending business in Burma; and the appellants, in the words of S. 93, are "in receipt" of these remittances when they come into their hands in Devakottah. We think it is plain that these remittances are "income from money lending." We do not think it makes any difference that the profits accruing from the business are actually earned elsewhere and pass first through the hands of some agent or partner before they reach the hands of these appellants.

This exact point has already been decided by a Bench of this Court in 55 Mad 848.[3] The facts in that case were exactly the same as in these appeals. We respectfully agree with that decision. The same argument that income cannot be received as income more than once was raised in that case and negatived. On this ground of appeal therefore the appellants must fail. Apart altogether from the fact that appellants are liable as being in receipt of income from money lending it appears to us that they are liable on another ground. S. 93 embraces three classes of persons (a) persons who within such area exercise a profession, art, trade or calling (b) or are in receipt of any income from money lending, (c) or are in receipt of any income from any source other than lands or houses inside the local limits of the area. Conceding for the sake of argument that in the process of transmission to Devakottah these remittances in some subtle way lose their character of "income from money lending," they still continue to be income from a certain definite source, which is not "lands or houses inside the local limits of the area." It appears to us therefore that the appellants are persons who are taxable in respect of those remittances on that ground also. Two further objections are raised in these appeals. Both have reference to the method of taxation. The tax is a half-yearly tax. The appellants object that they have not been assessed at all in the first half year and so are not liable to pay the tax for that half-year; and that they have not been legally assessed in the second half-year. S. 93 after describing the kinds of income which are assessable to the tax, provides that persons in receipt of such income shall pay a half-yearly tax on it on the scale shown in Sch. 4. And S. 9 of Sch. 4 is

> Persons liable to the profession tax shall be classified by the President of the Local Board and assessed to the profession tax on a scale proceeding proportionately to the following maximum scale, or on the maximum scale, as the case may be, and the President may from time to time revise such classification.

Then follows the scale. The effect of Ss. 93 and 9 of the schedule, therefore is that persons liable to the tax shall pay a half-yearly tax on their professional income on being assessed to the tax in the manner laid down in Sch. 4 that is to say when the President has decided in which of the classes enumerated in the scale, each person falls. The tax in these appeals relates to two half-years namely the half-year ending 30th September 1928 and the half-year ending 31st March 1929. The appellants were not assessed by the President for the first of these periods and their contention is that they are not taxable for that period. What happened was that in January 1929, that is to say, towards the close of the second half-year, the President classified the assessees as having been, for the whole year, in receipt of an uniform monthly income of so much per month, and imposed a tax amounting in each case to twice the appropriate half-yearly tax. The appellants contend that this procedure is illegal. Their case is that they must be assessed to the half yearly tax within the half-year to which the tax relates; in other words that they cannot be assessed retrospectively. We think that this contention must prevail. The point has been decided in 52 Mad 866[4] on a construction of the provisions of the Madras City Municipal Act (4 of 1919) which in our opinion are similar in principle in this respect to the Madras Local Boards Act (14 of 1920). That is a very exhaustive judgment and we feel that we cannot add anything useful to the reasoning of the learned Judges Waller and Krishnan Pandalai who decided the case. It is contended by the

3. Perianan Chetty v. Taluk Board, Devakottah, (1932) 19 A I R Mad 509=138 I C 600=55 Mad 848=63 M L J 148.

4. Prince of Arcot v. Corporation of Madras, (1930) 17 A I R Mad 200=122 I C 360=52 Mad 866=57 M L J 536.

learned advocate for the respondent Board that Ss. 111 and 113, Madras City Municipal Act, which are the taxing Sections of that Act differ from Sec. 93, Local Boards Act, in an important particular namely that they require a determination of the tax to be made by the taxing authority before the tax becomes leviable. The relevant words of S. 113 of that Act are :

> If, for 60 days in the aggregate in any half year any person exercises a profession etc., rendering him liable to the profession tax such person shall become liable for the profession tax and if the tax due in respect of the half year is not paid, the Commissioner shall cause a notice to be served on such person to pay it within 15 days.

And S. 111 is :

> Every person who within the City and for the period prescribed in S. 113 exercises a profession etc. bringing him within one or more of the classes of persons specified in the taxation rules in Sch. 4 shall pay a tax as determined under the said rules.

And Sch. 4 is as regards profession tax :

> Persons shall be assessed by the Commissioner to the profession tax under the following classes on a scale to be determined by the Council from time to time.

The argument of the learned advocate for the respondent Board is that under the Local Boards Act a person becomes liable to pay the tax for any particular half year by the mere fact of his receiving an income which is taxable under S. 93; while under the Municipal Act a person does not become liable until he is assessed by the Commissioner under the taxation rules. We do not think that this distinction can be made. Under S. 93, liability accrues when a person exercises a profession or receives an income "bringing him within one or more of the classes of persons specified in Sch. 4". And turning to S. 9 of Sch. 4 we find that he does not come within any of the said classes till he is "classified" by the President. In other words the President before assessing any one to tax is bound to determine in which class of the schedule he falls, just as the Commissioner under the taxation rules which apply to the City has to do exactly the same thing. In substance we think there is no difference between the two Acts. The concluding words of the substantive portion of S. 93, Local Boards Act, namely "shall pay a half yearly tax on his professional income on the scale shown in the said schedule (Sch. 4)", mean by implication that the President has to determine the assessee's place in the scale and in that manner determine the amount of the tax. We observe also that this determination by the President is not final. An assessee is at liberty under S. 11 of the Schedule to have his place in the scale and therefore the amount of his tax revised by the President on producing his accounts and demonstrating that he should be placed lower in the scale.

But even if for the sake of argument it is conceded that there is this difference between the two Acts, does that prevent the principle in 52 Mad 866[4] from applying to the facts of the present cases. The broad facts are that this is a half yearly tax, that it is assessed by the taxing authority at rates proportionate to the monthly income accruing during that half year, and that it is leviable in the half year itself. The principle of the case cited is that to allow the tax to be assessed after the close of the half year is inconsistent with the scheme of the Municipal Act which in these broad aspects, does not differ from the Local Boards Act. Following that decision we must allow these appeals to this extent namely that the tax for the first half year was illegally imposed and is recoverable by the appellants.

Lastly it is urged that even in respect of the second half year the assessment is illegal inasmuch as there is no separate assessment for that half year. We think that this objection is one of form and not of substance. The order of assessment in each case stated that the assessees received an income of so much per month during the whole year and that he was assessed to a tax which on reference to the schedule, is seen to be twice the half yearly tax appropriate to such monthly income. We think that this clearly means that for the second half year the assessee received a monthly income of the amount stated and was liable to pay a tax amounting to half of the amount at which he was assessed. In the result, we allow these appeals to the extent stated namely that the appellants are entitled to recover half of the tax paid by them for the year 1928-1929, representing the tax for the first half of that year. To that extent the decree of the lower Appellate Court is modified. For the rest the appeals are dismissed. Appellants to receive half their costs throughout from the Local Board respondent and the latter to pay its own costs throughout.

C.R.K./D.S. *Decree modified.*

A. I. R. 1938 Madras 945

KING J.

Ayinan Chettiar and others —
Appellants.

v.

K. R. Ramaswami Ayyar and others —
Respondents.

Second Appeal No. 1081 of 1933, Decided on 1st February 1938, against the decree of Sub.Judge, Trichinopoly, in A. S. No. 13 of 1933.

Execution — Death of judgment-debtor — Decree-holder in application for execution stating certain person as heir of judgment-debtor – Court issuing notice on that person and adding him to be legal representative though in fact not heir of judgment-debtor — Person remaining ex parte throughout—Sale of property in execution—Sale held not without jurisdiction.

That in all cases in which a person without any interest to defend the estate is impleaded as legal representative, there is want of jurisdiction cannot be put forward as a rule of law. It is the Court's duty to receive an application for execution against the L. R. of the deceased judgment-debtor and to issue notice to the person put forward as L. R. by the decree-holder and to decide, if necessary, whether that person is the L. R. or not. If it decides that that person is the true L. R. when in fact he is not, that is merely a wrong decision, and a Court has jurisdiction to decide wrong as well as right. It makes no difference whether the Court declares a man to be a L. R. after hearing him or makes the same order if he remains ex parte.
[P 946 C 1, 2]

In an execution petition the decree-holder stated that the deceased judgment-debtor's only heir was his daughter-in-law. Notice after notice was issued to her and finally she was added by the Court as L. R. of judgment-debtor though in fact she was not judgment-debtor's heir. She remained ex parte throughout. The property of the judgment-debtor was then sold in execution :

Held that the sale was not without jurisdiction: *25 Bom 337 (P C), Applied; 32 Cal 296 and A I R 1914 P C 129, Disting.* [P 946 C 1,2]

Judgment.—The subject-matter of this appeal is property which admittedly once belonged to one Ramachandra Aiyar. In O. S. No. 5 of 1905 a money decree was obtained against Ramachandra Aiyar. In 1910 Ramachandra Aiyar died. By 1915 the rights of the decree-holder had passed to the present defendant 1. The suit property was sold in execution of the decree at defendant 1's instance on 11th July 1917 and was purchased by one Venkatarama Aiyar who obtained delivery through Court on 3rd February 1918. In June 1918 Venkatarama Aiyar sold the property to defendant 2 from whom some years later defendants 3, 4 and 5 obtained mortgage rights. The present suit was brought by the plaintiff on 1st February 1930, claiming to be the adopted son of Ramchandra Aiyar, for the recovery of the property on the ground that the sale in 1917 having been held in proceedings to which he was not a party did not bind him, and was null and void in that the estate of his father Ramachandra Aiyar was not properly represented in those proceedings. The facts in regard to the representation of Ramachandra Aiyar's estate in the execution petition are as follows: Defendant 1 first attempted to implead a person named as Subramania Aiyar and stated to be Ramachandra Aiyar's adopted son. Notice was not apparently served on any such person who admittedly did not exist with that name. Then he filed an affidavit in February 1916 in which he stated that the adopted son is 'said to have died about May 1915' and that Ramachandra Aiyar's only heir was his daughter-in-law, Lakshmi Ammal. Notice after notice was issued to Lakshmi Ammal and finally she was added by the Court as L. R. of Ramachandra Aiyar. She remained ex parte throughout. She was in fact the widow not of any adopted son but of a predeceased natural son of Ramachandra Aiyar so that the statement that she was Ramachandra Aiyar's heir is not correct.

On these facts it was contended by the plaintiff that defendant 1 had deliberately and fraudulently kept the knowledge of the execution petition from him, but no attempt was made to prove this, and both Courts find that there is nothing at all to show that defendant 1's actions were not bona fide. The second appeal has accordingly been argued on the common ground that defendant 1 honestly attempted to implead the correct L. R. Plaintiff's name is Ramaswami Aiyar. His adoption was challenged in the suit, but both Courts found in favour of it and that fact too is now common ground. There can be little doubt that plaintiff has no practical grievance at all in this suit, and relies entirely on legal technicalities. His plaint gives no hint whatever of the reason for his 12 years of supposed ignorance except the bare statement, "I have been in Karur for a long time." He does not assert that if he had had notice of the execution petition he could have done anything to avert the sale or influence the price which it fetched. He has not ventured to give any evidence.

The learned District Munsif indeed shrewdly suspects that plaintiff was well aware of the execution petition and deliberately chose to take no action to save his property, and though there is no proof of this knowledge, I feel sure that the District Munsif is right.

These equitable considerations cannot however prevent an examination of the legal position. The learned District Munsif held that this case is governed by the principles laid down by the Privy Council in 25 Bom 337[1] and that it cannot be said that the sale was without jurisdiction. In appeal the learned Subordinate Judge held, without considering 25 Bom 337[1] that the true criterion was whether the person impleaded as L. R. had any present interest to defend the estate. In so holding he relied upon certain passages in 60 M L J 97.[2] Holding further that Lakshmi Ammal had no such interest (this finding cannot seriously be challenged), he reversed the decree of the learned District Munsif and decreed the suit.

It is conceded by the learned advocate for the plaintiff that unless the sale in 1917 can be shown to be without jurisdiction his client has no case. That in all cases in which a person without any interest to defend the estate is impleaded as L. R. there is want of jurisdiction cannot be put forward as a rule of law because in 25 Bom 337[1] the person actually impleaded was impleaded in spite of his own renunciation of all interest in the estate and yet the sale was held good until set aside. The true method of approach to this case therefore seems to me to be to analyze the reasoning of 25 Bom 337[1] and see whether it applies or not. That reasoning is this. It is the Court's duty to receive an application for execution against the L. R. of the deceased judgment-debtor and to issue notice to the person put forward as L. R. by the decree-holder and to decide, if necessary, whether that person is the L. R. or not. If it decides that that person is the true L. R. when in fact he is not, that is merely a wrong decision, and a Court has jurisdiction to decide wrong as well as right. Now the only point which differentiates 25 Bom 337[1] from the present case is this. In 25 Bom 337[1] the proposed L. R. appeared in response to the notice served upon him and objected to his being impleaded and the Court overruled his objection. In the present case Lakshmi Ammal did not appear, and the Court accepted her as the L. R. in her absence. This difference, it is argued by the learned advocate for the respondent is fundamental but I cannot see on what principle a Court which has jurisdiction to declare a man to be a L. R. after hearing him, has no jurisdiction to make the same order if he remains ex parte.

It is contended for the respondent that in two later rulings the Privy Council has so interpreted 25 Bom 337[1] as to make it inapplicable to the facts of the present case. The first of these is 32 Cal 296.[3] There is no doubt (see p. 314) reference is made to the Judges 'accepting without question' statements that Amirbaksh was L. R. of Naurez and that Alahanawaz was his guardian, but this was in a suit and not by an order in an execution petition and in fact Alahanawaz was not Amirbaksh's guardian. It was therefore a case in which whatever Amirbaksh's connexion with Naurez's estate may have been, Naurez's estate could not possibly be represented by a minor for whom no guardian ad litem had been appointed and therefore the estate was in law represented not by a wrong L. R. but by no one. The other case is 42 Cal 72.[4] There, the distinguishing factors were (i) that no proper notice was served upon the L. R. and (ii) that the respondents were responsible for this irregularity, factors neither of which exists in the present case. It seems to me therefore that neither 32 Cal 296[3] nor 42 Cal 72[4] is of any assistance to the respondent in the present appeal. They do not touch the fundamental requisites of jurisdiction, that the Court should issue notice to the proposed L. R. and that the Court should direct execution to proceed against him: O. 21, Rr. 22 and 23. Incidentally also they are both instances where the opposite party cannot plead bona fide conduct. I am therefore of opinion that the learned District Munsif was right when he held that 25 Bom 337[1] applies to the facts of this case. I set aside the decree of the learned Subordinate Judge and allow this appeal dismissing

1. Malkarjun v. Narhari, (1901) 25 Bom 337=27 I A 216=7 Sar 739=2 Bom L R 927 (P C).
2. Chaturbujdass Kushaldoss & Sons v. Rajamanicka Mudali, (1930) 17 A I R Mad 930=129 I C 469=54 Mad 212=60 M L J 97.
3. Khairajmal v. Diam, (1905) 32 Cal 296=32 I A 23=8 Sar 734=9 C W N 201=1 C L J 584 (P C).
4. Raghunath Das v. Sundar Das Khetri, (1914) 1 A I R P C 129=24 I C 304=42 Cal 72=41 I A 251 (P C).

plaintiff's suit with costs of the contesting defendants throughout. Leave refused.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 947

HORWILL J.

D. Chockalingam Chettiar — Appellant.

v.

T. S. P. L. P. Palaniappa Chettiar and another — Respondents.

Appeal No. 278 of 1934, Decided on 24th January 1938, against order of Dist. Court, South Arcot, D/. 24th October 1933.

Insolvency—Insolvency Court can go behind decree and ascertain whether decree debt is true or not if it believes that decree was obtained by fraud, collusion or is unjust.

No judgment or decree is binding on the Insolvency Court. The business of an Insolvency Court is to ascertain whether a debt is true or not, and although the judgment and decree are binding on the parties to it whether the debt is true or false and whatever the judgment and decree might be, yet the Insolvency Court is not so bound; for the Insolvency Court will not and should not ordinarily go behind the decree unless it has reason to believe that the decree was brought about by fraud or collusion or is unjust: *(1886) 16 Q B D 315 and (1907) 2 K B 23, Rel. on.* [P 948 C 1]

A trust, through a former trustee, executed a mortgage bond in favour of two insolvents and their brother. On this bond a mortgage suit was brought and decree obtained against the plaint institution. Subsequently, another trustee brought a suit to have it declared that the mortgage decree was not binding on the plaint trust and for refund of a certain amount which had been paid under the decree obtained by the insolvents and their brother. He was successful in the trial Court; but the insolvents and their brother, who were defendants 1 to 3 in the suit, filed a joint appeal against the decree. During the pendency of the appeal, defendants 1 and 2 became insolvents and died before the appeal came on for hearing. The Official Receiver did not come on record. The Appellate Court, apparently in ignorance of the fact that defendants 1 and 2 had become insolvents, declared that the appeal of defendants 1 and 2 had abated; and so the appeal against them was dismissed. Defendant 3, on precisely the same grounds of appeal as defendants 1 and 2 had raised, was successful; and it was held that the mortgage in question was binding on the plaintiff institution. On the strength of this judgment and decree passed in appeal, the trust sought to prove for the amount of the decree debt in the Insolvency Court :

Held that an injustice had resulted from the non-appearance on the record of the Official Receiver. The Insolvency Court was therefore entitled to go behind the decree and to say that the judgment debt of the trust was not a true one, and it mattered not whether the Official Receiver was a party to the appeal or not : *A I R 1930 Mad 751 and (1889) 22 Q B D 83, Disting.*

[P 948 C 2 ; P 949 C 1]

S. Nagaraja Iyer — *for Appellant.*

K. R. Rangaswamy Iyengar — *for Respondents.*

Judgment.—The appellant trust, through a former trustee, executed a mortgage bond in favour of the two insolvents and their brother. On this bond a mortgage suit was brought and a decree obtained against the plaint institution. In O. S. No. 8 of 1924 on the file of the Sub-Court, Negapatam, the plaintiff, another trustee, brought a suit to have it declared that the mortgage decree was not binding on the plaint trust and for refund of a certain amount which had been paid under the decree obtained by the insolvents and their brother. He was successful in the trial Court; but the insolvents and their brother, who were defendants 1 to 3 in the suit, filed a joint appeal against the decree in O. S. No. 8 of 1924. During the pendency of the appeal defendants 1 and 2 became insolvents and died before the appeal came on for hearing. The Appellate Court, apparently in ignorance of the fact that defendants 1 and 2 had become insolvents, declared that the appeal of defendants 1 and 2 had abated; and so the appeal against them was dismissed. Defendant 3, on precisely the same grounds of appeal as defendants 1 and 2 had raised, was successful; and it was held that the mortgage in question was binding on the plaintiff institution. On the strength of this judgment and decree passed in appeal, the appellant has sought to prove for the amount of the decree debt in O. S. No. 8 of 1924 in the Insolvency Court; and the learned District Judge has held that the decree passed in O. S. No. 8 of 1924 and confirmed in appeal as far as the insolvents are concerned, is not binding on the creditors; and he has held that the debt is not a true one. The plaintiff-trustee in this appeal contends that the decree was a proper one, free from fraud and collusion; and that therefore the Insolvency Court ought not to have gone behind the decree and, secondly, that in fact the then Official Receiver did have knowledge of the pendency of the appeal and did not take the trouble to come on record; and that he is therefore precluded from claiming that the decree of the Appellate Court is not binding on him. The third contention is that if the Insolvency Court goes behind the decree of this Court, it should reconsider the whole question whether the mortgage debt is binding on the appellant institution.

It is not denied that in certain circumstances the Insolvency Court can refuse to admit a judgment debt. The leading case on the question as to how far an Insolvency Court should consider itself bound by a decree is (1886) 16 Q B D 315,[1] and it will be seen therefrom that no judgment or decree is binding on the Insolvency Court, that the business of an Insolvency Court is to ascertain whether a debt is true or not, and that although the judgment and decree are binding on the parties to it whether the debt is true or false and whatever the judgment and decree might be, yet the Insolvency Court is not so bound ; for the Insolvency Court will not and should not ordinarily go behind the decree unless it has reason to believe that the decree was brought about by fraud or collusion or is unjust. As pointed out by Lord Esher in the case above referred to, a judgment is prima facie evidence of the correctness of the debt. He says :

> It cannot be doubted that a judgment is prima facie evidence of a debt, and that a judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him. Nevertheless, it seems to me that upon certain allegations being brought forward, the Court is entitled to inquire into the alleged debt ; and the Court, exercising a judicial authority, is bound to do so upon a sufficient cause being shown.

This principle has been followed in (1907) 2 K B 23[2] in which Cozens-Hardy M. R. quotes with approval a passage in the judgment of Bigham J., which was the subject of appeal :

> The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

Reference has been made by the learned advocate for the appellant to 59 M L J 321,[3] a judgment of Ramesam and Cornish JJ. In that case there was only one creditor and only one debt ; and it was contended by the insolvent that the decree was passed ex parte. The judgment-debtor, who became insolvent, contended that he was not properly served with summons in the case and that the debt was a fictitious one. Ramesam J. in his judgment, states his opinion that it was not a case to which the principles enunciated in (1886) 16 Q B D 315[1] and (1907) 2 K B 23[2] could be usefully applied ; for, if the debt was a fictitious one, the Official Assignee had no jurisdiction at all. The learned advocate for the appellant relies not so much upon the decision in this case as upon a remark in the judgment of Lord Esher in (1889) 22 Q B D 83[4] to the effect that

> the Court of bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition.

Applying the above principles to the facts before us, it seems clear that the Insolvency Court is entitled to go behind the decree of this Court above referred to if it is obviously an unjust decree which could not be enforced without doing injustice to the creditors represented by the Official Assignee. The decree against the insolvents and defendant 3 in O. S. No. 8 of 1924 was a joint decree ; and there is no difference at all between the cases of the defendants and their brother, defendant 3; and in fact they filed a common appeal with common grounds of appeal. It follows therefore that if the legal representatives of the insolvents and the Official Receiver had been on the record they would necessarily have succeeded ; so that it is quite clear that an injustice has resulted from the non-appearance on the record of the Official Receiver. The Insolvency Court was therefore entitled to go behind the decree and to say that the judgment debt of the appellant was not a true one.

It is next contended that even if the decree be re-opened the Insolvency Court ought to reconsider the question whether the mortgage debt was really binding on the plaintiff institution and whether the trial Court in O. S. No. 8 of 1924 was not right in giving a decree in favour of the appellant and this Court in appeal wrong. As has been laid down by the authorities cited above, if there is no reason to think that the judgment and decree are wrong the Insolvency Court is bound to follow that judgment and decree. The Insolvency

1. Ex parte Lennox; In re Lennox, (1886) 16 Q B D 315=55 L J Q B 45=54 L T 452=34 W R 51.
2. In re Van Laun; Ex parte Chatterton, (1907) 2 K B 23=76 L J K B 644 = 97 L T 69=14 Manson 91=51 S J 344=23 T L R 384.
3. Narasimha Sastri v. Official Assignee of Madras, (1930) 17 A I R Mad 751 = 129 I C 650=59 M L J 321.
4. In re Flatau; Ex parte Scotch Whisky Distillers, (1889) 22 Q B D 83=37 W R 42.

Court in this case would not be justified in considering whether Venkatasubba Rao and Cornish JJ. in Appeals Nos. 360 and 361 of 1925[5] are right or whether the trial Court is right. There is naturally a strong presumption that the Appellate Court was right; and only if the appellant was able to show that in some way a miscarriage of justice had been brought about in the Appellate Court, would the Insolvency Court be bound to consider whether the decision of the Appellate Court was right or not. The appellant has not been able to do that; and the lower Court was therefore justified in holding on the strength of the judgments in Appeals Nos. 360 and 361 of 1925[5] that the debt of the appellant was not a true one.

The present case is slightly different from those that have been quoted before me, in that it is alleged in the affidavits of the appellant filed in the Court below that the Official Receiver was aware of the existence of the proceedings and yet did not take the trouble to get himself brought on record. There is no reason to think that there was a wilful default and that the Official Receiver who had charge of the insolvent's estate at the time of the hearing of Appeals Nos. 360 and 361 of 1925[5] failed or neglected his duty. Assuming however that the Official Receiver did negligently fail to bring himself on record, I cannot say on the principle enunciated above that this would in any way make the case of the appellant any stronger. If the Insolvency Court is entitled to go behind the judgment and decree, it should consider whether the alleged debt is true or not; and it matters not whether the Official Receiver was a party to the appeal or not. The appeal therefore fails and is dismissed with costs of respondent 2.

C.R.K./D.S. *Appeal dismissed.*

5. Venkataraman v. Sivagurunatha Chettiar, *reported in* (1933) 20 A I R Mad 639 = 144 I C 584.

A. I. R. 1938 Madras 949

PANDRANG ROW J.

Public Prosecutor — Appellant.

v.

Chikka Rangan and others —

Respondents.

Criminal Appeals Nos. 683 to 689 of 1937, Decided on 2nd August 1938, against acquittal by Court of Bench Magistrates, Ootacamund, in S. C. Nos. 859 to 865 of 1931, respectively.

Prevention of Cruelty to Animals Act (1890), S. 3 (a)—Scope — Question whether there was overloading or not is to be decided on facts by Magistrate.

Whether the Local Government have determined the maximum weight to be carried by pack ponies and whether the District Magistrate's orders to that effect have been published in the local gazette are not necessary requirements for the determination of a case on the merits. Magistrates have to decide whether as a matter of fact there was overloading or not, and decide the case in accordance with their finding on that point.

[P 949 C 2]

Appellant in person.

L. V. Krishnaswamy—*for Respondents.*

Judgment. — These appeals raise the same question. The Bench Magistrates of Ootacamund acquitted the accused in these cases, who were charged with having overloaded their pack ponies and thereby committed an offence punishable under S. 3 (a), Prevention of Cruelty to Animals Act, 11 of 1890. The acquittal was pronounced without hearing any evidence, and on the preliminary point that under Ss. 1 and 2, Prevention of Cruelty to Animals Act, the Local Government have to determine the maximum weight to be carried by pack ponies, and that as the determination has not been made and the District Magistrate's orders had not been published in the local gazette, the prosecution was incompetent. The whole of this reasoning proceeds on a misconception of the law on the subject and there can be no doubt that these requirements are not necessary for a determination of the case on the merits. It is for the Bench Magistrates to decide whether as a matter of fact there was overloading or not, and decide the cases in accordance with their finding on that point. The orders of acquittal are therefore set aside and the cases are remitted to the Bench Magistrates for retrial according to law. It has been urged by the advocate who appears for the respondents that the alleged offence was, if at all, committed in a place to which the Prevention of Cruelty to Animals Act has not been extended. This is however a point which should be determined during the retrial and I have no doubt the Bench Magistrates will deal with the point and decide it. It is unnecessary for me, and indeed it is not possible for me on the materials on record, to say whether there is any substance in the point or not.

C.R.K./N.S. *Cases remitted for retrial.*

A. I. R. 1938 Madras 950

WADSWORTH J.

Mukkamala Hanumayamma —

Appellant.

v.

Kasineni Lakshmidevamma and another — Respondents.

Second Appeal No. 123 of 1934, Decided on 2nd August 1938, against decree of Dist. Court, Guntur, in A. S. No. 191 of 1931.

(a) Minor—Discharge by de facto guardian—Validity—De facto guardian validly in charge of minor's affairs can give good discharge in respect of debt due to minor.

A de facto guardian who is validly in charge of the minor's affairs may for the benefit of that minor give a good discharge in respect of a debt due to the minor. A de facto guardian of a Hindu minor can do those acts in the interests of the minor which can be done by a de jure guardian of that minor: *6 M I A 393 (P C) Ref.; A I R 1937 Mad 280, Not foll.* [P 951 C 2]

(b) Minor—De facto guardian—Powers of—Ordinarily first act of intermeddling with estate of minor would not be act of de facto guardian, if he has not already become one before hand—Nor subsequent management of estate make the first act as one of de facto guardian—Position of de facto guardian recognized by those interested in minor before any act of intermeddling has been accomplished—Courts might recognize the first act of such person as binding on minor.

A de facto guardian is one who looks after the property of the minor and generally acts in his interests for the time being. A fugitive or an isolated act of a person with regard to the minor's property would not make him a de facto guardian of the minor, nor would staying with a minor for a time make him a de facto guardian. There must be a continuous course of conduct as guardian of a minor in regard to his property in order to enable one to become a de facto guardian. The length of the period required to constitute one a de facto guardian would depend upon the circumstances of each case. Ordinarily, the first act of intermeddling with the estate of a minor would not be the act of a de facto guardian, if he had not become one before the act; nor would the subsequent management of the estate of the minor by such person make the first act, the act of a de facto guardian. Where, however, the position of the de facto guardian has been recognized in the family and by those mainly concerned, before any intermeddling act of a formal nature affecting the minor has been accomplished, the Courts might recognize the first act of such guardian as binding on the minor. The question must be whether in the eyes of the family of the minor and those interested in the welfare of the minor the person who makes an alienation or receives payment is, at the time of the transaction impeached, regarded by common consent as a person who is entitled to act on behalf of the minor. If there is such a general recognition, then once the person recognized has consented to act as guardian, it would not be necessary to wait for a series of transactions in the capacity of a guardian in order to clothe that person with authority to represent that estate. The question is essentially one of fact. If the intermeddler is a self-constituted guardian who comes into being for no other purpose than to carry out an isolated transaction, which transaction is of very doubtful advantage to the minor's estate, then there could be no such general recognition of the alleged guardian as would clothe him with authority and clearly there could be no such course of conduct as might take the place of or supplement the general recognition: *A I R 1929 Mad 110 and A I R 1927 Bom 611, Rel. on.* [P 952 C 1,2]

V. Govindarajachari and K. Krishnamurthi — *for Appellant.*

K. Kottayya — *for Respondents.*

Judgment.—This appeal raises an interesting question regarding the position of a person who starts to intermeddle with the estate of a minor and involves a decision as to what it is that first gives to that person the status of a de facto guardian. The appellant is the plaintiff who sued to recover a legacy of Rs. 1700 due to her under the will of her deceased husband. Defendant 1 is the sister of the deceased husband and executrix of his will. Defendant 2 is the mother of the plaintiff and the alleged de facto guardian. Defendant 3 is the brother of the deceased husband. The facts as found by the lower Courts are as follows: The plaintiff was 15 years old when her husband died on or about 10th February 1918. At that time she had been living with her husband for about a year. Shortly after the death of her husband, her mother, defendant 2 who does not contest the suit and has not given evidence, demanded on behalf of her daughter, the plaintiff, the money and lands due to the plaintiff under the will of the husband and at the same time threatened that, if payment was not made at once, the plaintiff would not be allowed to take part in the funeral ceremonies, the importance of which was recognized by all parties. Under this pressure an arrangement was made whereby on 22nd February 1918, that is, approximately 12 days after the death of the husband, defendant 1's husband executed a promissory note, Ex. I, for not only the legacy of Rs. 1700 but also for an amount of Rs. 408 which is described as interest on this legacy, apparently based on the identification of this legacy, with the katnam present to the deceased husband paid by the plaintiff's parents at the time of marriage, interest being calculated from the date of the giving of the present. The promissory note also covered an amount due to the minor for paddy and the promisor

undertook to pay interest at 12 per cent. This was on 22nd February. At the same time the plaintiff's mother received the lands bequeathed to the plaintiff and gave a receipt in token of the discharge of the legacy in Ex. II. Thereupon, the ceremonies went on and the plaintiff stayed in her mother.in.law's house for three months, a period which is more or less obligatory by the custom of the community. Just at the end of this period, two payments were made under Ex. I whereby the debt incurred by defendant 1's husband in discharge of the legacy to plaintiff was wiped off by payment to the plaintiff's mother. It must be observed that the actual discharge of the legacy was not by these cash payments but by the receipt dated 22nd February 1918, Ex. II. Admittedly after the cash payments had been made, the plaintiff left the house of her mother.in.law and went to live under the protection of her mother, defendant 2, and there she stayed for the rest of her minority. Although the plaintiff is not now living with her mother, it is found by the lower Courts that she only left her mother's house mainly for the purpose of the present case and that there is no real conflict between the two. It is also found as a matter of fact that ever since the plaintiff left the house of her mother.in.law, her affairs have been managed by her own mother, defendant 2.

The question is whether, on these facts, defendant 1, having arranged for the discharge of the legacy by delivery of the lands to the plaintiff's mother and by execution of the promissory note in her favour which promissory note was shortly afterwards discharged by defendant 1's husband, can be made to pay the legacy once more to the plaintiff herself. There is no finding of fact that the money paid to the plaintiff's mother has in actual truth been received by the plaintiff herself. Both the learned Judges of the Courts below appear to have conjectured that this may be so. They however base their decisions on the position that defendant 2 was the de facto guardian who could give a good discharge to defendant 1 and they have given a decree to the plaintiff against her mother only on the footing that the money is or should be with the mother and can be claimed only from her. I have therefore to decide whether defendant 2 was on the date when she gave the receipt, Ex. II, that is to say, on 22nd February 1918, the de facto guardian and whether she could give a valid discharge to the executrix in respect of the legacy to the plaintiff.

My attention has been drawn to one case in which a learned Judge of this Court has expressed a doubt as to the capacity of a de facto guardian to give a valid discharge on behalf of the minor: A I R 1937 Mad 280.[1] With the greatest respect to the learned Judge who made the observation referred to, it seems to me essential to hold that a de facto guardian who is validly in charge of the minor's affairs may for the benefit of that minor give a good discharge in respect of a debt due to the minor. There is a long line of authority beginning from 6 M I A 393[2] for the view that a de facto guardian of a Hindu minor can do those acts in the interests of the minor which can be done by a de jure guardian of that minor; and I am not aware of any infirmity of the position of the de facto guardian of the minor, once it has been established that he is the rightful guardian though not appointed by any process of law—disentitling him to do those acts which a de jure guardian can validly do. The difficulty in the present case however is that it raises the question of the first point of time at which the mother can be said to have begun to be the de facto guardian. The phrase "de facto guardian," necessarily connotes a guardian who is such a guardian as a result of something which has happened previously. 'De facto' literally means 'from that which has been done' and this basic conception of past acts resulting in a present status has led to at least two decisions in which it has been laid down that a person becomes a de facto guardian as a result of a course of conduct. Each of these cases arose out of an isolated act of alienation of the minor's property purporting to have been done by a person treated as a de facto guardian in that particular transaction only. The first case is that of 51 Bom 1040,[3] wherein Crump J. defines a de facto guardian as a person

> who, being neither a legal guardian nor a guardian appointed by Court, takes it upon himself to assume the management of the property of the minor as though he were a guardian.

He further observes that the term

1. Rajaram v. Kothandapani, (1937) 24 A I R Mad 280=173 I C 363.
2. Hunoomanpersaud Pandey v. Mt. Babooee Munraj Koonweree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).
3. Harilal Ranchhod v. Gordhan Keshav, (1927) 14 A I R Bom 611=105 I C 722=51 Bom 1040=29 Bom L R 1414.

implies some continuity of conduct, some management of the property beyond the isolated act of sale which comes into question.

Following that decision we have the decision of a Bench of this Court in 55 M L J 861,[4] which related to an alienation of a minor widow's property by the widow's mother purporting to act on behalf of her daughter, which transaction was the only act done on behalf of the minor by the mother and it was done at the time while the minor was living under the protection of her husband's step-brother in whose favour the sale impeached was carried out. This was clearly a case in which on the facts there was grave reason to suspect that the mother of the minor had been used to help in a transaction which was not in the interests of the minor. On p. 866 of the above report, the learned Judges make certain general observations on the position of a de facto guardian. It is said that :

> A de facto guardian is one who looks after the property of the minor and generally acts in his interests for the time being. A fugitive or an isolated act of a person with regard to the minor's property would not make him a de facto guardian of the minor, nor would staying with a minor for a time make him a de facto guardian. There must be a continuous course of conduct as guardian of a minor in regard to his property in order to enable one to become a de facto guardian. The length of the period required to constitute one a de facto guardian would depend upon the circumstances of each case. The first act of intermeddling with the estate of a minor would not be the act of a de facto guardian, if he had not become one before the act, nor would the subsequent management of the estate of the minor by such person make the first act, which is one of alienation, the act of a de facto guardian.

Now with reference to this last sentence, it must be observed that, on the facts of the case before the Bench, these observations regarding the first of a series of acts of management must be treated as an obiter dictum for it appears that in that case there was no subsequent course of conduct from which guardianship could be implied. At the same time it does seem to me that, if the position of a de facto guardian rests only on acts of intermeddling, if it is a position which has only to be built up by a series of acts, the first of those acts would, by itself, not be an act of a person who was already in the position of a de facto guardian before that act was done. A de facto guardian is one who is already a guardian owing to something which has happened previously. To hold otherwise would be tantamount to admitting that a person buying property from a minor's estate or paying debts to the minor's estate can recognize anybody he likes with impunity as the guardian, provided that the person comes to be recognized as the guardian de facto of the minor subsequently. At the same time there are obvious difficulties in the way of the application of the dictum as a literal statement of a rule of law to such a case as the present. One can conceive of circumstances in which the first formal act of the de facto guardian would be one which the Courts might rightly recognize as binding on the minor. I refer to a case in which the position of the de facto guardian has been recognized in the family and by those mainly concerned before any intermeddling act of a formal nature affecting the minor has been accomplished. Surely the question must be whether in the eyes of the family of the minor and those interested in the welfare of the minor, the person who makes an alienation or receives a payment is, at the time of the transaction impeached, regarded by common consent as the person who is entitled to act on behalf of the minor. If there is such a general recognition, then, in my opinion, when once the person recognized has consented to act as guardian, it would not be necessary to wait for a series of transactions in the capacity of guardian in order to clothe that person with authority to represent that estate. The question is essentially one of fact. If the intermeddler is, as is contemplated in the case referred to in 51 Bom 1040,[3] a self-constituted guardian who comes into being for no other purpose than to carry out an isolated transaction which transaction is of very doubtful advantage to the minor's estate, then there could be no such general recognition of the alleged guardian as would clothe him with authority and clearly there could be no such course of conduct as might take the place of or supplement the general recognition.

Applying this reasoning to the facts of the present case, I feel some difficulty in following the process by which the learned trial Judge has come to the conclusion that the receipt of the legacy by the mother of the plaintiff was in fact not the first act of guardianship but the third or fourth act. So far as I have been able to gather, the first transaction carried through by the plaintiff's mother on behalf of her daughter was on 22nd February 1918, when she

4. Chinna Alagumperumal v. Vinayakathammal, (1929) 16 A I R Mad 110=117 I C 731=55 M L J 861.

gave discharge on receipt of the promissory note and on transfer of the land. The fact that the cash due under the promissory note was paid only at a later date was to my mind immaterial, for, the discharge of the legacy was given in return for the execution of the promissory note which provided that the payment of the promised amount would be made in due course. Now can it be said that when this receipt (Ex. II) was given the plaintiff's mother was legally entitled to give a discharge? In dealing with this question, one should remember the relationship of the parties, the age of the plaintiff, the surrounding circumstances and the attitude of the husband's relative towards the claim of the plaintiff's mother. The plaintiff was a young girl who had not been with her husband for very long and who had been almost completely excluded from the considerable estate left by her husband. Her legal guardian, the mother-in-law, does not appear to have done anything to dispute the right of the plaintiff's mother to protect her interests. The action of the plaintiff's mother in vigorously pressing for payment and for transfer of the land seems to have resulted in the payment of considerably more than could be demanded on the strict terms of the legacy. When payment was demanded by the plaintiff's mother, it appears to have been recognized by the family in general that she was the person entitled to make the demand. This is clearly not a case in which there was a conspiracy to defraud the minor. The fact that the plaintiff's mother was regarded as the right person to protect the minor's interest is shown by the way in which immediately after the period of three months during which she had to live with her mother-in-law, she went to live with her mother, stayed with her thereafter and entrusted the whole of the management of her affairs to her mother.

I am quite prepared to concede that if the plaintiff's mother was not in the position of the de facto guardian at the time when she gave the discharge, any subsequent accession of authority would not clothe her first act with a character with which it was not at the time invested. But I do think we are entitled to look at what happened afterwards in order to come to the conclusion, firstly, as to the state of the mind of the mother in making the demand and secondly, as to the way in which the plaintiff's mother was regarded by the rest of the family, who after all are the persons mainly concerned in the matter of the guardianship. There is nothing in the facts in the case to raise a doubt as to the attitude of defendant 2 to her daughter, the plaintiff, nor to suggest that she was not in fact treated as the guardian by the rest of the family. I am of opinion that the materials are sufficient to warrant the conclusion that she was so treated at the time when she made the demand on behalf of her daughter for payment of the legacy and that the payment of this legacy was not merely the first of a series of transactions which eventually constituted her the de facto guardian. This seems to be a case in which the position of the plaintiff's mother as de facto guardian was recognized by the relatives from the beginning and was not the result of any long course of conduct. It seems to be undesirable to withhold from a person who has reasonably been recognized by the family as entitled to represent the minor, the power to do those acts which are necessary for the minor and beneficial to her. I therefore agree with the lower Courts in holding that the plaintiff's mother was the de facto guardian entitled to receive this legacy, though I would rest the decision not so much on the theory that the actual receipt of the money was one of the later instances of a course of conduct which clothed her with the position of the guardian, but rather on the fact that she was from the beginning after the death of the husband recognized by the family as the de facto guardian of the minor and that she had been recognized in that capacity and had assumed that capacity with the consent of all concerned before the payment was made to her. In this view, I would dismiss this appeal with costs. Leave to appeal is granted.

C.R.K./R.M. *Appeal dismissed.*

*** A. I. R. 1938 Madras 953**

LEACH C. J. AND MADHAVAN NAIR J.

Janaki Ammal — Appellant.

v.

G. Perumalswami Nadar and others — Respondents.

Appeal No. 25 of 1938, Decided on 25th April 1938, from judgment of Gentle J., D/- 11th January 1938.

*** Hindu Law—Mother — Right of residence — No absolute right to reside in family house —On partition, Court can compel her to vacate it but must give her another suitable residence.**

A Hindu mother has no absolute right to remain in the family house after it has been sold at an auction held in pursuance of an order passed in a partition suit and has been purchased by another branch of the family. She however has a right to a suitable residence and if one can be found among the family properties, the Court can compel her to accept it when a fair partition demands it. The coparceners have a right to separate and a right to have the estate partitioned and the Court must do justice to all parties : *12 Mad 260 (F B). Expl. ; A I R 1924 Mad 458 ; A I R 1920 Mad 106 and 12 W R O C 35. Ref.*

[P 955 C 2]

K. Rajah Iyer and A. S. Nataraja Iyer— *for Appellant.*

S. Doraiswamy Iyer, Srinivasaraghavan and Thiagarajan — *for Respondents.*

Leach C. J. — This appeal raises the question whether a Hindu mother has the right to remain in the family house after it has been sold at an auction held in pursuance of an order passed in a partition suit and has been purchased by another branch of the family. One Thavasamuthu Nadar had three sons, Rathnaswamy, Vallathambi and Guruswami. Rathnaswamy married Amanthammal, defendant 6 in the suit out of which this appeal arises, and by her had two sons and one daughter (plaintiffs 1 and 2 and defendant 9). Vallathambi married Janaki Ammal, the appellant, who was defendant 8 and by her had five sons and one daughter (defendants 1, 2, 3, 4, 5 and 11). Guruswami married Raja Rajeswari Ammal, defendant 7, who bore him three sons and a daughter (plaintiffs 3, 4 and 5 and defendant 10). Thavasamuthu lived with his three sons and their families in the family house at Porayar, Tanjore District. He was a man of considerable wealth and died leaving a large number of immovable properties. According to the plaint, Thavasamuthu died in or about the year 1885. Guruswami, the youngest son, died in 1920. Rathnaswamy and Vallathambi survived their father, but predeceased Guruswami. In the year 1921, a partition suit (C. S. No. 655 of 1921) was filed by the sons of Rathnaswamy and Guruswamy. On 18th January 1924 a preliminary decree for partition was passed by Devadoss J. who directed that the questions relating to the maintenance of the widows of Rathnaswamy, Vallathambi and Guruswami and their rights to reside in family "properties" should be decided after the receipt of the report from the Official Referee.

On 10th November 1936 the case came before Wadsworth J. who passed what has been described as an interim final decree. Wadsworth J. directed that the suit should be remanded to the Official Referee for the preparation of a final account on the basis of his order and for the framing of a scheme of partition. On 30th July 1937, the Court directed that the immovable properties comprising the estate should be sold at an auction at which the members of the three branches of Thavasamuthu's family alone should have the right to bid. In other words there should be a private, not a public auction. This private auction took place in September 1937. The family house was bought by plaintiffs 3, 4 and 5. Their branch altogether bought nine properties, of a total value of Rs. 53,000. The appellant's sons bought 23 houses with land attached for which they paid about Rupees 200,000. Lakshmana Rao J. dealt with the question of the confirmation of these sales. The appellant objected to the sale of the family house being confirmed and asked the learned Judge to cancel it or to declare that the sale was subject to her right to reside therein. The learned Judge rejected her contentions and confirmed the sale without any restriction. The appellant however refused to vacate when called upon to do so by the receivers and they had to apply to the Court for an order directing her to vacate. This application was heard by Gentle J. Plaintiffs 3, 4 and 5 offered to allow the appellant, although she was not their mother but the mother of defendants 1, 2, 3, 4, 5 and 11, to reside in another house which they had purchased, until the partition had been completed. The learned Judge considered that this was a very reasonable suggestion and passed an order directing the appellant to vacate the family house on this condition. The present appeal lies from this order. It has not been suggested that the respondents are unwilling to comply with the condition, but it is said that the learned Judge was wrong in directing the appellant to vacate at all. It is said that under Hindu law she has an absolute right to remain in the house until her death. While recognizing that as a general rule a Hindu mother has a right to reside in the family house, the respondents contend that in the special circumstances of this case the appellant is bound to vacate. They also contend that partition of the family properties puts an end to the right of a mother to remain in the family house, and in such circumstances she must accept a suitable

residence elsewhere. Mr. Rajah Iyer, on behalf of the appellant, relies on the Full Bench decision of this Court in 12 Mad 260,[1] and particularly on the following passage which appears at page 270 of the report:

> The right of residence of Hindu females is ordinarily referable to the family house, and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a bona fide purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her.

Mr. Doraiswami Iyer on behalf of the respondents does not challenge the correctness of this statement of the law, but he says that the appellant is bound to vacate in the circumstances of this case. In her written statement the appellant laid no claim to a right to reside in this particular house, but set up the plea that a house for her residence had to be set apart. The judgment of Devadoss J. in postponing the consideration of the question as to the houses in which the widows were to live made no special reference to the family house. No issue was raised as to the right of the appellant to remain in the family house and the present plea was not advanced until the sale had taken place. The suit proceeded on the basis that the appellant had the right to live in one of the family properties, not in a particular house, and the contention which she raised when the matter came before Lakshmana Rao J. was clearly an after-thought. Moreover the auction of the estate properties took place on this basis. Therefore, it seems to me that the appellant should not be allowed to say that the sale is not binding on her.

This is sufficient to dispose of the appeal, but I will deal with Mr. Doraiswami Iyer's second point which is based on the judgments of this Court in 46 M L J 145[2] and 43 Mad 635.[3] In the former case Schwabe C. J. expressed that it was quite wrong to say that the members of a joint Hindu family have rights in rem to residence in a particular house. He thought that it was true that while it was being used as a family house the family members had a right to reside there, but he expressed serious doubts as to whether they had a right to any particular room, and went on to say that on partition it was clearly a matter for the tribunal arranging the partition to say whether it was in the general interest of the coparceners that residence should be given in a particular house or not. In 43 Mad 635[3] Sadasiva Iyer J. quoted with approval the dictum of Peacock C. J. in 12 W R O C 35=4 Beng L R O C 72,[4] where he said that the father's widow and the other females of the family could not be turned out of the dwelling selected by the father for his residence and in which he left the females of his family at his death until some other place had been provided for them. In this judgment of Sadasiva Iyer J., Wallis C. J. concurred. It seems to me that there is considerable force in the contention that on a partition, the Court can direct a mother to vacate the family house if the circumstances demand it. She has a right to a suitable residence; and if one can be found among the family properties, it is going very far to say that the Court cannot compel her to accept it when a fair partition demands it. The coparceners have a right to separate and a right to have the estate partitioned and the Court must do justice to all parties. In the circumstances of this case we have no hesitation in holding that the order of Gentle J. is correct. Consequently the appeal will be dismissed with costs in favour of plaintiffs 3, 4 and 5.

C.R.K./B.D. *Appeal dismissed.*

1. Ramanadhan v. Rangammal, (1889) 12 Mad 260 (F B).
2. Official Assignee of Madras v. Rajabadhar Pillai, (1924) 11 A I R Mad 458 = 78 I C 536 =46 M L J 145.
3. Suryanarayana Rao Naidu v. Balasubramania Mudali, (1920) 7 A I R Mad 106=56 I C 524 =43 Mad 635=38 M L J 433.
4. Mangala Debi v. Dinanath Bose, (1869) 4 Beng L R O C 72=12 W R O C 35.

*** A. I. R. 1938 Madras 955**

WADSWORTH J.

N. Swaminatha Aiyar and another — Appellants.

v.

Kuppuswami Ayyar and others — Respondents.

Second Appeal No. 183 of 1936, Decided on 19th August 1938, against decree of Dist. Judge, Salem, in A. S. No. 30 of 1935.

*** Land Acquisition Act (1894), S. 31 — Question of title between rival claimants to money deposited in Court — Question must be decided under terms of Act and cannot be made subject of separate suit — Decision of such question operates as res judicata.**

When rival claimants come before the Court on a reference under S. 31, Land Acquisition Act, the Court has a duty to decide which of the two claimants is entitled to the money deposited in Court. The Act makes provision for the securing of funds in cases where the person entitled to the custody of them is incompetent to alienate them; but it does not empower the Court to direct the parties to go to a Civil Court to establish their case: *4 C L J 256, Rel. on.* [P 956 C 2]

It is moreover well established that the decision on a reference under the Land Acquisition Act on a question of title operates as res judicata to bar persons who are parties to that decision from agitating their title in separate proceedings. [P 956 C 2]

B. Sitarama Rao — *for Appellants.*

P. J. Kuppuswami Rao and K. S. Sundaram — *for Respondents.*

Judgment. — The appellants and the respondents were claimants of money deposited in Court under Sec. 31, Land Acquisition Act. They represented different branches of one family which owned originally certain lands handed over under Ex. 18 to one Ramaswami Iyer, the ancestor of the respondents, who was to perform certain charitable trusts and keep any surplus which there might be after the performance of those trusts. The lands now acquired by the Government consist of a portion of the land covered by this dedication; another portion has been previously acquired and out of the proceeds arrangement has been made for the income necessary to carry out the trusts. The respondents as descendants of the original manager of the trust claimed an exclusive right in the proceeds of the present acquisition. The appellants on the other hand claimed that they were entitled to a share. The trial Court went into the matter and decided that the appellants were not entitled to any share in the compensation amount and that it was payable entirely to the respondents, descendants of Ramaswami Ayyar. There was an appeal by the present appellants (claimants 7 and 8) to the District Judge, who dismissed the appeal with a very short judgment in the course of which he observes that neither the contention of the appellants nor the contention of the respondents appears to him to be unsubstantial and accordingly while confirming the award made by the Subordinate Judge he leaves it open to the parties to sue in regular form for the adjustment of their mutual claims and remarks that the appellants may, if so advised, ask for the attachment pendente lite of the disputed amount.

Now whatever this order was intended to mean, it appears to me to have the effect of confirming the decision of the Subordinate Judge which recognizes the title of the respondents and at the same time of leaving it open to the appellants to canvass the correctness of that decision by means of a separate suit. It seems to me that the learned District Judge had no power to come to such an ambiguous decision. When rival claimants come before the Court on a reference under S. 31, Land Acquisition Act, the Court has a duty to decide which of the two claimants is entitled to the money deposited in Court. The Act makes provision for the securing of funds in cases where the person entitled to the custody of them is incompetent to alienate them; but it does not, so far as I am aware, make any provision whereunder the Court can say, "Claimant *A* has a good case. Claimant *B* also has a good case. I direct them to go to a Civil Court to establish their case. But meanwhile I confirm the decision of the lower Court in favour of claimant *A*." The Court must decide the matter which is before it. In 4 C L J 256[1] at p. 258, when the Court was asked to leave the question of title between the claimants open for determination in a regular suit, the learned Judges observed:

> We think that wherever a question of title arises between rival claimants, it must under the terms of the Act be decided in that case and cannot be made the subject of a separate suit.

It is moreover well established that the decision on a reference under the Land Acquisition Act on a question of title operates as res judicata to bar persons who are parties to that decision from agitating their title in separate proceedings. If the District Judge's order were left as it stands, the appellants suing to establish their title to this money, as the learned District Judge seems to think that they can sue, would be met by the plea that the learned District Judge's own decision confirming the decision of the trial Court operates as res judicata to bar the suit. Clearly, the rights of the parties in this money must be decided by the Land Acquisition Court itself and by the District Court in appeal from the Court which heard the actual reference. The District Judge was therefore wrong in confirming the trial Court's decision while at the same time referring one party of claimants to a separate suit. The appeal is therefore allowed and remanded to the

1. Babujan v. Secy. of State, (1906) 4 C L J 256.

District Court for disposal in the light of these observations. Costs will abide the result. The court-fee will be refunded to the appellants.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 957

PANDRANG ROW J.

Balagurumurthy Chettiar — Appellant.

v.

Kalingan Ambalagaran and others — Respondents.

Appeal No. 73 of 1936, Decided on 8th August 1938, against order of Sub-Judge, Trichinopoly, in A. S. No. 31 of 1935.

Civil P. C. (1908), O. 41, R. 27 — Order admitting additional evidence in appeal passed before appeal is heard is without jurisdiction.

The legitimate occasion for the exercise of the discretion of admitting additional evidence in appeal is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. Hence an order admitting additional evidence in appeal passed before the appeal itself is heard is without jurisdiction: *A I R 1931 P C 143, Rel. on.* [P 957 C 2 ; P 958 C 1]

A. V. Narayanaswamy Iyer — *for Appellant.*

S. Amudhachari — *for Respondents.*

Judgment.—This is an appeal from the judgment of the Additional Subordinate Judge of Trichinopoly dated 6th December 1935, allowing the appeal by the defendants from the decree of the District Munsif, Trichinopoly, dated 21st December 1934, and remanding the suit to the trial Court for fresh disposal after taking evidence on a certain point. For the purpose of deciding this appeal, it is unnecessary to go into the facts of the case at any length. The suit was for recovery of the amount due under the mortgage executed by the father of defendants 1 to 3 and defendant 4 in favour of the plaintiff. Defendant 4's name was struck off and his case need not be considered. The suit was defended on the ground that the mortgage sued on had been discharged by the father of defendants 1 to 3 and that the endorsements of payments found on the mortgage were not true. After full trial the suit was decreed in favour of the plaintiff. It was not the case of the defendants who appealed to the District Court that they had not sufficient opportunity to present their case or adduce evidence in support of their case. But nevertheless they filed an application purporting to be under O. 41, R. 27, Civil P. C., praying the District Court to admit a certain document in evidence in appeal, namely a certified copy of an entry from a death register said to relate to their father. This application was opposed by the plaintiff-respondent but was allowed by the District Judge on 5th April 1935, that is to say long before the appeal was even ripe for hearing. In any case it is clear that the District Judge did not go into the merits of the appeal before he passed the order and the appeal itself was transferred by the District Judge to the Additional Subordinate Judge for disposal on a subsequent date.

The Additional Subordinate Judge who disposed of the appeal appears to have thought that he was bound by the order of the District Judge admitting the document in question as evidence in appeal and he thought that it was but fair that the plaintiff-respondent should have an opportunity of leading rebutting evidence to show that the entry in the death register in question did not relate to the father of defendants 1 to 3. He was not content with making this direction, but actually remanded the case to the lower Court for fresh disposal after taking evidence on the point. This necessarily involved the setting aside of the decree of the lower Court and that too for no valid reason. It cannot be maintained for a moment that the procedure adopted either by the District Judge in admitting additional evidence in appeal or the judgment of the Subordinate Judge reversing the decree of the Court below and remanding the case for fresh disposal was justifiable. The powers of the Appellate Court in the matter of admission of additional evidence are subject to limitations which are clearly laid down in O. 41, R. 27. This matter has been dealt with in more than one case by their Lordships of the Privy Council and it cannot for a moment be urged that the District Judge acted with jurisdiction when he ordered the document in question to be admitted as evidence in appeal before hearing the appeal itself at the instance of a party. As was observed by their Lordships in 10 Pat 654[1] at pages 668 and 669 :

> The legitimate occasion for the exercise of this discretion (of admitting additional evidence in appeal) is not whenever before the appeal is heard

[1] 1. Parsotim Thakur v. Lal Mohar Thakur, (1931) 18 A I R P C 148=132 I C 721=10 Pat 654 =58 I A 254 (P C).

a party applies to adduce fresh evidence but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. . . . . It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands.

Their Lordships go on to state that wherever the Court adopts this procedure it is bound by R. 27 (2) to record its reasons for so doing, and under R. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. In this case the order admitting additional evidonce in appeal was passed before the appeal was heard and there is no doubt therefore that that order was without jurisdiction. Even if the learned Subordinate Judge thought that this order of the District Judge admitting evidence was binding on him, there was no necessity for him to have reversed the decree of the Court below and remanded the suit for fresh disposal ; the correct procedure which he ought to have followed, even if he thought that the order of the District Judge was binding on him, was to have the additional evidence taken either by himself or by the lower Court and then dealt with the appeal. Both the order of the District Judge admitting evidence in appeal as well as the judgment of the Subordinate Judge reversing the decree of the trial Court and remanding the suit for fresh disposal are clearly erroneous and contrary to law. They are therefore set aside and the lower Appellate Court is directed to dispose of the appeal afresh according to law. The appellant is entitled to have his costs of this appeal from the respondents. The costs in the Court below should be provided for in the revised decree of the lower Appellate Court.

C.R.K./D.S. *Orders set aside.*

A. I. R. 1938 Madras 958

WADSWORTH J.

Perimi Chakrapani Naidu—Appellant.

v.

Mattapalli Venkataraju and another — Respondents.

Second Appeal No. 261 of 1933, Decided on 16th August 1938, against decree of Sub.Judge, Cocanada, in A. S. No. 117 of 1930.

Tort — Damages — Suit for — No action lies against any one for damages resulting from erroneous decision of Court, merely because he has set the Court in motion, unless malice is established.

No action will lie against any one for damages resulting from an erroneous decision of the Court, merely because that person has set the Court in motion, provided that malice is not established. The defendant in such an action is only liable for the direct consequences of his wrongful act and the intervening act of an independent third person bound by law to make a judicial decision breaks the chain of causation. [P 959 C 1]

The defendant obstructed the plaintiff from constructing a temporary dam across an irrigation channel and subsequently procured an order under Section 147, Criminal P. C., restraining the plaintiff from damming the channel and taking water to his channel. The plaintiff had to file a suit to establish his right to the water and he later on sued the defendant for the loss of crops caused to him by the defendant's obstruction, the basis of his claim being the defendant's action, in procuring from the Courts, the order restraining the plaintiff from taking the water :

Held that the suit by the plaintiff did not lie : *14 C W N 96, Rel. on.* [P 959 C 1]

P. V. Rajamannar and K. Subba Rao — *for Appellant.*

Ch. Raghava Rao — *for Respondents.*

Judgment.—The defendant in this case appeals against the decree for damages caused to the plaintiff's land by the loss of irrigation facilities, resulting from the action of the defendant in obstructing the legitimate construction of a temporary dam across an irrigation channel and in obtaining orders from the Courts which prevented the plaintiff from having the use of water to which he was entitled, pending Magisterial and Civil Court's proceedings. There is no doubt about the facts. The obstruction was on 31st August 1924. After interfering with the making of this dam, the defendant moved the Magistrate and procured an order under S. 147, Criminal P. C., on 21st November 1924 restraining the plaintiff from damming the channel and taking water to his land. The plaintiff consequently had to file a civil suit to establish his right and he also applied for a temporary injunction against the defendant to restrain him from interfering with exercise of this right. The defendant opposed the grant of any such injunction and it was consequently refused. Eventually, the plaintiff got a decree recognizing his right to the water and he now claims damages for the loss of the crops which would have been harvested in January 1926, January 1927 and January 1928.

This appeal has once been heard by Cornish J., but the judgment, unfortunately, was of no effect because one of the parties was dead at the time when the appeal

was heard. Now, quite clearly the plaintiff's claim for damages is based not on the original obstruction of the defendant in August 1924 which could not have affected the crops grown at the end of 1925, 1926, or 1927. The basis of the plaintiff's claim is the action of the defendant in procuring from the Courts orders which had the effect of preventing the plaintiff from taking the water to which he was entitled. If so much be conceded, it is difficult to see how the damages accruing to the plaintiff can have been caused at all by the extra judicial act of the defendant. Assuming however that the defendant's act in obstructing the construction of the dam was the first of a series of acts which together caused the damage, it is, I think, well established that no action will lie against any one for damages resulting from an erroneous decision of the Court, merely because that person has set the Court in motion, provided that malice is not established : 14 C W N 96.[1] It is well established that the defendant is only liable for the direct consequences of his wrongful acts and that the intervening act of an independent third person bound by law to make a judicial decision breaks the chain of causation. When once it is established that the party moving the Court is not, in the absence of malice, responsible for the Court's erroneous orders, it will be clear that the order of the Court, even though erroneous and even though passed at the instance of the defendant, is an act of a third party independent of the control of the defendant and bound to decide judicially. It is therefore a new act intervening and there is no chain of causation from the original act of the defendant which started the interference with plaintiff's rights. It seems to me unnecessary to say anything more. The case law on the subject has been fully discussed in the judgment of Cornish J. which unfortunately became inoperative. I agree entirely with the reasoning in that judgment and allow the appeal and dismiss the plaintiff's suit with costs throughout. Leave to appeal refused.

C.R.K./R.M. *Appeal allowed.*

1. Mina Kumari Bebi v. Surendra Narain, (1910) 14 C W N 96=8 I C 12=10 C L J 226.

A. I. R. 1938 Madras 959

LEACH C. J. AND VARADACHARIAR J.

A. Dhanapala Chetty — Appellant.

v.

D. Goverchand Sowcar and another — Respondents.

City Civil Court Appeal No. 85 of 1935, Decided on 7th April 1938, against decree of Court of City Civil Judge, Madras, in O. S. No. 342 of 1933.

(a) Res Judicata—Applicability—Applicability of doctrine to co-defendants—Requisite conditions specified.

Before it can be held that the doctrine of res judicata is applicable to the case of persons who are impleaded as co-defendants in a suit, three conditions are requisite namely: (1) there must be conflict of interests between those concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (3) the question between the co-defendants must have been finally decided: *A I R 1931 P C 114 and A I R 1932 P C 161, Rel. on.* [P 960 C 2]

(b) Mortgage—Suit on – Minor alleging that he was minor on date of execution of mortgage —Burden is on him to prove that.

Where a mortgagor alleges that he was a minor on the date the mortgage was executed, the burden is on him to prove that he was a minor on that date. [P 960 C 2]

(c) Transfer of Property Act (1882), Ss. 59, 3 — Mere endorsement by Sub-Registrar of admission of execution and signature of witnesses present at the time are not sufficient to satisfy requirements of S. 59, in absence of evidence showing that signature of witnesses to admission were affixed in presence of admitting executant or any endorsement to that effect.

The mere endorsement by the Sub-Registrar of an admission of execution and the signature of the witnesses present at the time are not sufficient to satisfy the requirements of S. 59, T. P. Act, as amended by the Acts of 1926 and 1927, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants or of any endorsement to that effect. [P 962 C 1]

Where therefore the document as it stands does not show that the signatures of the identifying witnesses were affixed in the presence of the executant, the document cannot be said to be properly attested, unless it is shown that the signatures of the identifying witnesses were affixed in the presence of the executant: *A I R 1931 Mad 335, Rel. on; A I R 1929 Mad 1 (F B), Disting.* [P 962 C 1]

S. T. Srinivasagopalachari for T. D. Srinivasachari — *for Appellant.*

K. V. Sesha Aiyangar and T. Krishnarajan — *for Respondents.*

Leach C. J.—This appeal arises out of a mortgage suit filed by respondent 1 against the appellant. There were two mortgages, one dated 2nd April 1921 for Rs. 600 and

the other dated 25th April 1921 for Rs. 400. The first mortgage carried interest at 24 per cent. per annum, and the second mortgage, interest at 30 per cent. per annum. The property charged in each case was the appellant's half share in a house. Respondent 2 is a subsequent mortgagee, but he took no part in the case and he is not concerned with the questions raised in this appeal. The appellant contested both the mortgages on these grounds: (i) that he was a minor at the time they were entered into; (ii) that this question of minority had already been decided in his favour in a previous litigation, and therefore the doctrine of res judicata operated, and (iii) that no consideration passed for either mortgage. He raised a further contention with regard to the second mortgage to the effect that it was not valid because it had not been attested in accordance with the provisions of S. 59, T. P. Act. The learned Judge decided against the appellant on all these questions and decreed the suit, but he reduced the rate of interest to one per cent. per annum in each case. This reduction of the interest has not been challenged in this appeal.

I will first deal with the argument on the second point, namely, that of res judicata. It appears that on 3rd February 1921 the appellant executed in favour of one P. Ratnavelu Achari another mortgage of the same property. Ratnavelu instituted a suit No. 545 of 1922 in the City Civil Court to recover the mortgage debt. Respondent 1 was made a party to that suit on the ground that he had a second charge over the property and had therefore a right to redeem Ratnavelu's mortgage. Respondent 1 did not appear and so far as he was concerned the case was decided ex parte. The trial Court held that the mortgagor was a major at the time of the execution of the mortgage in favour of Ratnavelu, but on appeal to this Court that decision was reversed and the mortgage was held to have no validity, having been executed during the minority of the appellant. Ratnavelu's suit was accordingly dismissed and respondent 1 became the first mortgagee. The plea of res judicata is merely based on the fact that respondent 1 was a party to the previous suit in which the question of the appellant's minority was decided. But this question was not a question between himself and first mortgagee or between himself and the mortgagor. It was a question which concerned only Ratnavelu Achari and the present appellant. In 53 All 103[1] their Lordships of the Privy Council pointed out that in a case of this nature there are three conditions requisite before it can be held that the doctrine of res judicata has operation: (i) there must be a conflict of interests between those concerned; (ii) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (iii) the question between the co-defendants must have been finally decided. This decision was re-affirmed by their Lordships in 10 Rang 322.[2] In Suit No. 545 of 1922, there was no conflict between the two defendants and therefore no question to be decided so far as respondent 1 was concerned in order to give the plaintiff relief. The doctrine of res judicata could not, in these circumstances, apply.

Turning to the question of the minority of the appellant at the time when he executed the mortgages of 2nd and 25th April 1921, the learned trial Judge has rightly held that the onus was upon him to prove that he was a minor on those dates. The learned Judge has come to the conclusion that he has failed to discharge the burden cast upon him, and we are also in agreement with this finding. The appellant is the son of one Vajravelu Chetty. Vajravelu had two sons, one born on 29th August 1900 and the other born on 11th August 1903. The appellant contends that he is the younger son. It is an undoubted fact that one of Vajravelu's sons died in infancy and it is said by respondent 1 that this was the son who was born on 11th August 1903, that is the second son. The plaintiff has put in evidence an extract from the register of deaths kept by the Health Department of the Corporation of Madras which shows that on 22nd August 1904 one Vytheeswaradu, aged one year and six months, died at No. 137, Linghi Chetty Street. It is common ground that the appellant's father had a house known as No. 259, Linghi Chetty Street. In fact this was the house in respect of which the appellant executed mortgages in favour of respondent 1. Respondent 1 states that this death certificate refers to the second son of Vajravelu Chetty and that Vajravelu was then living in 137, Linghi Chetty

1. Munni Bibi v. Tirloki Nath, (1931) 18 A I R P C 114=132 I C 598=53 All 103=58 I A 158 (P C).
2. Maung Sein Done v. Ma Pai Nyun, (1932) 19 A I R P C 161=137 I C 328=10 Rang 322= 59 I A 247 (P C).

Street. It is quite clear that if this certificate does refer to a son of Vajravelu then that son was the second son, which would mean that the appellant was the elder son and was of age at the time the mortgages were executed. The appellant called three witnesses with a view to proving that these entries in the register of deaths refer to the son of one Namasivaya Chetty, a Telugu. The learned trial Judge has, however, refused to believe these three witnesses and has given a very good reason for holding that the entries could not refer to a son of Namasivaya Chetty. Namasivaya was a Telugu, and it was admitted by the appellant's own witnesses that not a single Telugu is known by the name "Vytheeswaradu" which is the name of a God of the Tamil Community. Therefore it followed that the child who died on 22nd August 1904 was a son of a Tamil citizen.

The appellant's story was that his elder brother had died in 1901 at the village of Kilachembedu in the Wandiwash Taluk, which I understand is about 80 miles from Madras. It is admitted however that there is a register of deaths kept in this village and that the register for 1901 is still in existence. The appellant has taken no steps whatever to have this register produced in Court. If there was an entry in this register showing that a boy of the name of Vytheeswaran had died in that village in 1901, it would go a long way to establish proof of the plaintiff's contention that he was a minor when he signed the deeds. The appellant contented himself with relying on the evidence of the three witnesses whom the learned trial Judge refused to believe and on the evidence given in the previous case. But he was not entitled to rely at all on what happened in that case. The evidence there was not made evidence in this case and did not concern the issue between the appellant and respondent 1. I should also mention that the plaintiff called as a witness his maternal uncle, one V. Srinivasa Chetty. His evidence was of a very vague nature. No reliance was placed on it by the learned Judge, and we consider that he was fully justified in disregarding it. Therefore the position is that the appellant has failed entirely to discharge the burden of proof and the plea of minority must also be rejected. With regard to the question of consideration, the appellant's case really rests on his denial that any consideration passed. The mortgage deeds disclose what the consideration was and the appellant's word cannot be accepted as proving that the consideration stated therein did not in fact pass. The plaintiff has produced his account books showing that he did lend the money. The fact that these account books were accurately kept in the ordinary course of business was not challenged in cross-examination. There is also no substance in this plea.

The only other question which remains to be considered is whether the second mortgage is invalid for want of attestation. It was discovered in the course of the case that there were no witnesses to the appellant's signature at the foot of the document. But at the back there were three witnesses to his signature before the Registrar admitting the execution of the document. The appellant in his written statement acknowledged that he has executed the document, though he made no admission with regard to the attestation. He did not however raise any objection to it until respondent 1 was in the witness-box. It was then that his learned advocate observed that the document had not been attested in the ordinary way. The learned Judge however decided that the document had been rightly attested and in this connexion relied on the decision in 52 Mad 123.[3] Before discussing the judgment in that case, it is necessary to refer to Ss. 59 and 3, T. P. Act. Sec. 59 provides that where the principal money secured is Rs. 100 or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested at least by two witnesses. Sec. 3 defines the word "attested" in relation to an instrument. The word means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment to his signature or mark or of the signature of such other person and each of whom has signed the instrument in the presence of the executant. In 52 Mad 123,[3] a Full Bench of this Court held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement

3. Veerappa Chettier v. Subramania Iyer, (1929) 16 A I R Mad 1=116 I C 867=52 Mad 123 =55 M L J 794 (F B).

under Ss 58 and 59, Registration Act, are a sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Acts. But in that case there was evidence that the identifying witnesses had signed in the presence of the executant, and this fact was lost sight of by the learned trial Judge in the present case. In 60 M L J 302[4] it was held that the mere endorsement by the Sub-Registrar of an admission of execution and the signature of the witnesses present at the time are not sufficient to satisfy the requirements of Sec. 59, T P Act, as amended by the Acts of 1926 and 1927, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants or any endorsement to that effect. When this question of attestation was raised in the trial Court the learned advocate for respondent 1 asked the learned Judge to allow evidence to be called apparently in order to prove that the identifying witnesses had seen the appellant sign the instrument or that they had received from him a personal acknowledgment of his signature and had themselves signed in his presence. The learned Judge however did not consider that this evidence was necessary in view of the pleadings and the decision in 52 Mad 123.[3] We are however unable to share this opinion. The document as it stands does not show that the signatures of the identifying witnesses were affixed in the presence of the appellant. In these circumstances we consider that the proper course will be to send the case back to the trial Court to take the evidence which the parties may wish to offer on this question and to state its finding on the evidence. The record of the case will then be returned to this Court.

The decree of the trial Court stands so far as the mortgage of 2nd April 1921 is concerned. The question of the validity of the mortgage of 25th April 1921 will be decided after receipt of the record from the trial Court. The trial Court will submit its findings within two months. Ten days will be allowed for objections.

C.R.K./R.M. *Case remanded.*

4. Ramanathan Chetty v. Delhi Badaha Tevar, (1931) 18 A I R Mad 335=131 I C 840=60 M L J 302.

A. I. R. 1938 Madras 962

MADHAVAN NAIR OFFG. C. J. AND KRISHNASWAMI AYYANGAR J.

H. M. Ebrahim Sait — Appellant.

v.

South India Industrials Ltd. — Respondent.

Original Side Appeal No. 50 of 1938, Decided on 10th August 1938, from order of Gentle J., D/. 29th April 1938.

(a) Madras High Court Original Side Rules, O. 7, R. 7 (2)—Leave to defend unconditionally should generally be given where defendant has shown that he has fair case for defence—Defendant's case must be bona fide and should raise triable issue—Court should be satisfied that there is a fair issue to be tried by competent tribunal.

Leave to defend should, as a general rule, be given unconditionally, where the defendant shows that he has a fair case for the defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence. A mere allegation of facts which might amount to a defence is not sufficient. The defendant's case should be bona fide and should raise a triable issue, which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defences raised show that there is a fair issue to be tried by a competent tribunal before leave to defend is given unconditionally. The Court must also be satisfied that the defence has not been set up to gain time. Further, in deciding whether the defence set up is a real defence or not, all the circumstances must be looked at: *(1888) 5 T L R 72; (1902) 85 L T 262 and (1898) 77 L T J O 255, Rel. on; A I R 1935 Mad 43, Explained.* [P 963 C 2; P 964 C 1]

(b) Company — Directors — Powers of — Managing business of company includes institution of suits on its behalf.

Managing the business of the company includes the institution of suits on its behalf, when it becomes necessary in the course of management to recover moneys due to the company. [P 964 C 2]

(c) Company—Directors—Meeting of directors—Notice.

In law, a meeting of directors is not duly convened unless due notice has been given to all directors. [P 965 C 1]

(d) Company — Share-holder — Rights of—Set-off.

A share-holder is not entitled to set off against a company what he might receive on a winding up against the moneys due by him. The company cannot be expected to await the winding up for the recovery of the moneys due to it from the share-holders. [P 965 C 2]

V. Ramaswami Iyer and S. Narasinga Rao — *for Appellant.*

V. Rajagopalachariar and K. P. Raman Menon — *for Respondent.*

Madhavan Nair Offg. C. J.—This is an appeal against the order of Gentle J.

confirming the order of the Master giving the appellant (defendant in C. S. No. 167 of 1937) leave to defend on his furnishing security for a sum of Rs. 25,000 within a period of two months from the date of his order. The security has not been furnished. The appellant contends that leave to defend the suit should have been given to him unconditionally. The circumstances are these. The respondent (plaintiff) is the South India Industrials Ltd. The suit has been filed by its managing director. The appellant is another managing director. The claim against the appellant is for a sum of Rs. 2,83,878-6-11—the amount overdrawn by him from the company previous to the year 1928. There is no contest regarding this amount owing by the appellant to the company. In defence, the appellant raised various contentions, the most important of which is that the suit has not been filed with proper authority, inasmuch as the plaint purports to be signed by the managing director. His case on this point is that there is nothing to show that he has been properly authorized to file the suit on behalf of the company. So far as the merits of the claim are concerned, the defences are two-fold. The appellant seeks to set off against the amount claimed a considerable sum of money—we are told that it would amount to a little over a lakh of rupees—owing to him by the company in respect of unpaid bonus declared some years ago. He claims also to set off another amount, namely the amount which he as a share-holder might receive upon the winding up of the company. The third point raised is that the suit is barred by limitation.

On behalf of the company it is alleged that the proceedings of the Board of Directors will show that the managing director who has signed the plaint is authorized to institute suits on behalf of the company, that there is no substance in the two claims to set off made by the appellant, for he has waived his right to claim the bonus, and that a share-holder cannot claim to set off what he might eventually receive on a winding up of the company against the amount which he owes to the company. It is also urged by the respondent that the plea that the suit is barred by limitation cannot stand, having regard to the letter written by the appellant acknowledging his liability to pay the amount claimed. Both the Master and the learned Judge were not impressed with the defences raised, but as they did not desire to shut out altogether an opportunity for defending the suit, the appellant was given permission to defend it provided he furnished security for the sum of Rs. 25,000. As already stated it is urged before us that in the circumstances of the case the Court is bound to grant the appellant permission to defend unconditionally. O. 7, R. 7 (2) of the Original Side Rules says that:

> Leave to appear and defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Master thinks fit . . .

Order 14, R. 6 of the Rules of the Supreme Court says:

> Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit.

According to both the rules the Court has discretion to decide whether leave to defend should be given unconditionally or subject to terms The important English decisions bearing on the question are referred to in the Note to O. 14, R. 6, in the Annual Practice. According to these decisions it may be stated that:

> As a general rule where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend.

See (1888) 5 T L R 72[1] and the other cases referred to in the Note. In (1902) 85 L T 262[2] it is laid down that where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court either by having judgment entered against him or by being put under terms to pay money into Court as a condition of obtaining leave to defend. From this one is apt to understand, as has been argued before us, that all that is required to entitle the defendant to claim the privilege of being allowed to defend without any condition is a mere allegation of facts which might amount to a defence; but that it is not so, is clear from the following observations of Lord Chancellor (Halsbury):

> There are some things too plain for argument and where there were pleas put in simply for the purposes of delay which only added to the expense and where it was not in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to

1. Saw v. Hakim, (1888) 5 T L R 72.
2. Jacobs v. Booth's Distillery Co., (1902) 85 L T 262=50 W R 49.

plaintiffs who were endeavouring to enforce their rights.

In other words, triable issues must be such as would show that the defendant has a bona fide defence. This aspect of the question is sometimes apt to be forgotten. Further it must be remembered that:

In deciding whether the defence set up is a real defence or not, all the circumstances must be looked at: Per Bowen L. J. in (1898) 77 L T J O 255.[3]

The decision in (1902) 85 L T 262[2] is followed in the decision in 58 Mad 116[4] strongly relied upon by the appellant, but it appears to us that in stating the rule the learned Judges, if we may say so respectfully, have not sufficiently emphasized the qualification that in order to bring the defendant within the rule which entitles him to ask for leave to defend without any condition, the defence should be a bona fide one and not a mere attempt to prolong or delay the case, although it may be said that this aspect cannot be said to have been altogether overlooked because reliance has been placed by them on the decision of this Court in 46 M L J 255[5] where the following observations occur:

By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must as a rule bring something more before the Court to show that it is a bona fide defence, and not a mere attempt to gain time by getting leave to defend.

We do not understand the decision in 58 Mad 116[4] as laying down the broad proposition that the mere setting up of a defence, with the possibility of the defendant proving it would by itself and without regard to other considerations, be enough to entitle the defendant to claim that leave should be given to him to defend the suit unconditionally. As we have pointed out the decision in (1902) 85 L T 262[2] itself makes this point clear. All the cases cited before us indicate that the defendant's case should be bona fide and should raise a triable issue which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defences raised show that there is a fair issue to be tried by a competent tribunal before leave to defend is given unconditionally.

We will now examine whether with respect to the contentions put forward by the appellant he has a fair case to set up against the respondent. Having regard to the facts the only point which appears to be of some importance is whether the suit has been properly filed on behalf of the company. The plaintiff-respondent is only one of the directors of the company. It is argued that neither Cl. 69 (k) of the Articles of Association which relates to the powers of the directors to institute suits nor the resolution passed by the company at its meeting of 31st July 1937 that a "lawyer's notice be sent to Mr. H. M. Ebrahim Sait (defendant-appellant) demanding payment of his dues with interest within 15 days otherwise to file a suit against him for the recovery of the amount," authorizes the plaintiff-respondent to institute this suit. Admittedly notice of the meeting which passed the resolution referred to was not given to the appellant by the directors, but having regard to another proceeding it is not necessary for the respondent to rely on the resolution to show that he had authority to institute the suit. Cl. 69 (k) of the Articles of Association gives power to the directors of the company to institute, conduct, defend, compromise and abandon any legal proceedings, etc., etc. It is true that under this provision all the directors should join to validly institute a suit but under Cl. 69 (d)

the directors may from time to time entrust to and confer upon a managing director for the time being such of the powers exercisable under the Articles of Association of the company by the directors as they may think fit . . .

It is argued for the respondent that the directors have entrusted him with full powers to institute suits on behalf of the company by himself. The proceedings of the directors dated 7th June 1918 to which the present appellant along with others was a party show that it was

resolved that the Chairman M. Mohamad Hashim Sait (respondent) and M. Hajee Ebrahim Sait (appellant) be appointed Managing Directors of the company on a remuneration of Rs. 2000 per mensem each to manage the business of the company either jointly or severally.

It follows that the two persons mentioned have power either jointly or severally to "manage the business of the company." It appears to us that managing the business of the company would include institution of suits as well, when it becomes necessary in the course of management to recover

3. Blaiberg v. Abrahams, (1898) 77 L T J O 255.
4. Sundaram Chettiar v. Valli Ammal, (1935) 22 A I R Mad 43=152 I C 687=58 Mad 116=68 M L J 16.
5. Perya Miyana Marakayar & Sons v. Subramania Iyer, (1924) 11 A I R Mad 612=78 I C 504=46 M L J 255.

moneys due to the company. The present one is a case of this kind. No authority has been quoted to show that institution of legal proceedings would not fall within the meaning of the expression "to manage the business of the company." As such management as has been delegated to them by the directors can be conducted by either of them, the suit instituted by the respondent would certainly be a validly instituted suit. We are told that as a matter of fact in the past both the respondent and the appellant have instituted suits on behalf of the company each by himself and this practice is relied on as lending additional support to the respondent's contention. We have no doubt that the resolution mentioned above read with Cls. 69 (k) and 69 (d) of the Articles of Association enables the respondent to institute suits validly on behalf of the company. In this view it is not necessary to canvass the question whether the respondent can rely on the special resolution of the company dated 30th July 1937 authorizing the company to file a suit against the appellant in support of his argument. However, we may point out that in law, a meeting of directors is not duly convened unless due notice has been given to all the directors (*see* 5 Hals 337) and if this is so, the resolution cannot be called in aid to support the respondent's position as admittedly no notice of the meeting was given to the appellant. But as we have stated, the other proceedings referred to give sufficient power to the respondent to institute the suit validly. On the merits, the contentions of the appellant have no force at all. He may have a claim for a portion of the undistributed bonus but this claim amounting at best only to Rs. 1,00,000 odd, has been given up by him by letter dated 8th June 1927 wherein he says :

> I find that there is absolutely no chance of recovering all or any portion of the bonus and dividends due to me and as such I hereby release my right to the same.

It is true that owing to some legal formalities not having been complied with, it was resolved that the acceptance of this surrender might not be given effect to till the said legal formalities have been complied with, but we know nothing as to whether these have been complied with or not. The other directors also have surrendered their claims to bonuses and suitable entries have been made in the company's books in all cases. In the circumstances the appellant can have no right to set off his claim to bonus as against the claim made by the company. With regard to the other claim to set off, no authority has been shown that a share-holder is entitled to set off what he might receive on a winding up against moneys due by him. The contention appears to be a novel one. Surely, the company cannot be expected to await the winding up for the recovery of the moneys due to it from the share-holders. The plea of the bar of limitation stands on an equally slender basis. The appellant has acknowledged his liability to pay the amount and the letter Ex. A dated 18th November 1934 will save the suit from this plea. It is not necessary for us to go into the merits of the appellant's case, but from the facts which appear from the affidavits and the papers filed before us, it is clear that these pleas are vexatious and not bona fide. He admits the correctness of the amount due from him and acknowledges also his liability to pay it. He knows full well that as managing director he or the respondent can institute suits validly each by himself as they have done in the past. He also knows that he surrendered his right to claim the bonus. In the circumstances, the pleas urged by him in defence of the suit cannot be considered to be bona fide but must be considered as being urged simply to gain time. For these reasons we confirm the order passed by Gentle J. and dismiss the appeal with costs. Time for furnishing security is extended for three weeks from this day.

C.R.K./R.M. *Appeal dismissed.*

*** A. I. R. 1938 Madras 965**
SPECIAL BENCH

LEACH C. J., GENTLE AND KRISHNASWAMI AYYANGAR JJ.

In re Gondikota Satyanarayanamurthy Pantulu Garu, Pleader, Chicacole.

Proceedings under Legal Practitioners Act, Decided on 19th April 1938.

*** Legal Practitioners Act (1879), S. 13 — Mere negligence does not found petition for professional misconduct—There is nothing unprofessional in pleader employing unregistered clerk.**

Mere negligence does not found a petition for professional misconduct. There must be moral delinquency in addition to negligence. There is nothing unprofessional in a pleader employing an unregistered clerk. The law allows a pleader to have two registered clerks but does not insist that

any clerk should be registered : *A I R 1926 Mad 568 (S B), Rel. on.* [P 966 C 2]

N. Rajagopala Iyengar for Advocate-General — *In support of the Notice.*

B. Jagannadha Doss — *for Pleader.*

Leach C. J. — The Court is called upon to consider a report of the District Judge of Vizagapatam in which he suggests that the respondent, a pleader, should be censured for unprofessional conduct. The proceedings arise out of a petition filed by one Abbas Ali Sahib, in which he complained that the respondent had neglected instructions given to him in connexion with certain execution proceedings on 6th September 1937 and had failed to take effective steps until 9th November 1937. It appears that the complainant paid the respondent a sum of Rs. 10-4-0 on account of out-of-pocket expenses and his fee of Rs. 2 and also paid to the respondent's clerk, Rs. 3-12-0 of which one rupee was to be the clerk's fee. A question arose when the case was before the District Munsif who inquired into the complaint whether the Rs. 3-12-0 had been refunded to the petitioner, as alleged by the clerk. The District Munsif held that the amount had not been returned, but this question is of no importance. There is no charge against the respondent in respect of the moneys. The charge is one of having neglected his client's interests. The District Munsif held that there had been no neglect and that the delay was the result of the complainant not having seen the respondent between 13th September and 9th November 1937. The District Munsif accordingly held that the respondent was not guilty of intentional neglect in the conduct of the execution proceedings.

It appears that the clerk was an unregistered clerk and when the report came before the District Judge this fact weighed greatly with him. He has expressed the opinion that keeping the clerk after he had discovered that the Rs. 3-12-0 had not been returned to the complainant was reprehensible, and he considered that the respondent had not paid due care to the complainant's business as he was bound to do. He also laid stress on the fact that the respondent had not told the complainant that his clerk was unregistered. Holding these views he considered that the respondent had been guilty of minor professional misconduct calling for a censure from the High Court. It is quite clear that the learned District Judge misconceived the whole position. The charge was one of negligence and negligence had not been proved. Even if it had been proved, mere negligence does not found a petition for professional misconduct as was pointed out by a Special Bench of this Court in 49 Mad 523.[1] There must be moral delinquency in addition to negligence. The charge here is merely one of neglect. There is nothing unprofessional in a pleader employing an unregistered clerk. The law allows a pleader to have two registered clerks, but does not insist that any clerk should be registered. It follows from what I have said that the report of the District Judge cannot be accepted. My learned brothers agree and consequently the complaint will be dismissed. There is not the slightest foundation for a charge of professional misconduct against the respondent.

C.R.K./D.S. *Complaint dismissed.*

1. In re A vakil, (1926) 13 A I R Mad 568 = 96 I C 685 = 49 Mad 523 = 50 M L J 399 (S B).

---

* A. I. R. 1938 Madras 966

VARADACHARIAR AND PANDRANG ROW JJ.

Paboodan Goolabchand — Appellant.

v.

M. J. V. Miller and another — Respondents.

Appeal No. 132 of 1935, Decided on 12th April 1938, against decree of Sub-Judge, Nilgiris at Ootacamund, in O. S. No. 83 of 1932.

(a) Contract Act (1872), Ss. 187 and 188 — Agent appointed to manage estate and having no express authority to borrow, borrowing money—Borrowing not attempted to be justified on ground of necessity or with reference to usual course of business — Principal cannot be held liable on footing that agent acted within limits of his authority.

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. The limits of "necessary implication" are indicated by S. 188. [P 969 C 2]

Where an agent appointed to manage estate and who has no express authority to borrow, borrows money and if no attempt is made to justify the borrowing on the ground of 'necessity' or with reference to the "usual course of business," the principal cannot be held liable on the footing that in borrowing, the agent acted within the limits of his authority : *A I R 1915 P C 121; 23 M L J 595 and 33 Cal 343, Rel. on; (1890) 15 A C 357, Disting.* [P 969 C 2]

*** (b) Principal and Agent—By unauthorized borrowing by agent, money of third person applied to benefit of principal — Principal is jointly and severally liable to restore money even if agent had other funds in his hands at the time of borrowing—This equitable principle regarding creditor's right against principal is not excluded by Contract Act.**

Where by any wrongful or unauthorized act of an agent, the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of such money or property. If the agent had already misappropriated the principal's moneys and thus created a necessity for the borrowing, the lender cannot suffer for the dishonesty of the agent, and the borrowing would have been at a time when there were in fact no funds of the principal available. If, on the other hand, the agent borrowed even when the principal's money were available, the borrowed money, if paid into the principal's account or applied for his benefit, will clearly be money, which the principal was not entitled to retain, and the fact or possibility of a subsequent misappropriation by the agent cannot affect the lender's remedies : *(1894) 2 Q B 40, Rel. on; (1906) 1 K B 103, Expl ; A I R 1926 P C 136, Disting.* [P 970 C 1, 2; P 971 C 1]

This equitable rule regarding the creditors' right against the principal is recognized and followed in this country and there is no justification for the contention that equitable claims are excluded by the Contract Act. If necessary, the creditor's claim in a case of this kind may be rested on S. 64 or S. 70, Contract Act : *A I R 1916 Mad 1025; 1 C L J 199; 6 C L J 639 and A I R 1936 Bom 62, Rel. on.* [P 971 C 1]

(c) Limitation Act (1908), Arts. 64 and 97—Agreement between creditor and manager of estate that balance due to creditor should be treated as advance for supply of tea from estate to creditor for certain period — Agreement subsequently repudiated – Suit by creditor for recovery of amount brought within three years of repudiation is in time.

A manager of an estate was in the habit of borrowing money from a creditor. By an agreement the parties arranged that the balance due to the creditor should be treated as an advance for the supply of tea from the estate for a period of three years to the creditor. The agreement was subsequently repudiated and the creditor claimed payment of the amount which was agreed to be treated as advance under the agreement :

Held that the creditor was not entitled to recover the money till the consideration failed by reason of repudiation of the agreement. A suit brought within three years of the date of repudiation was therefore in time : *11 All 47 (P C), Rel. on.* [P 971 C 2]

S. Srinivasa Iyengar, K. Rajah Iyer and V. Ramaswamy Iyer — *for Appellant.*

S. Panchapagesa Sastri and K. R. Krishnaswamy — *for Respondents.*

Varadachariar J. — The appellant, a marwari banker at Coonoor, sued for recovery of a sum of money representing the balance due under a running account of advances and dealings between himself and defendant 2, when the latter was in management of an estate known as the "High Field Estate," near Coonoor. The plaint prayed for a decree not only against defendant 2 but also against defendants 1 and 3 and against the estate of W. M. Miller, the deceased father of defendant 1 and the husband of the 3rd. It is difficult to understand the ground on which defendant 3 was sought to be made liable, and as the lower Court exonerated her and that part of the decision has not been appealed against, it is unnecessary to refer to that part of the claim any further. The suit was decreed as against defendant 2, but dismissed as against the 1st. Defendant 2 has allowed the decree against him to become final. The plaintiff has appealed against so much of the lower Court's decree as dismissed the claim against defendant 1.

W. M. Miller was the last owner of the High Field Estate and he bequeathed it to defendant 1 and certain others, subject to a life-interest in favour of defendant 3. Defendant 1 was one of the executors under his father's will and he alone took out probate. Under Ex. B (11th April 1927) defendant 1 appointed defendant 2 his agent for the management of the High Field Estate and though defendant 3 was also appointed agent, she was away from India during part of the material period and even during the period of her stay at Coonoor (January to December 1928) she left the management in defendant 2's hands. It is the plaintiff's case that between August 1927 and October 1929, defendant 2 "in a usual and regular conduct, management and superintendence of the High Field Estate" drew moneys from the plaintiff from time to time, 'for the payment of the staff and labour of the estate and its working expenses, taxes and public dues.' Repayments used to be made by defendant 2 by cash or by cheque and sometimes by the supply of tea grown on the estate. In October 1929 the balance due to the plaintiff was found to be Rs. 15,000 and by an agreement (Ex. TT) dated 28th October 1929, between the plaintiff and defendant 2, it was arranged that this amount should be treated as an advance for the supply of tea from the estate for a period of three years. As defendant 3 repudiated this agreement, the plaintiff claims payment of the amount of Rs. 15,000 treated as advance under that agreement.

Defendant 1 was sought to be made liable on two grounds: (i) that defendant 2 acted within the limits of his authority in borrowing moneys from the plaintiff and (ii) that defendant 1 and the estate have benefited by the moneys paid by the plaintiff from time to time, " the same having been spent for the business of the estate, the maintenance of the staff and payment of its taxes and dues." Defendant 1 contended that Ex. B, the power of attorney, did not authorize defendant 2 to borrow, that there was no necessity for him to borrow for estate purposes and that defendant 2 must, if at all, have borrowed from the plaintiff for other businesses of his own. He denied that any money borrowed from the plaintiff was used for or on the estate. The agreement of October 1929 (Ex. TT) he denounced as the result of a conspiracy between defendant 2 and the plaintiff, got up apparently with a view to render the plaintiff's position stronger, at the expense of the estate. Though an issue was raised in respect of the agreement of 28th October 1929, it is not necessary for the purposes of this case to deal with it. An issue was also raised as to the truth of the dealings between the plaintiff and defendant 2; the lower Court recorded a finding in plaintiff's favour on this question and the correctness of that finding has not been challenged before us, on behalf of defendant 1. The only point for determination in the appeal is whether defendant 1 can be held liable for the plaint claim and if so to what extent.

At the time when the issues were framed and when the defendant's witnesses were examined, the possible grounds on which defendant 1 could be made liable do not seem to have been very clearly realized. The investigation seems to have been practically confined to the question whether defendant 2 was authorized to borrow and whether there was necessity for him to borrow for the purpose of the estate. On this part of the case, the trial Court has upheld defendant 1's contention and found that defendant 2 had no authority to borrow and that there was no necessity for borrowing. This finding against defendant 2's authority and the need for borrowing has been challenged before us by the appellant's learned counsel.

Before the suit came on for argument, it seems to have been realised that it was also necessary to decide how much, if any, of the money advanced by the plaintiff to defendant 2 was used by him for the purposes of the High Field Estate. To facilitate the investigation of this question, a Commissioner was appointed on 6th October 1934 and it appears from his report (Ex. OOO) that four questions were referred to him, to report upon after an examination of the accounts and connected records filed by the parties. Oral evidence was also adduced, through some of the witnesses examined on the plaintiff's side, to show that the amounts advanced by the plaintiffs were sometimes utilized for estate purposes, such as payment of wages to coolies, payment of taxes and other dues etc. In this connexion, the lower Court observed that it is

> difficult to judge from defendant 2's account books alone how much money was actually received on behalf of the estate as income from the estate and how much money had to be spent on account of that estate . . . . . If defendant 2 had sufficient funds from the income of the estate itself to meet all those expenses, but misappropriated those moneys and borrowed money from the plaintiff to meet necessary expenses, it would not follow that the principal would be thereby bound.

In another part of the judgment, the learned Subordinate Judge said that it was unnecessary to consider the evidence on the plaintiff's side as to the actual application of his money for estate purposes, because " admitting that it is so, it does not follow that plaintiff has got a right of claim against defendant 1 " unless it is 'shown further that there was need to borrow for this purpose and that the estate had not sufficient funds from which these calls could be met.' This part of the judgment has been criticised by the appellant's learned counsel as vitiated by error of law and as resting on an assumption of possible misappropriation by defendant 2 for which there was no warrant. It was also contended that the Commissioner's report contained all the necessary information required for this part of the case and that if the lower Court was not satisfied with that report, it should have considered the evidence and come to its own conclusion as to the extent to which moneys advanced by the plaintiff have been applied by defendant 2 for the benefit of defendant 1 or of the estate.

In para. 16 of the judgment, the learned Subordinate Judge remarks that plaintiff must have thought that the moneys were lent to defendant 2 himself and not to the agent of defendant 1. It is difficult to reconcile this observation with the opening sentence in para. 15 where he rejects defendant 1's suggestion that plaintiff must

have originally opened his accounts in the name of defendant 2 personally and not in the name of the manager of the High Field Estate and proceeds to say that 'plaintiff might have believed that defendant 2 had authority to borrow.' We have little doubt that the plaintiff advanced the moneys referred to in the plaint to defendant 2 only in his capacity as agent of defendant 1. The respondent's learned counsel urged before us that the way in which plaintiff's accounts in respect of his dealings with defendant 2 have been kept, as explained by the commissioner in explanatory Note 1 of his report, Ex. OOO, suggested that the larger advances must have been made to defendant 2 in his personal capacity. We are unable to agree with this contention. As pointed out in the objections filed on behalf of the plaintiff to that report, some of the entries are only paper entries and the actual advances and repayments must, according to the plaintiff's accounts, be taken to amount only to Rs. 70,000 odd and Rs. 61,000 odd respectively.

Dealing with the question of defendant 2's authority to borrow, the learned counsel for the appellant conceded that defendant 2 had no express authority to do so, in view of the terms of Ex. B, but he contended that such power must be implied in the case of a person who is entrusted with the conduct of a business, especially where the principal is away from the country. He relied on S. 187, Contract Act, and criticised the proposition founded on (1841) 7 M & W 595,[1] as not consistent with the later authorities like (1847) 4 C B 686[2]: *see also* 1 C L J 199[3] at page 205. He also took exception to the criticism of Messrs. Pollock and Mulla on 2 Luck 253,[4] and relied on the wide observations in (1829) 130 E R 1132[5] and (1890) 15 A C 357.[6] It does not seem to us necessary, in this case, to deal with the general question of the borrowing powers of a person placed in charge of a business. The Indian Legislature appears to have solved the conflict of authority in England by a specific provision in Part 2 of Sec. 188, Contract Act: *cf.* Art. 37 and the illustrations thereto in Lowstead on Agency. Where, as here, the agent's authority is defined in writing, we doubt if S. 187, Contract Act, can be relied on, for it is well settled that:

> Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication: 43 Cal 527[7] at page 540.

The limits of 'necessary implication' are indicated by S. 188, Contract Act: *see* 23 M L J 595[8] at p. 598 and 33 Cal 343.[9] As no attempt was made to justify the borrowing in this case on the ground of 'necessity' or with reference to the 'usual course of business', we must confirm the finding of the Court below that defendant 1 cannot be held liable in this case on the footing that in borrowing from the plaintiff defendant 2 acted within the limits of his authority. The observations in (1890) 15 A C 357[6] cannot be relied on here, because it was conceded in that case that the agent did have power to borrow and the only question was whether the nature and terms of the particular loan were justified.

As regards the alternative basis on which the appellant's claim is sought to be supported, viz. the utilization of the plaintiff's moneys for the benefit of defendant 1 or the estate, it must be conceded that the appellant's criticizm against that part of the lower Court's judgment which deals with it is in the main justified. The learned Subordinate Judge fell into an error in mixing up the question of necessity with the question of benefit. If necessity for the loan is made out, the creditor holds the principal liable on the contract itself, because, by the terms of Sec. 188, Contract Act, the agent's authority to bind the principal is recognized whenever what the agent does is necessary for the business. It is only when the contract as such cannot be enforced against the principal, that the lender has to fall back on the equitable rule founded on the theory of 'unjust

1. Hawtayner v. Bourne, (1841) 7 M & W 595=10 L J Ex 224=5 Jur 118=56 R R 806.
2. Ricketts v. Bennet, (1847) 4 C B 686=17 L J C P 17=11 Jur 1062=72 R R 691.
3. Heramba Chandra v. Kasi Nath, (1905) 1 C L J 199.
4. Dhanpat Rao v. Allahabad Bank Ltd. Lucknow, (1927) 14 A I R Oudh 44=98 I C 783=2 Luck 253=3 O W N Sup 224.
5. Withington v. Heering, (1829) 5 Bing 442 = 130 E R 1132.
6. Montaignac v. Shitta, (1890) 15 A C 357.
7. Bank of Bengal v. Ramanathan Chetty, (1915) 2 A I R P C 121=32 I C 419=43 Cal 527=43 I A 48=8 L B R 536 (P C).
8. Palaniappa Chettiar v. Arunachelam Chettiar, (1912) 23 M L J 595=17 I C 139 = 1912 M W N 1204.
9. Ferguson v. Umachand, (1906) 33 Cal 343.

enrichment'. Though the authorities have not been uniform as to the precise basis of the rule, the rule itself is now well established that, where by any wrongful or unauthorized act of an agent the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of such money or property : *see* Bowstead, Art. 103. In some cases, the plaintiff's right was based on the count for money had and received or the theory of failure of consideration, and sometimes on the analogy of the count for money paid to the use of the defendant. Again, the theory of subrogation was at one time suggested as the analogy but it was later on pointed out that the analogy was not true: (1899) 1 Ch 440.[10] It was also suggested that in such case, there was really no borrowing at all, because there was no addition to the principal's total liability, but merely a substitution of liability to one person (the lender) in place of the pre-existing liability to another (the person paid off). Other cases have supported the claim only on grounds of equity; and in (1899) 1 Ch 440[10] two of the Lords Justices observed that the effect of the rule was to make the borrowing valid to the extent to which the principal has received the money or the benefit of its application. For a discussion of the theoretical basis, see Keener on Quasi-Contracts pages 329, *et. seq.*

On behalf of defendant 1, Mr. Panchapagesa Sastri relied on the circumstances that in (1906) 1 K B 103[11] reference has been made in the judgments to the fact that when the unauthorized loan was borrowed by the agent, he had no funds of the principal in his bank account; and he contended that the principle recognized in this class of cases should not be applied here, unless it was shown that at the time when defendant 2 borrowed moneys from the plaintiff, he did not have in his hands sufficient moneys of his principal to meet the then existing demands. Mr. Srinivasa Iyengar asserted that defendant 2 must have borrowed only on account of necessity and he maintained that the observations of the lower Court about misappropriation by defendant 2 are absolutely baseless. He further contended on the authority of (1894) 2 Q B 40,[12] that if and in so far as it is shown that the plaintiff's moneys have been utilized by defendant 2 for the benefit of defendant 1, the plaintiff's right to recover such amount from defendant 1 cannot be affected by the fact, even if it be a fact, that defendant 2 had misappropriated moneys belonging to defendant 1, unless it was proved that the plaintiff was aware of and was a party to defendant 2's misconduct. We are not satisfied that there is any warrant in the evidence for the theory of misappropriation. Though the agent's cash book (Ex. 2) is said to be incomplete, defendant 1's learned counsel admits that defendant 2 has brought into one or other of the various books of account kept by him all his receipts from the estate. We are not concerned to know whether or not he informed his principal of his lack of funds or left him to remain under the impression that he had sufficient funds in his hands to carry on the administration of the estate. The suggestion that part of the moneys received from the plaintiff might have been used for defendant 2's personal concerns is immaterial to the present discussion, because, under this head, plaintiff seeks to hold defendant 1 liable only for what is shown to have been applied for his benefit. Whether the accounts of defendant 2 are complete or not, it has not been suggested or shown that the entries, so far as they go, are false; and the plaintiff is entitled to rely on them to the extent to which they go.

We agree with Mr. Srinivasa Iyengar's contention based on (1894) 2 Q B 40[12] and we also think that the reference in (1906) 1 K B 103[11] to the absence of other funds in the hands of the agent at the time of the borrowing, must not be understood as intended to import a necessary condition in respect of the creditor's right to relief against the principal in such cases. If the agent had already misappropriated the principal's moneys and thus created a necessity for the borrowing, the lender cannot suffer for the dishonesty of the agent and the borrowing would have been at a time when there were in fact no funds of the principal available. If, on the other hand, the agent borrowed even when the principal's moneys were available, the borrowed

10. In re Wrexham Mold and Connah's Quay Railway Co No. 1, (1899) 1 Ch 440=68 L J Ch 270=80 L T 130=47 W R 464=6 Manson 218=15 T L R 209.

11. Bannatyne v. MacIver, (1906) 1 K B 103=75 L J K B 120=94 L T 150=54 W R 293.

12. Reid v. Rigby & Co., (1894) 2 Q B 40=63 L J Q B 451=10 R 280.

money, if paid into the principal's account or applied for his benefit will clearly be money, which the principal was not entitled to retain, and the fact or possibility of a subsequent misappropriation by the agent cannot affect the lender's remedies: (1906) 1 K B 103[11] at page 111. On page 334 of his book on Quasi Contracts, Mr. Keener refers to one case in which misappropriation by the agent may afford a defence to the principal against the lender's claim, i. e. where the agent pays the borrowed money into the principal's account and then draws it out and misappropriates it, without utilizing it for the principal's benefit. That observation has no application to a claim which is founded on the actual application of the plaintiff's moneys to the principal's benefit.

Mr. Sastri next contended that in India the creditor's right against the principal must be limited to the cases provided for in the Contract Act; but the equitable rule was recognized and followed in this country in 1915 M W N 761,[13] 1 C L J 199,[3] 6 C L J 639[14] and A I R 1936 Bom 62[15] at pp. 66 and 87. There is no justification for the contention that equitable claims are excluded by the Contract Act. If necessary, the creditor's claim in a case of this kind may be rested on S. 64 or S. 70, Contract Act.

It was next contended on behalf of defendant 1 that a claim on this alternative footing must be held to be barred by limitation as plaintiff should be deemed to have had a separate cause of action each time the moneys advanced by him were utilized for defendant 1's benefit and the suit was instituted more than three years after the last of such advances. It is not necessary for the purposes of this case to decide whether a claim of this kind will be governed by the three years rule of limitation or will be governed by Art. 120 and what will be the starting point of limitation. Even according to the principle suggested by defendant 1's learned counsel, the plaintiff had a subsisting claim against defendant 1 on 28th October 1929 and on that date the amount so due was treated as advance under Ex. TT. An agreement like that for the sale of tea was within defendant 2's power and from the date of Ex. TT plaintiff was not, on the principle of 11 All 47,[16] entitled to recover the money till the consideration failed by reason of defendant 3's repudiation of Ex. TT. The suit has been filed within three years of the date of this repudiation.

Lastly, Mr. Sastri contended that as the plaintiff had obtained a decree against the agent, he could not seek to hold the principal jointly liable. (1926) A C 761,[17] relied on by him in this connexion has no application here; because, that decision related to the maintainability of a subsequent suit against the principal after a decree had been obtained against the agent in a previous suit. Notwithstanding the opinion expressed by Coutts.Trotter J. in 49 Mad 900,[18] it seems to us also open to question whether in the face of the clear language of S. 233, Contract Act, we can apply the English rule of alternative liability in this country. Further, even in England, the principle in (1879) 4 A C 504[19] on which (1926) A C 761[17] is based will apply only when the principal is subsequently sued on the contract of the agent. Where, as here, the principal is sought to be held liable on equitable grounds, even the rule in England, as stated by Bowstead (Art. 103) seems to be one of joint and several liability of both principal and agent.

It remains to determine the amount which, on this alternative ground, the plaintiff will be entitled to recover from defendant 1. The lower Court has not given any finding on this point, in the view that it took of the law. The oral evidence adduced on the plaintiff's side only proves in a general way that moneys borrowed from the plaintiff used to be applied by defendant 2 or under his directions for the benefit of defendant 1. The amount thus applied must be fixed only with reference to the accounts produced on both sides. The Commissioner who examined the accounts states (in Table D of Ex. OOO) that out of the plaintiff's advances to

---

13. Suppayya Pattar v. Hajjee Ahmed Sait, (1916) 3 A I R Mad 1025=32 I C 763=1915 M W N 761.
14. Chasiram v. Raja Mohan Bikram Sha, (1907) 6 C L J 639.
15. T. R. Pratt Ltd. v. E. D. Sassoon & Co., (1936) 23 A I R Bom 62 = 161 I C 126 = 60 Bom 326=37 Bom L R 978.
16. Bassu Kuar v. Dhum Singh, (1889) 11 All 47 =15 I A 211=5 Sar 260 (P C).
17. R. M. K. R. M. Somasundaram Chetty v. M. R. M. V. L. Subramanian Chetty, (1926) 13 A I R P C 136=99 I C 742=(1926) A C 761= 95 L J P C 197=135 L T 645=42 T L R 686.
18. Kuttikrishnan Nair v. Appa Nair, (1926) 13 A I R Mad 1213=97 I C 475 = 49 Mad 900= 51 M L J 311.
19. Kendall v. Hamilton, (1879) 4 A C 504 = 48 L J Q B 705=41 L T 418=28 W R 97.

defendant 2, Rs. 21,199-6-1 could be traced in the accounts kept by defendant 2 and Rs. 8956-2-0 could be "doubtfully traced". In table E, he shows that from defendant 2's books only Rs. 17,874-8-3 could be traced to have been repaid to the plaintiff. In Table F the Commissioner shows that the Rs. 21,199-6-1 have been used for the purposes of the estate; and he adds that the sum of Rs. 8956-2-0 "may be presumed to have been spent on the estate." It is conceded on behalf of the appellant that in so far as the claim against defendant 1 is not on the contract itself but only for the restoration of the benefit enjoyed by him, plaintiff is not entitled to discount or interest as per terms of the contract between him and defendant 2. Whether he will be entitled to interest on grounds of equity and if so, at what rate and for what period, may be left to be determined after the return of the finding we propose to call for.

Both parties also agree that the plaintiff must give credit to defendant 1 for all sums that he has received from defendant 2 in repayment of the advances comprised in the present claim: *see* Keener, page 281. Mr. Sastri contends that as the plaintiff admits receipt of about Rs. 61,000 there is nothing more that he could claim from defendant 1 if (as per the Commissioner's report) only about Rs. 30,000 (Rs. 21,199 plus Rs. 8956) could at best have been spent on his estate. Mr. Srinivasa Iyengar rightly points out that the plaintiff's admission was made on the footing that more than Rs. 70,000 had been advanced and if, on the strength of defendant 2's accounts, only a smaller sum is to be held to have been applied for defendant 1's benefit, defendant 1 cannot ignore those accounts when it comes to the question of repayment and contend that all the Rs. 61,000 repaid by defendant 2 to the plaintiff should be deemed to have been paid out of defendant 1's funds. Defendant 1 must either rely on the plaintiff's accounts and admissions as a whole or prove the extent of repayment by other evidence.

At one stage, we were inclined to adopt the figures given in the Commissioner's Tables D, E and F and pass a decree here on their basis, particularly in view of the fact that in the objections filed on behalf of defendant 1 to that report no specific objection has been taken to these figures or to the Commissioner's remarks relating to them; but the objection-statement does in a way question the correctness of the Commissioner's method and of his figures. As the Commissioner's report has left a large sum as "doubtful" and his view as to its application is stated only as a matter of presumption, we have thought it more satisfactory to ask the lower Court to examine the accounts and the other evidence in the case and submit a finding as to (1) how much of the amounts advanced by the plaintiff to defendant 2 between August 1927 and October 1929 was paid by the latter into defendant 1's account or applied for the benefit of defendant 1 or of the estate of which defendant 1 was executor, (2) what amounts have been repaid by defendant 2 to the plaintiff out of the funds of defendant 1 or of the estate. We may add that though, as we have already held, the mere possession by defendant 2 of funds of defendant 1 or of the estate at the time of any borrowing from the plaintiff will not as a matter of law affect the plaintiff's right of recovery, such possession of funds will be a relevant fact to be taken into consideration in deciding whether any particular item of expenditure was in fact met out of the plaintiff's advances or out of moneys belonging to defendant 1 or to the estate. We leave it to the lower Court, to determine whether it is necessary to obtain a fresh report from the same or from another Commissioner. Finding to be submitted before 31st July 1937. Ten days for objections.

[In pursuance of the order contained in the above judgment the Subordinate Judge of Nilgiris at Ootacamund submitted his finding after which his Lordship delivered judgment dismissing the appeal.]

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1938 Madras 972

WADSWORTH J.

Ramanatha Gurukkal — Appellant.

v.

V. V. R. Arunachalam Chettiar and another — Respondents.

Second Appeal No. 381 of 1934, Decided on 4th August 1938, against decree of Sub-Judge, Trichinopoly, D/- 18th December 1933.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 43 (3) — Jurisdiction of Civil Courts — Order of dismissal validly communicated — Allegation that order was arbitrary does not give Civil Courts jurisdiction to scrutinize it.

An order of dismissal validly communicated is one which the Civil Courts cannot scrutinise. A

mere allegation that it is an order which from its arbitrary nature deserves scrutiny would not be sufficient to confer jurisdiction on Civil Courts.

[P 973 C 2]

(b) Interpretation of Statutes — Ousting of jurisdiction of Civil Courts — General scheme of Act is to be considered.

A statute may attach finality to particular orders in the sense of precluding a further appeal to the statutory authorities; whether it was intended to go further and oust the jurisdiction of the Civil Courts as well, will depend not upon words of that kind but upon the general scheme of the particular legislation. The ordinary rule is that where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain, unless a bar to such entertainment has been enacted expressly or at least by necessary implication: *A I R 1936 Mad 269, Foll.*

[P 974 C 1]

(c) Madras Hindu Religious Endowments Act (2 of 1927), S. 43 — Orders under, are final—Jurisdiction of Civil Courts is barred.

Section 73 of the Act is a clear indication that the provisions of S. 43 setting up a special machinery of appeal and conferring finality on the decisions in appeals by dismissed office-holders was intended to oust the jurisdiction of Civil Courts to question the propriety of an order of dismissal passed under that Section and communicated to the person dismissed : *A I R 1938 Mad 250, Ref.*

[P 974 C 2]

T. V. Muthukrishna Iyer — *for Appellant.*

M. Subbaroya Iyer — *for Respondents.*

Judgment.—This appeal raises the question of the precise force of the words, "the decision of the Board shall be final" at the end of S. 43, Cl. 3, Madras Hindu Religious Endowments Act (Act 2 of 1927). The appellant was the hereditary archaka in a non-excepted temple, the control of which is regulated by the Religious Endowments Act. It is found as a fact by the lower Appellate Court that he was dismissed from the office by the trustee, defendant 1, and that the order of dismissal was communicated to him. Instead of preferring an appeal to the Committee or to the Board, he filed a suit praying for a declaration of his right to the office and for an injunction restraining the trustee from interfering with the performance of his duties. Various contentions have been raised for the appellant by Mr. Muthukrishna Iyer, some of which seem to me to have little force. It is contended that assuming that there is a statutory exclusion of the jurisdiction of Civil Courts, this exclusion can only relate to orders of dismissal which are not arbitrary and that once there is an averment that a temple servant has been dismissed in an arbitrary manner, the suit must be treated as one relating to an act which is not a legal order of dismissal at all and that the Civil Courts can exercise a jurisdiction which otherwise they would not possess. It seems to me that this contention is unsound and that if an order of dismissal validly communicated is one which the Civil Courts cannot scrutinize, a mere allegation that it is an order which from its arbitrary nature deserves scrutiny would not be sufficient to confer jurisdiction.

It is also contended that S. 43 applies only to punishments for causes enumerated in Cl. (1) of that Section, namely breach of trust, incapacity, disobedience, neglect of duty, misconduct or other sufficient cause and that the present order of dismissal does not fall within those categories. But actually in the present case, the reason put forward by the trustee for dismissing the plaintiff was that he suffered from a physical disability which made him unfit to hold office. Whether or not there in fact were other matters which led to the plaintiff's dismissal, the ground of dismissal stated is, to my mind, one which, if true, might be treated as indicating an incapacity to hold office sufficient to clothe the trustee with the power to pass an order of dismissal under S. 43 of the Act.

The substantial ground upon which this appeal is based relates to the machinery of appeal set up by S. 43 and the interpretation of the word "final" in sub-cl. (3) of S. 43. Sub-cl. (2) provides for an appeal to the Committee against an order of the trustee under sub-cl. (1) and sub-cl. (3) provides that :

> A hereditary office-holder or servant of a temple may prefer an appeal to the Board against the order of a committee on an appeal under sub-s. (2) and the decision of the Board shall be final.

It is argued that the machinery of appeal set up in the Section is not intended to oust the jurisdiction of the Civil Courts and that the word "final" means only final so far as the process of appeal, to what I may call the executive authority, is concerned. The argument is that the right of a hereditary archaka to his office is a common law right and that the jurisdiction of Civil Courts to protect that right cannot be taken away except by express words or by words of which the necessary implication is that the jurisdiction of the Court has been removed. The case-law on this subject has been summarized by Varada-

chariar J. in 69 M L J 695.[1] The principles underlying the cases have been stated in terms which I would respectfully adopt. The learned Judge points out that a statute may attach finality to particular orders in the sense of precluding a further appeal to the statutory authorities; whether it was intended to go further and oust the jurisdiction of the Civil Courts as well, will depend not upon words of that kind but upon the general scheme of the particular legislation. He goes on to point out that the ordinary rule is that where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain unless a bar to such entertainment has been enacted expressly or at least by necessary implication.

Applying these principles to the present case, what we have is a claim to be restored to a common law office from which the plaintiff has been removed in the exercise of powers created by a particular statute, which statute prescribes two separate appeals to authorities specially constituted for the purpose and superior to the original disciplinary authority; prima facie it would appear that there is a statutory limitation to a common law right, which right has been restricted in its working by the procedure specially laid down for remedying any wrongs which may have been done to the holder of a common law right. It has been further contended on behalf of the respondent that not only is there a clear provision for a machinery for remedying the wrong of which the plaintiff complains but that there is also an express provision in the Act indicating the intention of the Legislature that Civil Courts should not deal with wrongs of the kind now under consideration Reference is made to the last clause of Sec. 73. S. 73 has obviously been drafted to take the place, so far as temples under the control of the Religious Endowments Board are concerned, of S. 92, Civil P. C. There is however a significant change in the wording of the final clause which restricts the jurisdiction of Civil Courts in suits of this nature in comparison with the corresponding provision of S. 92, Civil P. C. Sub-cl. (2) of S. 92 clearly prohibits the filing of suits other than those instituted in the manner laid down in sub-sec. (1) only in so far as such suits claim reliefs specified in sub-sec. (1). Sub-cl. (3) of S. 73, Religious Endowments Act, however does not restrict the prohibition of suits in Civil Courts to suits claiming those reliefs specified in sub-s. (1) of that Section but it lays down in much more general language "no suit in respect of such administration or management shall be instituted except as provided by this Act." The words "such administration or management" have been interpreted by a Bench of this Court as referring back to the previous clause and meaning any suit in respect of the administration or management of a religious endowment : (1937) 2 M L J 931[2] at page 934.

Undoubtedly a simple suit by a hereditary archaka to establish his right to succeed to the office would not be a suit in respect of the administration or management of a religious endowment. What has happened is that the archaka has been dismissed by the trustee in the exercise of his powers of administration and management conferred upon him under the Act. I am unable to hold that a suit which is in effect a suit to set aside a dismissal by a trustee in the exercise of these powers is not a suit in respect of the administration or management of the religious endowment. I am therefore of opinion that S. 73 of the Act is a clear indication that the provisions of S. 43 setting up a special machinery of appeal and conferring finality on the decisions in appeals by dismissed office-holders was intended to oust the jurisdiction of Civil Courts to question the propriety of an order of dismissal passed under that Section and communicated to the person dismissed. A special remedy is created by the statute for any wrong which may have been caused in the exercise of disciplinary powers conferred by the statute and it is to my mind clearly not in accordance with the scheme of the Act to prosecute a pre-existing remedy provided by the Civil Courts and to ignore the statutory remedy laid down in the Act. In the result therefore the appeal is dismissed with costs. Leave to appeal is granted.

C.R.K./B.D. *Appeal dismissed.*

1. Pandia Naicker v. Secy. of State, (1936) 23 A I R Mad 269=162 I C 419 =69 M L J 695.

2. Singam Iyengar v. Kasturi Ranga Iyengar, (1938) 25 A I R Mad 250=(1937) 2 M L J 931.

A. I. R. 1938 Madras 975

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Gottepulla Bapayya Naidu—Petitioner.

v.

Peta Bapayya and others—Respondents.

Criminal Misc. Petn. No. 247 of 1938, Decided on 2nd May 1938.

Contempt — Contempt of Court — Criminal proceedings by zamindar against his ryots — — Certain person, pending these proceedings, issuing pamphlet accusing zamindar of having deliberately launched false cases and of having oppressed his ryots — Contempt held of grave nature.

Nothing is more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented ; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. It is no excuse to urge that the mind of the trial Judge would not be affected by the statements : *A I R 1938 Mad 248, Rel. on.* [P 976 C 1]

A zamindar launched criminal proceedings against his ryots. While these proceedings were pending a person issued a pamphlet accusing the complainant zamindar of having deliberately launched false cases against his ryots and in other ways oppressing them :

Held that the contempt was of a grave nature. [P 976 C 1]

M. Appa Rao — *for Petitioner.*

B. Jagannadha Doss for S. Suryaprakasam and K. Venkatarama Razu — *for Respondents.*

Leach C. J. — This is an application to commit the three respondents for contempt of Court. The petitioner is the mokhasadar of Kondaparava, Kistna District. Respondent 1 is the President of the West Kistna Congress Committee, respondent 2 is the Secretary of that Committee, and respondent 3 is said to be the printer of the pamphlet which is the subject-matter of this petition. Last year there was trouble between the petitioner and the ryots on his estate and he filed a complaint in the Court of the Sub-Magistrate, Tiruvarur, alleging an offence under the Cattle Trespass Act against 26 of the ryots. It was said that they had rescued cattle which were being taken to the pound after a trespass. He also complained that the ryots had unlawfully interfered with the produce of his forests and were guilty of "turbulent acts endangering human life and property." In this connexion he instituted proceedings under S. 144, Criminal P. C., against 11 ryots in the same Court. He also filed a number of applications under S. 74, Madras Estates Land Act. While these proceedings were pending a pamphlet was distributed containing the following statements :

The zamindars and mokhasadars are oppressing in many ways the ryots in their village, since the success of the Congress in the elections. The sole cause for oppressing the ryots is that they voted for the Congress and helped to establish the Congress Government.

* * * *

The mokhasadar is oppressing the ryots in many ways by not granting pattas to the ryots in relation to their lands even in their possession by not giving receipts for cists paid, by including in his house farm lands the lands in possession of the ryots whenever he is displeased.

As the ryots have not submitted to the mokhasadar who by not granting pattas to the Kondeparava ryots who are suffering like this from a very long time, attempted to deprive them of their rights they are enjoying from of old, the mokhasadar is now harassing those poor ryots illegally foisting upon the villagers a pound case (under Cattle Trespass Act) against 26 of them, a forest case against 11 of them, summary suits on 43 of them and a case against 3 of them for alleged murdering of a forest watcher and by fabricating many such cases.

These poor ryots who are bent down by unbearable poverty from a very long time are unable even to protect their rights again in these illegal cases set up by the mokhasadar. Therefore we request the public to render monetary and such other voluntary help in order that the rights of the ryots may be protected.

In the affidavit in reply, respondent 1 has taken objection to certain parts of the translation of this petition, which was supplied by the petitioner and for the words "illegally foisting upon the villagers" he would have substituted "has unjustly launched.' The Senior Telugu Interpreter of the Court has been called before the Court and he says that the words used actually mean "unjustly concocted." Respondent 1 as President of the Committee takes full responsibility for the publication of this pamphlet, and, recognizing that the statements do amount to contempt of Court, has tendered an apology. Respondent 2 has stated that he had nothing to do with the drawing up of the pamphlet and that he was unaware of its issue. Respondent 3 says that he is not responsible as the printer, as he had let his Press to another some time before the pamphlet was printed. The learned advocate for the petitioner has accepted the pleas of respondents 2 and 3 and the case has proceeded against respondent 1 alone. The contempt here is of a very grave nature. While these proceedings were pending, the West Kistna Congress Committee issued this pamphlet accusing the petitioner of having deliberately launched false cases against his ryots and in other ways oppressing them, and

respondent 1 acknowledges responsibility. In a recent case of a similar nature, 1937 M W N 1193,[1] I had occasion to refer to the observations of Lord Hardwicke in (1742) 2 Atk 469=26 E R 683,[2] where he said that nothing is more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. And I would add, as I added in the previous case, it is no excuse to urge that the mind of the trial Judge would not be affected by the statements.

The offence here is so grave that we consider we should not be doing justice if we accepted the apology of respondent 1 and let the matter rest there. We consider that this is a case in which a fine should be inflicted, and we direct respondent 1 to pay a fine of Rs. 250 within 10 days, failing which he will undergo simple imprisonment for a period of one month. He will also pay the costs of the petitioner, which we fix at Rs. 100.

D.S./R.K. *Order accordingly.*

1. Krishna Yachendra Bahadur Varu v. N. V. Rama Naidu, (1938) 25 A I R Mad 248=173 I C 455=39 Cr L J 328 = I L R (1938) Mad 545=(1938) 2 M L J 81=1937 M W N 1193.
2. In re Read and Huggonson; Roach v. Gravan, (1742) 2 Atk 469=26 E R 683.

A. I. R. 1938 Madras 976

ABDUR RAHMAN J.

Sheik Dawood Rowther — Petitioner.

v.

Abdul Kadar Rowther — Respondent.

Civil Revision Petn. No. 1130 of 1937, Decided on 19th August 1938, from order of Dist. Court, West Tanjore, D/- 10th August 1937.

Criminal P. C. (1898), Ss. 476, 439 — Petitioner alleged to have harvested crops attached in execution of decree—Court relying on order of attachment, and receiver's report holding case under S. 206, Penal Code, to be made out against petitioner and filing complaint under S. 476 against him—No directions issued by attaching Court under O. 21, R. 45, Civil P. C. —Crops appearing to have been harvested by petitioner to save them from being ruined — Order under Sec. 476 held not justified — Although High Court would not ordinarily interfere in revision, it was a fit case for such interference.

Mere harvesting of crops, which have been attached in execution of a decree, would not bring the person doing so within the scope of S. 206, Penal Code, unless it is shown that he did one of the things mentioned in S. 206 with a fraudulent intent. It must be shown that the person concerned committed or attempted to commit the offence under S. 206 by harvesting the crops with the intention of preventing the crops from being taken in execution of decree and not merely with the intention of saving them. [P 977 C 1]

On a complaint being made to it that the petitioner had harvested certain crops which had been attached, the Court, relying mainly on the order of attachment and the receiver's report, held that a prima facie case was made out under S. 206, Penal Code, and ordered a complaint to be filed against him under S. 476, Criminal P. C. The requirements of O. 21, R. 45, Civil P. C., had not been kept in mind by the Court ordering the attachment and it appeared that the crops had been harvested by the petitioner to save them from being ruined. Moreover there was nothing to show on the record that the petitioner knew of the crops having been attached under the orders of the Court:

Held **that the order under Sec. 476, Criminal P. C., was not justified. Ordinarily the High Court would not have interfered in revision, but in view of the errors of law committed by the Court below, it was a fit case for interference in revision.** [P 977 C 1, 2]

J. V. Srinivasa Rao—*for Petitioner.*

Order. — The Subordinate Judge of Kumbakonam ordered a complaint to be made against the petitioner on the ground that certain crops which were already attached on 26th September 1936 under the orders of the Court were harvested by him on or about 8th October in that year. The Court relying mainly on the order of attachment and the receiver's report held that a prima facie case was made out under S. 206, Penal Code, against the petitioner and ordered a complaint to be filed against him under Sec. 476, Criminal P. C. The order of the learned Subordinate Judge was perfunctory, and did not seem to comply with the requirements of the Section. An appeal against this order was dismissed by the learned District Judge who tried to read into the order things which were not mentioned there. He however came to a distinct finding that the prosecution was expedient in the interests of justice. The petitioner has now come up in revision. It appears to be rather strange that the provisions of O. 21, R. 45 (2), Civil P. C., were not noticed by either of the Courts below. The crops were perishable and it has been for that reason provided in the above stated rule that the judgment-debtor may tend, cut, gather and store the produce in spite of an order of attachment, subject to such conditions as may have been imposed by the Court either in the order of attachment

or in any subsequent order. I have seen the order of attachment issued by the Court and no condition was imposed in that order. Nor was any condition imposed on the judgment-debtor subsequently. It is found by the learned District Judge that evidence showed that the harvest was ripe for being cut by 6th October. If it were so, the crops would have been ruined if allowed to remain standing for any length of time—and it was necessary for the judgment-debtor as much in his own interests as in those of the attaching decree-holder that they were cut—particularly when no directions were given by the attaching Court either at the time of ordering attachment or subsequently.

This is not all. Before a person can be ordered to be prosecuted under Sec. 206, Penal Code, there must be some evidence to show that he had fraudulently removed, concealed, transferred or delivered to any person, any property or any interest therein intending thereby to prevent the property or interest from being taken in the execution of the decree which was passed against him. Not to say of any evidence on the point that the petitioner had removed, concealed, transferred or delivered the crops which had been cut by him either fraudulently or otherwise, there is no allegation that he ever did or intended to do so. The mere harvesting of crops would not bring him within the scope of S. 206 unless it were shown that he did one of the things mentioned above with a fraudulent intent. It might be said that the petitioner appears to have made an attempt to commit the offence. But, even then, it would have to be shown that he did so with the intention of preventing the crops from being taken in the execution of decree and not merely with the intention of saving them, as appears to have been the case here. The point was taken by the petitioner before the learned District Judge but no attention seems to have been paid by him to this part of the case. In the end, there is nothing to show on the record that the petitioner knew of the crops having been attached under the orders of the Court. The fact that certain other persons knew of the attachment cannot be sufficient to prove that the petitioner had any knowledge. Nor is the fact that his crops were attached on previous occasions relevant to show that they were attached on this occasion.

If I were not satisfied about the errors of law having been committed by the Sub-ordinate Courts, I would not be interfering in revision. But since the Subordinate Judge does not appear to have taken the matter seriously or in any case failed to consider the various matters which he was required to consider before taking such a serious step and since the learned District Judge did not pay sufficient attention to the petitioner's contentions that there was no intention on his part to remove the crops clandestinely and that his action was bona fide and lastly the requirements of O. 21, R. 45 were not kept in mind by the Court ordering attachment, I hold that the order under S. 476 was not justified. I would therefore vacate the order. The complaint if filed will now be withdrawn.

C.R.K./R.M. *Order vacated.*

A. I. R. 1938 Madras 977

PANDRANG ROW J.

Society for Propagation of Gospel in Foreign Parts and another — Appellants.

v.

R. Sama Rao Naidu — Respondent.

Appeal No. 273 of 1936, Decided on 10th August 1938, against order of City Civil Court, Madras, D/- 27th February 1936.

Civil P. C. (1908), S. 20—Suit by landlord for realisation of rent—Lease silent as to place where rent is to be paid—Question as to where it is payable is to be decided with reference to S. 49, Contract Act — Lease executed and registered at *S* in district *T*—Agreement to give lease entered into at *M* where lessor lived—Suit by lessor for recovery of rent instituted at *M*—Circumstances of case showing that it was intention of parties that payment was to be made at *M*—Court at *M* held to have jurisdiction to try the suit.

Where a lease is silent as to the place where the rent is to be paid, the question as to where it is payable is to be decided with reference to S. 49, Contract Act, which provides that when no place is fixed in the contract for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place. If from the circumstances, in which contract in question was entered into, it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn, whether the rule of the English Common law, which requires the debtor to seek the creditor, applies or not to India.

[P 978 C 2; P 979 C 1]

A lease was executed and registered at *S* in *T* District, although the agreement to take the lease was entered into at *M* where the lessor lived. The rent was payable in cash. The lessor brought a suit for recovery of the rent at *M*. The question

arose as to whether the Court at *M* had jurisdiction to try the suit. From the facts and circumstances of the case it was clear that the intention of the parties was that payment of rent was to be made at *M* and that if, as a matter of fact, the lessee had applied under S. 49, Contract Act, to the lessor to fix the place of payment, *M* would have been fixed as the place of payment :

Held that the Court at *M* had jurisdiction to entertain the suit : *A I R 1927 P C 156, Rel. on.* [P 979 C 2]

T. M. Krishnaswamy Iyer and T. A. Anantha Iyer — *for Appellants.*

R. Gopalaswamy Iyengar and S. Sankara Iyer — *for Respondent.*

Judgment.—This is an appeal from the order of the City Civil Judge, Madras, dated 27th February 1936 directing that the plaint in O. S. No. 1124 of 1935 should be returned for presentation to the proper Court. The suit was one instituted by the Society for the Propagation of the Gospel in Foreign Parts by its authorized agent, the Lord Bishop of Madras as plaintiff 1 and by the Hon'ble Sir David Devadoss, Kt., the Treasurer of the Central Church Council of the Society as plaintiff 2. The suit was to recover arrears of rent due on a lease executed in favour of the defendant. The counter-part of the lease was executed by the defendant in favour of the Superintendent of the S. P. G. Mission, the late Dewan Bahadur Paul Appaswami (then City Civil Judge) for a period of three years in respect of certain lands in Padrikotagam village in Shiyali Taluk in the Tanjore District. The net rent payable was Rs. 2626.8.0. The deed, Ex. A, is silent as to where the rent was to be paid. It says : "I shall pay this amount before 14th May of the respective year and obtain receipt." As the deed required registration, it was executed and registered in the Shiyali Taluk and not in Madras though the agreement to take a lease was entered into at Madras itself where Mr. Paul Appaswami lived. His address is given in Ex. A as Ritherdon Road, Vepery, Madras. The defendant resisted the suit on several grounds one of which was want of local jurisdiction in the City Civil Court to entertain the suit. On this preliminary question of jurisdiction the learned City Civil Judge came to the conclusion that the plea of want of jurisdiction was well founded and made the order referred to above directing the return of the plaint, and the merits of the claim were not gone into. The only point therefore that arises in this appeal for determination is whether the plea of want of local jurisdiction is sound.

The question of local jurisdiction is determined by S. 20, Civil P. C., which provides that a suit may be instituted in the Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. The question is whether in this case the cause of action arose wholly or in part within the limits of the City of Madras. It is obvious, and the point is not contested, that if the place where the rent was to be paid under the deed, Ex. A, was Madras, the City Civil Court, Madras, will have local jurisdiction. So the question narrows itself into this: was the rent payable under Ex. A at Madras. As observed already, the deed itself is silent as to the place of payment. In similar circumstances it has been held in some cases that the rule of the English Common law that the debtor should seek his creditor would apply to India also, but this has been doubted to some extent in other cases. The latest pronouncement on the subject which is of the highest authority is to be found in 5 Rang 451[1] in which the previous pronouncement of their Lordships of the Judicial Committee in 53 Cal 88[2] has been referred to. It is in my opinion unnecessary to go beyond the observations of the Judicial Committee in 5 Rang 451.[1] Apart from the applicability of the general rule of the Common law in England which requires a debtor to seek his creditor and the limitation to which it is subject, namely that it applies only when the creditor is within the realm, the point is to be decided with reference to S. 49, Contract Act, which provides that when no place is fixed in the contract for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place. In 5 Rang 451[1] their Lordships of the Judicial Committee observe that as this Section in the Contract Act makes it the duty of the promisor to apply for the appointment of a reasonable place, if that duty is disregarded by the promisor, his disregard or neglect to perform the statutory duty imposed on him cannot better his position. The final pronouncement in 5 Rang 451[1] was as follows :

1. Soniram Jetmull v. R. D. Tata & Co. Ltd., (1927) 14 A I R P C 156=102 I C 610=5 Rang 451=54 I A 265 (P C).
2. Bansilal Abirchand v. Ghulam Mahbub Khan, (1925) 12 A I R P C 290=92 I C 760=53 Cal 88=53 I A 58 (P C).

Their Lordships do not think that it is possible to accede to the present contention that S. 49, Contract Act, gets rid of inference that should justly be drawn from the terms of the Contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him.

In other words, therefore, if from the circumstances in which the contract in question was entered into, it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn whether the rule of the English Common law which requires the debtor to seek the creditor applies or not to India. Applying this rule to the facts of the present case I have no doubt that the intention of the parties must have been at the time that the payment of rent was to be made in Madras which was the place where the local office, so to speak, of the S. P. G. Mission is situated and where Mr. Paul Appaswami was living at the time Ex. A was executed in his favour. It is in my opinion most unlikely that Mr. Paul Appaswami would have agreed to the payment of rent in Shiyali Taluk itself to some person whom he was to send or authorize for the purpose. The learned trial Judge in the Court below appears to have been led away by considerations which are really irrelevant in the present suit or rather by circumstances which do not exist in the present suit, namely that if rent is payable in paddy it would be most unreasonable or inconvenient to require a lessee to pay rent in respect of lands in Shiyali Taluk at Madras. I do not wish to pronounce any opinion on this question as that does not arise in the present case. The rent is payable in cash and the argument based on inconvenience does not apply to the facts of the present case. The principle to be applied is not one to be applied absolutely without any regard to the particular circumstances of each case but one which has to be applied with particular regard to the circumstances in which the particular contract came to be entered into. The learned advocate for the defendant-respondent has argued that from the fact that some previous payments in respect of previous leases were made at Cuddalore, it must be presumed that the intention of the parties was that the rent payable under Ex. A also was to be made at Cuddalore. This argument appears to be a new one in the sense that it does not appear to have been put before the Court below or raised in the written statement. In any case I have gone through the correspondence in question relied upon on behalf of the respondent and I am unable to draw the inference that I am asked to draw, namely that the intention of the parties when Ex. A was executed was that the rent was to be paid elsewhere than at Madras. It may be that on special occasions for special reasons it was convenient for the treasurer or the Superintendent to arrange for the receipt of rent at Cuddalore but beyond this the correspondence does not establish that the rent was to be paid at Cuddalore always or as a matter of course. The inference to be drawn in the circumstances from the position of the parties and the fact that the rent was to be paid in cash is that both parties to the contract Ex. A intended that the rent was to be paid at Madras to Mr. Paul Appaswami or his successor in office, and I have no doubt that if as a matter of fact the defendant had applied under S. 49 to his lessor to fix the place of payment, Madras would have been fixed as the place for payment. By omitting to apply for fixing the place of performance the defendant cannot put himself in a better position. Of course this is not in any way to throw doubt on his defence that the payments made by him amount to a full discharge of the plaintiff's claim. In these circumstances I am of opinion that the lower Court was wrong in coming to the conclusion that it had no local jurisdiction to entertain the suit. The appeal must therefore be allowed and the order appealed from set aside, the lower Court is directed to receive the plaint and restore the suit to its original number on the file and dispose of it according to law. The appellants are entitled to their costs of this appeal from the respondents. Costs in the Court below already incurred and to be incurred in future should be provided for in the revised decree of the Court below.

C.R.K./R.M. *Appeal allowed.*

A. I. R. 1938 Madras 979

VARADACHARIAR J.

Edara Venkayya — Petitioner.

v.

Edara Venkata Rao — Respondent.

Civil Revn. Petns. Nos. 87 and 386 to 388 of 1937, Decided on 19th August 1938, from order of Dist. Court, West Godavari at Ellore, D/- 6th November 1936.

Civil P. C. (1908), O. 2, R. 2 (3)—Leave under — Application for leave when can be made explained — What the Court has to consider stated.

The question whether leave for particular purposes should be obtained before the institution of the suit or could be obtained later will, in cases not governed by any definite statutory time-limit, have to be decided according to the bearing of the leave upon the jurisdiction of the Court to entertain the particular suit or its bearing upon the constitution of the particular action or the significance of other consideration. [P 981 C 1]

Where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application for leave should be made before the institution of the suit itself or at least along with the plaint. Where the objection under O. 2, R. 2 arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for; it only entails a disability as regards subsequent proceedings. It may be that as a matter of prudence the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But, that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. The Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution : *(1907) 2 K B 727 and (1879) 11 Ch D 905, Ref.* [P 981 C 2; P 982 C 1]

B. Somayya — *for Petitioner.*

V. V. Srinivasa Iyengar and V. V. Ramadurai — *for Respondent.*

Order.—In these revision petitions, the petitioner challenges the validity of four orders passed by the lower Court granting leave under O. 2, R. 2 (3), Civil P. C., to the plaintiff to omit the claim for certain reliefs, in the circumstances to be presently mentioned. The orders have been questioned on two grounds : (i) that the Court had no power to grant leave at the stage at which the applications were made, and (ii) that the circumstances alleged in the application for leave did not justify the grant of leave. The latter question relates to the exercise of the discretion which is vested by law in the lower Court and except in very exceptional circumstances, it is not proper for a Court of revision to interfere with the way in which the lower Court has exercised its discretion. In the present case I do not see sufficient reason for interfering with that exercise of discretion. The question as to the power of the Court to grant leave at the stage at which the applications were made to it is not free from difficulty. The relevant facts are as follows. The plaintiff was entitled to recover a sum of Rupees 20,000 from the defendant in ten annual instalments of Rs. 2000 each, the first instalment becoming payable on 31st March 1929. As the first instalment was not paid on the due date, the plaintiff filed a suit for its recovery in April 1929. Several defences were raised to that suit and the plaintiff apparently waited to see what the decision in that suit would be before he filed his next suit. But it unfortunately happened that that suit remained pending for a number of years. In 1933 he filed his second suit, O. S. No. 19 of 1933. By that time not only the second instalment but some later instalments had also fallen due. But O. S. No. 19 of 1933 sought the recovery of the second instalment only. O. S. No. 17 of 1934 was filed next year for the third instalment and two other suits, viz. O. S. No. 16 of 1935 and O. S. No. 13 of 1936 were filed for the recovery of the later instalment. Luckily or unluckily for the parties, all the four suits beginning from O. S. No. 19 of 1933 remained pending to this date. At some stage, the defendant raised the plea uuder O. 2, R. 2, Civil P. C., on the ground that as the claim for some of the later instalments had accrued due even before O. S. No. 19 of 1933 was filed, the later suits would be barred by the provisions of that Rule. Similar pleas were sought to be raised in the other suits as well. It was at this stage that applications were filed by the plaintiff on 1st October 1936, for grant of leave under O. 2, R. 2 (3).

On the facts above stated, Mr. Somayya, the learned counsel for the defendant, contends that on a proper construction of Cl. 3 of O. 2, R. 2, leave should have been asked for before O. S. No. 19 of 1933 was actually filed or at least at the time the suit was instituted, and that the Court has no power at a late stage to grant such leave. I may mention here that the lower Court has taken care to leave an allied question open namely whether the leave granted under the orders now challenged will be effective to obviate the bar under O. 2, R. 2, Civil P. C., in respect of suits that have been already instituted. I do not therefore wish to say anything on that question; nor do I wish to be understood as expressing any

opinion on the question whether O. 2, R. 2 (3) applies to these suits or not. These are questions to be considered in the suits themselves. The only question dealt with by the Court below and proposed to be dealt with by me here is whether assuming that the bar under O. 2, R. 2 (3) would have applied to each of the later suits, the Court had power to grant leave under that clause at a late stage of the pendency of the earlier suit. The learned Judge has laid some stress on the fact that in re-enacting this provision in the Code of 1908, the Legislature has omitted certain words which were found in the corresponding provision in the Codes of 1882 and 1877. In the last clause of S. 43 of the older Codes, there occurred in parenthesis the words "except with the leave of the Court obtained before the first hearing" between the words "omits" and "to sue." The learned Judge understands the reasons of the omission to be that it was intended to leave the question of the time for making an application at large, subject only to the power of the Court to decline to grant leave if an application was made too late. Mr. Somayya suggests that that was not the real reason for the omission; he attributes it to a recognition by the Legislature of the fact that the words found in the old Rule were really inconsistent with the substantive provision that all reliefs arising out of the same claim must be claimed in one and the same suit. He points out that the question of omission or no omission in respect of some reliefs must be settled at the initial stage itself and could not be properly dealt with at later stages of the suit. I am not by any means satisfied that there is any inherent incompatibility of the kind suggested by Mr. Somayya. The older Code obviously contemplated that the application for leave might be made after the institution of the suit, though it fixed a time-limit by prescribing that leave should be obtained before the first hearing.

The question whether leave for particular purposes should be obtained before the institution of the suit or could be obtained later will, in cases not governed by any definite statutory time limit, have to be decided according to the bearing of the leave upon the jurisdiction of the Court to entertain the particular suit or its bearing upon the constitution of the particular action or the significance of other consideration. Taking for instance the provision in the Letters Patent that the leave of the Court should be obtained before a suit of a particular kind is instituted in the High Court, it is obviously a provision by way of condition precedent to the jurisdiction of the Court. If, on the other hand, we take the rule relating to the necessity for leave for a suit against a Receiver or for a suit under O. 1, R. 8, Civil P. C., the leave is not one that bears on the jurisdiction of the Court; the requirement as to leave is based on considerations relating to the interests of other persons or the authority of other Courts. The provision as to leave in this latter class of cases rests not so much even on the constitution of the particular suit as upon the expediency of granting relief in that particular suit in a manner that may affect the interests of other persons. That is why the preponderance of authority is in favour of the view that in this class of cases leave is not a condition precedent to the institution of the suit. Another class of cases which lies midway between these two groups is illustrated by the provision of O. 2, R. 4, Civil P. C., as regards the joinder of particular claims in one suit with a particular claim for the recovery of immovable property. Under the corresponding rule of the English Practice, it has been held in England that the leave contemplated by this rule may be granted even at a later stage of the suit: *see* (1907) 2 K B 727.[1] The observations of Jessel M. R. in (1879) 11 Ch D 905,[2] seem to suggest a stricter view, but, they have been explained by Buckley L. J. in the later case. Again, the leave contemplated by S. 20 (b), Civil P. C., in respect of defendants residing outside the jurisdiction of the Court has been held to be capable of being granted on an application made after the institution of the suit. These illustrations show that where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application for leave should be made before the institution of the suit itself or at least along with the plaint.

Where the objection under O. 2, R. 2, Civil P. C., arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in

1. Lloyd v. Great Western & Metropolitan Dairies Co., (1907) 2 K B 727=76 L J K B 924=97 L T 384=23 T L R 570=51 S J 530.
2. In re Pilcher; Pilcher v. Hinds, (1879) 11 Ch D 905=48 L J Ch 587=40 L T 832=27 W R 789.

which leave should have been asked for; it only entails a disability as regards subsequent proceedings. It therefore seems to me that there is even less reason in this class of cases for insisting that the application for leave to omit must precede or at least be contemporaneous with the plaint in the first suit. It may be that as a matter of prudence the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. So far as I can see, the Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. I am therefore unable to agree with Mr. Somayya's contention that the reason of the thing requires that such an application must have been made prior to the institution of the suit in which the application is made. In this view, the omission in the new Code of the words found in parenthesis in Cl. 3 of Sec. 43 of the old Code justifies the inference that the Legislature did not wish to insist upon leave being obtained before the first hearing. Some of the Commentators on the new Code (including Sir Dinshaw Mulla) also take this view, and I am not satisfied that that view does not correctly represent the intention of the Legislature. The civil revision petitions accordingly fail and are dismissed with costs in Civil Revision Petition No. 87 of 1937.

C.R.K./N.S. *Petitions dismissed.*

*** A. I. R. 1938 Madras 982**

VENKATASUBBA RAO AND ABDUR RAHMAN JJ.

Vedakannu Nadar & others—Appellants.

v.

Nanguneri Taluk Singikulam Annadana Chatram & others—Respondents.

Appeals Nos. 111 and 112 of 1935, Decided on 6th May 1938.

(a) Contract—Entire contract for single consideration — Contract cannot be divided into separate parts.

Where there is one and entire contract for a single consideration, each part of the contract is an inducement to every other part of it and there is no warrant for dividing the bargain into two distinct parts: *(1881) 20 Ch D 1, Rel. on.*

[P 985 C 1; P 992 C 2]

(b) Trusts—Charitable endowment—Transfer of right to conduct charity by trustee to co-trustee for consideration is against public policy.

Where a trustee or hakdar of a charitable endowment transfers his right to conduct charity to another co-trustee for consideration and agrees that he would not have any claim in respect of duty or right of conducting the charity, the transfer is against public policy and confers no right on the transferee: *1 Mad 235; 6 Mad 76 and 19 Mad 211, Rel. on ; A I R 1935 Mad 220 ; 15 Mad 183 and 27 Mad 192, Disting.; 36 Cal 975, Expl.*

[P 987 C 1]

*** (c) Trusts — De facto trustee has no locus standi to maintain suit on behalf of trust — Position of de facto trustee explained.**

There is no warrant for the conclusion that a de facto trustee, as such, has any locus standi to maintain an action on behalf of trust. After all, his position is that of an intermeddler or a wrongdoer (unless on the facts of each case a presumption can be raised in his favour of being a trustee de jure) and he cannot confer any rights on himself by committing a wrong, although he may assume liability on account of this conduct. The position of such trustees under the Hindu law is not any different from what they occupy under other systems of law. A trustee de facto is really no other than what is known to law as a trustee de son tort and his position does not improve by describing him to be a trustee de facto. As a trustee de son tort he cannot be held to confer a right on himself to maintain these suits, even if they are taken to have been instituted for the benefit of the charities: *A I R 1926 Mad 1066 and A I R 1927 Mad 69, Dissent.; Case law discussed.*

[P 989 C 2; P 990 C 1]

(d) Hindu Law — Guardian de facto — His action may entail liabilities on minors if alienation by him is for benefit of minors *(Obiter).*

Under the Hindu law, unlike the Mahomedan law, the action of a guardian de facto may entail certain liabilities on minors, if his action in alienating their properties is found to have been for their benefit or necessity: *6 M I A 393 (P C); 14 Bom 562 ; 23 M L J 638 and A I R 1926 Mad 457, Rel. on.*

[P 989 C 2]

*** (e) Trusts — One trustee cannot maintain suit on behalf of trust property if remaining trustees are not joined as plaintiffs or defendants.**

The general principle of law is that the office of a trustee, irrespective of the number of trustees, is a joint one and co-trustees form, as it were, one trustee and must therefore execute the duties of their office jointly. Hence no suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even as defendants : *8 Cal 42 (P C); 11 Cal 338 ; 9 M L J 312 and A I R 1922 Mad 317, Rel. on.*

[P 990 C 1]

*** (f) Civil P. C. (1908), O. 1, R. 3—Suit by trustee on behalf of trust property—Co-trustees not joined either as plaintiffs or defendants for 17 years in spite of objection regarding the same—Exercise of discretion of joining them as defendants after 17 years held not proper.**

A trustee instituted a suit on behalf of trust property without joining his co-trustees either as plaintiffs or as defendants. An objection as to non-joinder of co-trustees as defendants was raised but the plaintiff remained adamant in his opposition to the objection. After 17 years during which time the suit was pending, he made an application for the addition of co-trustees as defendants to the suit :

Held that in view of the conduct of the plaintiff during 17 years and the prejudice which might be caused to the defendants by taking away the advantage gained by them on account of the plea of limitation, the exercise of the discretion of joining the co-trustees as defendants would neither be judicious nor judicial : *8 Cal 42 (P C), Rel. on.* [P 990 C 2]

(g) Trusts — Misconduct of trustee.

Misconduct on the part of the trustee does not ipso facto result in his removal. [P 993 C 1]

(h) Executor—Suit by one executor is incompetent in absence of joinder of executors *(Obiter).*

In the case of co-executors, a suit by one executor cannot be held properly constituted unless all of them are on the record : *A I R 1921 Mad 528, Rel. on.* [P 993 C 1]

S. Doraiswami Iyer, K. Venkateswaran, K. R. Rajagopalan and S. P. Vasudevan — *for Defendants.*

M. Patanjali Sastri for M. Balasubramania Mudaliar — *for Respondents.*

Abdur Rahman J.—Two suits for ejectment, out of which these appeals arise, were filed in the name of a public charity known as Nanguneri Taluk Singikulam Annadana Chatram by the plaintiff as a hukdar (which is here used for a manager of a trust) sometime in 1921 against a number of tenants and were decreed by the Subordinate Judge in March 1935. Having regard to the fact that the suits were filed on behalf of a charity, which was neither registered nor a juristic entity, it is fairly obvious that they could not proceed, but since they have gone on for this length of time and even succeeded in the trial Court, it may well be argued that the defect was one of wrong description merely and should not be allowed to prevail at this stage. We have therefore decided to go into the other question relating to the right of the plaintiff and after his death, which occurred while the suits were still pending, to that of his heirs to institute and maintain these actions.

The facts which are relevant for this purpose may be shortly stated. These properties appear to have belonged to one family at one time and were endowed for the purpose of a chatram (which may be regarded as a dharmasala or an inn) long ago. The origin of the endowment is lost in obscurity. The parties however agree that the properties belonging to this family were divided in three shares. The plaintiff and one Alagappa Mudaliar claimed 5/12 and 6/12 out of these properties respectively while defendant 1 stated that she was entitled to 2/12. Some arrangement appears to have been arrived at between them in regard to these shares but we are not concerned here with what was allotted to each of them. It appears that following the arrangement regarding their private properties, these three branches managed this charity and considered themselves to be entitled as "hukdars" in the endowed properties to the same extent until 10th February 1914, when Alagappa Mudaliar assigned his rights in those properties to the original plaintiff in consideration of a sum of Rs. 1300. In view of the present contention raised on behalf of the parties, I shall have to examine this document in its appropriate place. To resume the narrative, it appears that Alagappa took no interest in the management and in view of the transfer effected in 1914, the original plaintiff instituted these suits for ejectment in 1921 in which the hukdar of 1/12 interest in the endowed property was impleaded as defendant 1 but Alagappa or his heirs, as he is also said to have died subsequently, leaving three sons behind him and who are stated to be alive even now, were neither impleaded as plaintiffs nor as defendants.

The only question that we have now been called upon to decide is, if Alagappa or his sons were necessary parties to the suit and whether in their absence, these suits could be maintained. This objection was specifically raised by the defendants in their written statements and having been decided against them by the lower Court, it has been again taken in the grounds of appeals and pressed before us. In fact, the learned counsel for the appellant has argued this as a preliminary point and has stated that it would be unnecessary to go into others if we agreed with this contention of his. He urges that it was absolutely necessary for the original plaintiff and his heirs to implead Alagappa and his heirs as plaintiffs and if he or they refused to join as such, he or they should have been added

at least as defendants. But the plaintiffs refused to join them either as plaintiffs or defendants and it is therefore contended that the present plaintiffs have no locus standi to maintain these actions in their absence.

In order to determine this question, it is essential to examine the deed of transfer executed by Alagappa Mudaliar in 1914 (Ex. F) and adjudicate on its validity. This deed purports to convey 6/12th share in the properties in suits to the original plaintiff, which have been stated to belong to the executant of the document and over which the charities are declared to have a charge merely. It is common case of the parties now, that this statement in the document is entirely incorrect and the properties belonged to the charity itself. Basing his contention on this fact, it was argued by Mr. Patanjali Sastri that the consideration was paid by the original plaintiff to Alagappa Mudaliar as a price for the properties alone but since the properties did not belong to the vendor, they could not have passed to the original plaintiff and the money paid by him must be deemed to have been paid for nothing and wasted; but the duty of conducting the charities should none the less be held to have devolved on him as he contends that the share in the properties was sold subject to a charge in regard to charities, and since this share in the properties was found not to belong to the vendor, the charge or burden on the properties and the right to manage the charities should still be found to have been transferred to the original plaintiff, as the right to manage the charities was merely ancillary to the ownership which had been transferred to the plaintiff. On the other hand, it is contended by Mr. Doraiswami Aiyar for the appellants that on a true construction, the document must be taken to have been executed with the object of transferring the property as well as the right of conducting the charities and the price should be taken to have been paid not only for the properties but for the right attached to these properties as well. In view of the fact that no attempt was made by the original plaintiff to get rid of the transaction covered by this deed on account of a mutual mistake of parties as to the transferor's title, if the parties were really under a mistake, or on account of fraud, if the transferor knew at the time of the sale that he had no title to the property, or at all events on account of failure of consideration, we were asked to draw the inference that the parties were fully conscious of the fact that Alagappa had no title to the properties at the time of the execution of the sale deed and that the document was executed in this manner to avert a charge of illegality which would otherwise be patent on the face of it; as in that case it would have to be stated in the document that a trustee's right of conducting charities was being sold to another co-trustee. It was also put to us alternatively that if we did not agree with the above contention, it must be held that there were no specific words in the deed which could be construed to have transferred the right of conducting charities; and while in the former case the transfer of the right of a trustee to a co-trustee for consideration would be void being against public policy, there would be no transfer at all in the latter case. In either case, the original plaintiff and his heirs, it is urged, have no right to sue alone particularly when Alagappa or his heirs were not impleaded even as defendants.

Having read the document as a whole, I am unable to agree with the contention put forward by Mr. Patanjali Sastri. It is true that at the commencement of the sale deed the properties have been stated to have belonged to the family and a charge only has been declared to be existing in regard to the charities; but the conveyance of the properties with 'absolute rights' read along with the reasons of transfer contained in the document leaves no doubt in my mind that the right of managing charities was intended to be conveyed to the original plaintiff. This is very clearly brought out by the penultimate sentence in the sale deed which reads as follows :

> Hereafter, I shall have no claim of any kind in respect of the schedule-mentioned properties or duty or right of conducting the charities.

The words 'claim' and 'right' used in this sentence are significant and point very clearly to the intention of the parties. Mr. Patanjali Sastri's argument did not take notice of the fact that it was not only the duty of conducting charities but its right as well which was transferred to the original plaintiff and the price which was paid must be taken to cover both the properties and the right of management. Moreover it is not correct to say that the right to manage the charities was merely ancillary to the properties conveyed under the deed of sale. There is a great deal of force in

the contention that if the words 'absolute rights' are not taken to cover the right of management, there are no other words in the sale deed under which this right could be held to have been transferred.

It would not perhaps be incorrect to infer from the litigation (O. S. No. 32 of 1916) which followed soon after the execution of Ex. F, when these properties were claimed to belong to the original plaintiff, but to substantiate which no evidence had been produced by him, that the parties to the document were under no misapprehension as regards the nature of the properties transferred under this deed. In view of the words of the deed however, it is unnecessary to rely on this circumstance as, in my opinion, this document was intended to convey the right of management to the original plaintiff, and that the consideration was paid either wholly or at all events partially for this right as well. There was only one contract between the parties and it must be held, as was found to be the case in (1881) 20 Ch D 1[1] to be entire and indivisible in character. It is impossible to divide Ex. F into bits as Mr. Patanjali Sastri urges us to do and detach one portion of its contents from the rest and give effect to it. I must for the above reasons hold that the right to conduct the charities was transferred to the original plaintiff for consideration by Alagappa Mudaliar.

The next question then to decide is, if the alienation of the huq right was valid or in other words, was it possible for the huqdar or trustee to transfer his right of management of the endowed property to the original plaintiff for consideration? Reliance was placed by the learned counsel for the appellant in this connection on a Privy Council decision in 1 Mad 235.[2] The question which came up for consideration in that case was whether the uralars (trustees) of Tracharamara Pagoda could lawfully alienate their right to manage the said pagoda? It is true that this case was in respect of a transfer of the trustees' rights in properties endowed for religious purposes, and the case which we are now called upon to decide relates to a charitable trust. But there is no principle or reason to hold that a decision on this point in regard to trusts of religious nature would not equally apply to those which are charitable in character. Their Lordships in the course of their judgment observed:

> The first question is, whether independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district open to the public opinion of that district and having that sort of family interest in the maintenance of this religious worship which would ensure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connexion with the families from which the trustees were to be taken.

The next case cited was that in 6 Mad 76.[3] This also related to a religious trust. It was held in this case that an alienation of hereditary religious trusts or offices to a person not in the line of heirs was not legal, but the learned Judges considered it unnecessary to determine whether an alienation to a person standing in the line of heirs should be upheld. In the course of their judgment it was observed:

> To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices who desired to sell them to give a dishonest recognition to qualifications which, in fact, were not the qualifications demanded by the nature of the office.

The third case which is directly in point and which relates to a charitable endowment is that in 19 Mad 211.[4] The learned Subordinate Judge has quoted a passage from this judgment but has unfortunately misunderstood the observations and was therefore unable to apply them correctly to the facts of the present case. The passage reads as follows:

> It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's bro

1. Redgrave v. Hurd, (1881) 20 Ch D 1=51 L J Ch 113=45 L T 485=30 W R 251.
2. Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty, (1876-78) 1 Mad 235=4 I A 76=3 Sar 687=3 Suther 382 (P C).
3. Kuppa Gurukkal v. Dorasami Gurukkal, (1883) 6 Mad 76.
4. Alagappa Mudaliar v. Sivaramasundara Mudaliar, (1896) 19 Mad 211.

thers their right of control, and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights.

The learned Subordinate Judge appears to have considered that the arrangement contained in Ex. F would be covered by the last two sentences but he apparently overlooked the important reservation made in them and expressed in the words "and, if necessary of resumption of actual management." Is there anything like the reservation mentioned in this case? On the contrary, the penultimate sentence in the sale deed, which has been already quoted, makes it clear that the power of resumption was not only not reserved but it was clearly stated on the other hand that the vendor would not have any claim of any kind in respect of duty or right of conducting the charities. For the same reason, sufficient attention was not paid by the trial Court to the words "to that extent" in the last sentence of the judgment quoted above. It may also be noted in passing that, like the Privy Council case in 1 Mad 235,[2] the learned Judges in this case, 19 Mad 211,[4] presumed that in the absence of any other suggestion as to rule of succession, the intention of the founder of the choultry must be taken to have been that the office of management should be held in common by the family of the original holders. It is hardly necessary to discuss the other cases which were cited by Mr. Doraiswami Aiyar, but the decision in 38 Mad 850[5] might be referred to with advantage. Mr. Patanjali Sastri has relied on 68 M L J 295.[6] This was a case of an alienation of office of an archaka (pujari) which was held to be valid as it was made without any consideration to one in the line of heirs and was not considered to be opposed to the interests of the institution. It was also observed in this case that the duties entrusted to an archaka were frequently carried out in temples by proxy and an alienation of the office was for these reasons upheld. It may be interesting to note the gradual development of this branch of the law and of the various views expressed by eminent Judges at various times; but the case has no application to the facts of the present case, where the office in dispute is first of all that of a trustee of a charitable endowment and not of an archaka and, what is more important, this has been found to have been alienated for consideration under Ex. F. Moreover the alienation was not in the line of heirs although it may have been to a member of the family, but it cannot be said that the alienation was not opposed to the interest of the institution or that there are any circumstances in this case which may rebut the presumption raised by their Lordships of the Privy Council in 1 Mad 235[2] and by the learned Judges in 19 Mad 211[4] to the effect that the intention of the founder of the trust must have been that the office of management should be held in common by the members of his family jointly. The other cases relied on by the learned counsel for the respondents are those in 15 Mad 183[7] and 27 Mad 192.[8] They have no application to this case as the first one relates to the office of a pujari, while in the second case the parties had agreed to carry on the management of a religious institution by rotation and no question of alienation of an office for consideration was raised or considered. Moreover the members of the junior branch who had surrendered their office were not parties to the suit, which was confined to the disputes between the members of the senior branch inter se, and their Lordships of the Judicial Committee in confirming this judgment in 29 Mad 283,[9] clearly stated that this decision would not affect the rights of the members of the junior branch who were not before the Court.

As for 36 Cal 975,[10] which was the case of a private idol, the alienation of the shebaitship to a closely connected member of the family was held to be valid under the Hindu law and it was held that the alienation was not effected for any personal gain and the alienee appeared to have more interest in the worship of the idol than anyone else. As stated above, this decision was arrived at in the special circumstances of that case and does not fit in with the

5. Sundarambal Ammal v. Yogavana Gurukkal, (1915) 2 A I R Mad 561=23 I C 72=38 Mad 850=26 M L J 315.
6. Prayagdossjee Varu v. Govindacharulu, (1935) 22 A I R Mad 220=157 I C 547=68 M L J 295.
7. Narayana v. Ranga, (1892) 15 Mad 183=2 M L J 19.
8. Ramanathan Chetty v. Murugappa Chetty, (1904) 27 Mad 192.
9. Ramanathan Chetty v. Murugappa Chetty, (1906) 29 Mad 283=33 I A 139=16 M L J 265 (P C).
10. Nirod Barani v. Shibadas, (1909) 36 Cal 975=3 I C 76=13 C W N 1084.

various Madras cases which have been cited above. Having regard to the idea of the public policy which militates against the alienation of the office of a trustee to an endowment either charitable or religious, and to the principle enunciated in 19 Mad 211,[4] with which we are in respectful agreement, and which follows the Privy Council decision in 1 Mad 235[2] we must hold that Alagappa Mudaliar could not alienate his office in favour of the original plaintiff, and the alienation conferred no right on him. It is hardly necessary to consider how Alagappa's position would be affected if he were alive, since he had executed a sale deed himself; and it is clear that his sons could not be prejudiced by their father's conduct in transferring the office which he could not legally alienate, and which could not, in any case be of any validity after his death. Consequently, Alagappa's heirs should still be considered to be joint trustees with the original plaintiff and defendant 1.

The next point raised by the learned counsel for the respondents was that since the original plaintiff had been functioning as a trustee de facto, he was entitled to institute these suits regardless of whether he was a trustee de jure or not. This argument has been rendered possible on account of some decided cases, which were cited by him and to which I shall advert shortly. The term "de facto" appears to have been rather loosely used, but when used in connexion with a trustee or a guardian as distinguished from a "de jure" trustee or guardian, it is meant to convey a person who has been actually functioning in either of these capacities when he was not entitled to do so legally. If this is all that is meant to convey, the expression is unhappy, as this idea would have been better expressed, at least so far as a trustee is concerned, by the words "trustee de son tort", a term which is so well known and which brings out the idea of wrong so very clearly. A person cannot legally confer any right on himself by acting in a wrongful manner although he may subject himself to certain liabilities. This was pointed out by their Lordships of the Judicial Committee in 34 All 213[11] in the following words:

> It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "de facto" guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

If on the other hand, the term "de facto" is employed to describe a person who is found to be acting as a trustee of an institution or as a guardian of a person under disability and thus presumed to be a trustee or a guardian de jure unless found to be otherwise, it would not do, in my opinion, that harm which it has now done. In other words, a legal presumption in favour of a person's legal title and the office may be raised if he is found to be acting as such, as was done in 37 All 86,[12] but it must be remembered that it is rebuttable and would shift the burden of proof on the party who denies his position. It would then be a rule of evidence merely and not one of substantive law and can be defended on the principle underlying S. 110, Evidence Act. But unfortunately, the cases have not rested there. It is hardly necessary to discuss 31 I C 913,[13] which was the case of a dormant partner and which was decided on an entirely different principle, but with great deference I am not prepared to accede to the correctness of the decisions in A I R 1926 Mad 1066[14] and 51 M L J 598,[15] which followed two Allahabad cases in 63 I C 171[16] and A I R 1924 All 59.[17]

I should like to examine the Allahabad cases first on which both the Madras decisions are based. Taking up 63 I C 171,[16] I find that one Altaf Hussain had filed a suit for an injunction against Benarsi restraining him from building on a piece of land which was situated between an Imambara and his premises on the ground that certain Muharram ceremonies were being performed by him as a mutawalli every year. The suit was dismissed by the trial Court, on what grounds one cannot say, but was partially decreed in appeal. The matter was then taken up to the High Court where Altaf Hussain's locus standi to institute the suit was challenged on the ground that mutawalli's rights were inalienable, and a transfer of such rights to Altaf

11. Mata Din v. Ahmad Ali, (1912) 34 All 213=13 I C 976 = 9 A L J 215=15 O C 49 = 39 I A 49 (P C).
12. Niamat Ali v. Ali Raza, (1915) 2 A I R All 25 =26 I C 778 = 37 All 86=13 A L J 26.
13. Guzzu Payideyya v. Venkata Reddi, (1916) 3 A I R Mad 926=31 I C 913.
14. Mohammad Ibrahim v. Sundaram Chetti, (1926) 13 A I R Mad 1066=96 I C 823.
15. Moidin Bibi Ammal v. Rathnavelu Mudali, (1927) 14 A I R Mad 69 = 98 I C 812 = 51 M L J 598.
16. Benarsi v. Altaf Hussain, (1921) 63 I C 171.
17. Muizuddin v. Mohamad Ikhlaq, (1924) 11 A I R All 59=74 I C 756=21 A L J 516.

Hussain would not confer any rights on, and consequently any title in, him to file the suit. I cannot say if this objection was raised in the trial and the lower Appellate Courts or if it was raised for the first time before the High Court. It was found by Stuart J. who delivered the judgment of the Court that the previous mutawalli had transferred his rights to Altaf Hussain a few years before the suit, who had since then made considerable improvements in the Imambara with his own funds. It is hardly necessary for me to express any opinion in this case on the question whether the learned Judge was right in disagreeing with the conclusion arrived at in 8 Cal 732,[18] but suffice it to say that in the absence of the deed of trust, under which the trust was created and where the founder of the trust, could confer an authority on the mutawalli to transfer his office, the learned Judge presumed the appointment to be a good one prima facie and held that it could be challenged for sufficient reasons only and could not be questioned by a person who was alleged to have infringed rights of the mosque or Imambara. Then follow the words "A person challenging the de facto mutawalli's position must adduce evidence to show that he has no title." They only mean, in my opinion, that under the circumstances of the case, the learned Judge was willing to raise a presumption that Altaf Hussain who had been acting as a mutawalli under a deed of transfer by the prior incumbent of office must be taken to be a mutawalli de jure in the absence of the deed of trust and that it was for Benarsi to rebut this presumption which he had failed to do. It is unnecessary to examine this case any further as I find that the learned Judge decided the question of Altaf Hussain's rights to maintain the suit not only on the presumption raised by him but on other considerations as well. It would thus follow that if analyzed, the case does not go any further than what was held in 37 All 86.[12]

The other Allahabad case is that in A I R 1924 All 59.[17] The question in that case was whether Muizuddin was entitled to obtain a refund of certain moneys found to be due to his late father Bashiruddin, who was described to be a de facto mutawalli of the trust. In a suit which was filed against Bashiruddin for his removal, it was held by the High Court in appeal that "he had acted as a de facto mutawalli of the trust sufficiently long to be entitled to remain in possession of the trust property as such." The facts of this case are not known, but if the learned Judges were deciding the case on a consideration of the question of limitation, it would be an entirely different matter. On the other hand, if they were prepared to raise a presumption in favour of his being a de jure mutawalli, the case does not take us any further than what was decided in 37 All 86.[12]

The other de facto trustee mentioned in this case is Muizuddin himself. When he tried to realize the balance of certain money by execution, to which Basbiruddin was found to be entitled by virtue of the decree which was passed by the High Court in his favour, Muizuddin's allegation that he was appointed to be a mutawalli by his father was not accepted, but in his capacity as a mutawalli de facto he was held entitled to execute the decree on two conditions which are to a certain extent conflicting. The first condition was that he must agree 'to credit' the money realized by him to the trust and "account therefor duly to the person or persons who may hereafter be declared lawfully entitled to the mutawallishiip." The other condition was that he would not be entitled to withdraw the moneys, "if the opposite party takes steps within a reasonable period to get the question of mutawallishiip to the trust adjudicated in a proper Court."

If Muizuddin had any legal rights as a de facto mutawalli, why and under what law were these conditions being imposed? If he was being treated as a next friend of a minor would have been, whose interests had to be protected by the Court, he was not being treated as a mutawalli at all but a stranger and the user of the term 'de facto' was, with great deference, incorrect. This case is therefore no authority for the proposition that a de facto mutawalli has any rights as such.

Let me now take up the Madras cases on this point. The first one is 1913 M W N 181.[19] There is no discussion in that case on this point at all and is therefore of no value in arriving at a conclusion. Moreover the plaintiff's possession in this case was found to be prior to that of the defendant's and the plaintiff was for that reason held

18. Wahid Ali v. Ashruf Hussain, (1882) 8 Cal 732=10 C L R 529.

19. Kasi Chetty v. Deivasikhamony Nataraja Dikshitar, (1913) M W N 181=16 I C 622.

entitled to eject the defendant. The second one in A I R 1926 Mad 1066[14] was a case by a mutawalli for possession of a property which belonged to a mosque. This was decreed in spite of the objection that a de facto trusteeship was not recognized under the Mahomedan law and the plaintiff was therefore not entitled to sue. There is no discussion in that case on the point, although both the Allahabad cases were cited and the decision was based on the ground that no such objection was taken in them. They could hardly be any authority if this point was not taken or decided in them. I have gone through them and already stated what the rationale of these decisions was. The third Madras case which was cited was that of 51 M L J 598.[15] The same contention 'that Mahomedan law does not contemplate a de facto trustee and that such a person has no locus standi to sue' was raised in this case but repelled by the learned Judges on the ground that "de facto mutawallis of mosques are spoken of as if they were well known to the law," in the Allahabad case cited above. The only work on Mahomedan law to which any reference was made was that of Tyabji's, but the remark made by the learned author

> that a person not validly entitled to act as mutawalli, by taking charge of it and purporting to manage the property thereby becomes a trustee de son tort and answerable as such,

does not seem to have been followed and does not certainly support the conclusion at which the learned Judges arrived. The next case relied upon by the learned counsel for the respondents was that of 61 M L J 887.[20] A study of the facts of that case would however show that the case was finally decided by Ramesam J., on the ground that Neelambal Achi's right of possession passed on Kandasami's death, which occurred before he could accept the trustee's office, to the plaintiff and not on Kandasami's heirs as he, i. e. the plaintiff, was found to be the reversioner to Neelambal's estate. The other remarks in the judgment are in the nature of obiter and have no application to the facts of the present case. It has been admitted in the present plaint that the lease to the present defendants was granted by the Taluk Board of Shermadevi in 1906 and they were recognized to be permanent tenants under a compromise which was arrived at between the parties to O. S. No. 11 of 1909 at the appellate stage. This would show that the tenants were in possession of the properties in dispute long before the transfer of the trustee's office was effected in favour of the original plaintiff. There is no rule of law under which they can be debarred from questioning the locus standi of the original plaintiff to maintain the suit for ejectment when he is said to have come into possession of that right long after their occupation of the property in suit.

The only other case which was cited by Mr. Patanjali Sastri was a Calcutta decision in 64 I C 737.[21] There is no discussion on this point in that case while it appears that the plaintiff had been recognized to be a shebait by the parties concerned. The case was therefore decided on what appears to be an admission rather than on a settlement of the question whether he was entitled to sue in the capacity of a de facto trustee. An examination of these cases would show that there is no warrant for the conclusion that a de facto trustee, as such, has any locus standi to maintain an action. After all, his position is that of an intermeddler or a wrongdoer (unless on the facts of each case a presumption can be raised in his favour of being a trustee de jure) and he cannot confer any rights on himself by committing a wrong, although, as their Lordships observed in 34 All 213,[11] he may assume liability on account of this conduct.

We are concerned in this case with the position of what has been styled a trustee de facto. It may be that under the Hindu law, unlike the Mahomedan law, the action of a guardian de facto has been held to entail certain liabilities on minors, if his action in alienating their properties is found to have been for their benefit or necessity as held in 6 M I A 393,[22] 14 Bom 562,[23] 23 M L J 638[24] and 50 M L J 689.[25] But we are not concerned here with de facto guardians but with what have been called trustees de facto. I have not come

20. Appasami Pillai v. Ramu Thevar, (1932) 19 A I R Mad 267=136 I C 340=61 M L J 887.

21. Harimohan Modak v. Rameshwar Das, (1920) 7 A I R Cal 799=64 I C 737.

22. Hanooman Persaud Panday v. Mt. Babooee Munraj Koonweree, (1854-57) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).

23. Nathuram v. Shoma Chhagan, (1890) 14 Bom 562.

24. Vembu Aiyar v. Srinivasa Aiyangar, (1912) 23 M L J 638=17 I C 609.

25. V. Seetharamamma v. M. Applah, (1926) 13 A I R Mad 457=92 I C 827=49 Mad 768=50 M L J 689.

across any case, nor has one been cited at the Bar which may lead me to the conclusion that the position of such trustees under the Hindu law is any different from what they occupy under other systems of law.

I have therefore no hesitation in holding that a trustee de facto is really no other than what is known to law as a trustee de son tort and his position does not improve, as remarked by their Lordships of the Judicial Committee, by describing him to be a trustee de facto. As a trustee de son tort he cannot be held to confer a right on himself to maintain these suits, even if they are taken to have been instituted for the benefit of the charities. Moreover, having found that Alagappa's heirs still continue to be trustees of the Chatram, and that it was not legally permissible for the original plaintiff and his heirs to file or continue these actions without his (Alagappa's) heirs being parties to the suit either as plaintiffs or as defendants, the question of de facto trusteeship assumes, in my opinion, secondary importance merely.

The general principle of law is that the office of a trustee, irrespective of the number of trustees, is a joint one and co-trustees form, as it were, one trustee and must therefore execute the duties of their office jointly. It has been held in a number of cases that no suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even as defendants : *see* 8 Cal 42,[26] 11 Cal 338,[27] 9 M L J 312[28] and 42 M L J 133.[29] Following these authorities it must be held that the suits were not maintainable by the original plaintiff or by his legal representatives without impleading Alagappa or his heirs either as plaintiffs or as defendants in the suits.

Having found that the present plaintiffs could not continue the suits in the absence of Alagappa's heirs, we have to decide the course which we should follow in regard to them. The suits were pending in the trial Court for 14 years and the plaintiffs were adamant in their opposition to the objection raised on account of non-joinder of the remaining trustees. Mr. Patanjali Sastri made a verbal application at the close of his arguments, that his clients might be permitted to join Alagappa's heirs as parties to the suits now, and that the case remanded for a fresh trial after they had been impleaded. He placed reliance on 57 Mad 1031.[30] The application was vehemently opposed by the counsel for the appellants.

Mr. Doraiswami Aiyar has first of all contended that even if we remand the suit at this stage, the orders passed by us would be infructuous, as the suits would have to be dismissed under S. 22, Limitation Act. He has placed reliance in this part of the case on (1916) 1 A C 603,[31] 40 M L J 532,[32] 44 M L J 249[33] and 62 M L J 154.[34] He has further urged that in view of the plaintiff's conduct during the last 17 years, this is not a case in which we should exercise our discretion — even if it exists — in the plaintiff's favour and take away an advantage which his clients have gained, on account of the plaintiff's persistence, by lapse of time. Having considered the matter very carefully, it appears to us that the plaintiffs' abstinence from making Alagappa or his heirs parties to the suits was deliberate and they were trying to fight shy of Alagappa or his heirs in this litigation. The request by their counsel at the fag end of the case is too belated to be seriously noticed. It seems to be unnecessary for me to determine the question of limitation which might have had to be carefully considered if I had been inclined to exercise my discretion in the plaintiff's favour. But in view of their conduct, and the prejudice which may be caused to the appellants, it appears to me that the exercise of discretion in their favour would neither be judicious nor judicial. In these circumstances, we are constrained to accept the appeals and dismiss these suits. The appellants will have their costs in both the Courts.

26. Rajendronath Dutt v. Sheik Muhammad Lal, (1882) 8 Cal 42=8 I A 135=4 Sar 254 (P C).
27. Bachu Lal v. Oliulla, (1885) 11 Cal 338.
28. Ashtamurthi Nambudri v. Raman Menon, (1899) 9 M L J 312.
29. Shanmuga Moopanar v. Subbaya Moopanar, (1922) 9 A I R Mad 317=70 I C 645=42 M L J 133.
30. Ramanathan Chettiar v. Annamalai Chettiar, (1934) 21 A I R Mad 367 = 150 I C 602 = 57 Mad 1031=66 M L J 451.
31. Meyyappa Chetty v. Supramanian Chetty, (1916) 3 A I R P C 202=35 I C 323 = 43 I A 113=(1916) 1 A C 603 =85 L J P C 179=114 L T 1002 (P C).
32. Seerangathuni v. Vaitilinga Mudaliar, (1921) 8 A I R Mad 528 = 63 I C 104 = 40 M L J 532.
33. Mohanavelu Mudaliar v. Annamalai Mudaliar, (1923) 10 A I R Mad 337=72 I C 63=44 M L J 249.
34. Sobhandri Appa Rao v. Sri Raja Parthasarathi Appa Rao, (1932) 19 A I R Mad 583=137 I C 274=62 M L J 154.

Appeal No. 111 of 1935

Venkatasubba Rao J.—I agree with the judgment just delivered by my learned brother. The appeal raises several questions, but there is one point fatal to the plaintiff's case with which alone it is necessary to deal. The suit has been brought by one Thirumalayappa Mudaliar, who claims to be the sole trustee of a certain Annadhana Chatram or choultry—a charitable foundation. His case is that his family has enjoyed the right of trusteeship for about two centuries, that he was himself possessed of a 5/12th share of the right, that he acquired by transfer 6/12th share of a cosharer by name Alagappa and that defendant 1 Kalyani, a Hindu widow, was possessed of the remaining 1/12th share, which she lost by non-enjoyment and to which he somehow became entitled. The plaintiff thus claims that the entire right passed to him, and on the strength of that alleged title, seeks to recover possession of the properties in question said to belong to the charity. Defendant 1, out of the 15 defendants originally impleaded, was thus a formal party and of the remaining defendants the 2nd and the 3rd are the most important.

The facts that led to the suit may be briefly set forth. The Taluk Board of Shermadevi, alleging mismanagement of the trust, took possession of the properties in the year 1905, and was in possession thereof till 1915, when owing to a certain order made by the Government, they were restored to the plaintiff's family. The possession of the Taluk Board, according to the plaintiff, was that of a trespasser, and he further alleged that defendants 2 and 3 obtained from that body the properties on lease and their possession was also in consequence wrongful. There was a litigation between the Taluk Board and the aforesaid defendants 2 and 3, which, ended in a compromise recognizing in them occupancy rights. The plaintiff impeached this compromise, declared that he was not bound by it and in 1916 sued defendants 2 and 3 for possession. In the suit he claimed the properties as belonging to his family in private ownership, subject only to some sort of trust in favour of the choultry. Defendants 2 and 3, who claimed permanent rights in the property and contended that they were not liable to be ejected, asserted that the plaintiff's claim was a fraudulent one and that the properties exclusively belonged to the choultry. There was an issue framed as to whether the properties belonged to the plaintiff's family or to the charity. No attempt was made by the plaintiff to prove the private ownership set up by him, but at the close of the case and just before the delivery of the judgment, applied that the choultry should be impleaded as a party. His application was granted, but his suit, on some ground with which we are not concerned, was dismissed. An appeal was taken and the District Judge, Mr. Jackson, holding that by the time the charity was brought on the record the claim became statute-barred, confirmed the lower Court's decision. It was while this appeal was pending that the present suit was brought in 1921. From Mr. Jackson's judgment a second appeal was filed in the High Court, which in 1930 was withdrawn by consent of parties, it being agreed that the matters in controversy were to be left at large. Such in brief are the antecedent facts of this litigation.

Defendants 2 and 3 pleaded that they and their ancestors were in possession from time immemorial enjoying permanent occupancy rights; they raise a further contention, a plea in limine, that the transfer by Alagappa on which the plaintiff relied, was inoperative and invalid and did not confer on him the right he claimed. This contention, as I shall presently show, is well founded and ought to prevail. So far as defendant 1, Kalyani, is concerned, she pleaded that the plaintiff does not possess the full right of trusteeship as claimed by him and that she is entitled to a sixth share thereof. It may be mentioned that by a decree passed in a separate suit, her right as put forward here has been recognized and affirmed.

The question then that has to be considered is, whether the plaintiff has validly acquired Alagappa's share in the right in question. The lower Court's decision is in his favour and the defendants have filed the present appeal. It has been laid down by the Judicial Committee that a trustee of a Hindu temple had no power to transfer his right of management. In the case before the Board, the trusteeship vested in the karnavans of four distinct tarwads and they transferred to a third party — the Rajah of Charakel — the property of the temple as well as their right of trusteeship. Their Lordships hold that independently of custom, persons holding such a trust are incapable of transferring it and both principle and reason are strongly opposed to

such a power and particularly to such an exercise of it as had taken place in the case before them. They state in conclusion that under what may be termed the Common law of India, the trustees have no power to transfer their right and dealing with the question of custom, they go on to declare that in no circumstances will the law recognize a custom sanctioning not merely the transfer but the sale of a trusteeship: 1 Mad 235.[2] 19 Mad 211[4] (which, it is interesting to note, related to this very family) is more directly in point. There, as here, the trust related to a charity and the assignment was in favour of a member of the family. It was held by Muthuswami Aiyar and Shephard JJ. that it did not operate as an effectual transfer of the trust. The view as expressed by the learned Judges seems to be that the transfer of a trusteeship is bad, whether or not for consideration; nor does it make any difference in their opinion that the alienee happens to be a member of the same family. This decision moreover introduces an important qualification—is the arrangement intended for the convenient management of the charity, the assignor reserving to himself his right of control and resumption, or is it intended to divest him once for all of his right of management? In the former case, the arrangement is good but in the latter, is not. This view of the law has been accepted in several later decisions, of which it is sufficient to mention 24 M L J 75.[35] That a transfer of trusteeship, if for consideration, that is to say, for the personal or pecuniary benefit of the transferor is utterly bad, is not disputed by Mr. Patanjali Sastri, the respondents' (the plaintiffs') learned counsel. But he contends that a transfer for no consideration and in favour of the next heir or a member of the same family is valid and ought to be recognized. On this point there has been a conflict of opinion in the various Courts and even in the same Court divergent views have been expressed. It is unnecessary to pursue this matter, as I am clearly satisfied that the transfer, if any, in the present case (I used the words 'if any' as will be seen, advisedly) is for the pecuniary benefit of the transferor.

This brings me to the question, what is the effect of Ex. F (dated 10th February 1914), described as a deed of sale, on its proper interpretation? Mr. Patanjali Sastri's contention may be put thus: At the date of the document the plaintiff's family assumed (though in the sequel the assumption has turned out to be wrong) that it owned the property, burdened no doubt with some trust; the subject of the bargain therefore was the property and not the trusteeship; the consideration of Rs. 1300 mentioned in Ex. F must thus be related to the property. In the first place, the document is not susceptible of this interpretation. It says:

> As it would be very much convenient for the charities to be conducted in case my share also is added to yours, the above properties have been settled to be sold to you for Rs. 1300 subject to the charge of the above charities.

This shows that the parties regarded the two things, the owning of the property and the conducting of the charity, as inseparably connected. The same idea occurs again:

> As you too are responsible for conducting the charities out of the above properties, as you alone are to succeed to the two shares out of the 12 shares.

Here also the ownership of the property carries with it the duty of performing the charity. The matter does not stop there. The document concludes thus:

> Hereafter I shall have no claim of any kind in respect of the schedule-mentioned properties or the duty or the right of conducting the charities.

It will be seen that the parties kept in mind both the aspects of the trusteeship, namely the duty as well as the right. It is difficult in the face of these recitals, to accept the contention that the object of the document was to deal solely with the property. Secondly, it is argued that the consideration was fixed with reference to the property alone and that the trusteeship passed to the transferee as merely ancillary to it. There was, I have no doubt, an entire contract for a single consideration and it is impossible to sever the contract as suggested. Each part of the contract was an inducement to every other part of it and there is no warrant for dividing the bargain into two distinct parts: *see* the observations of Jessel M. R. at p. 18 and of Lush L. J. at p. 26 in (1881) 20 Ch D 1.[1] Thirdly, it is argued that the operative part of the document is that which deals with the property and not the passage quoted above, which deals with "duty and the right of conducting the charities." Here I must observe that Mr. Patanjali Sastri is put into a dilemma. If his contention is right, there has been

35. Rajaram v. Ram Boy, (1913) 24 M L J 75=18 I C 77=(1913) M W N 176.

no transfer at all of the office in question, in which case the plaintiff is out of Court. Lastly, it remains to observe that on the learned counsel's own showing the document is vitiated by a mutual mistake, both the parties being under the mistaken impression, that the property belonged to the family and not to the charity. If this be so, the document must be deemed to be of no effect and the right of trusteeship has not passed to the plaintiff.

In the result as Mr. Doraiswami Aiyar rightly contends: (1) either there has been a sale of the office, in which case the transaction is illegal and cannot be given effect to, (2) or there has been no transfer of the trusteeship at all, on which hypothesis the plaintiff's claim to Alagappa's share falls to the ground. Whichever is the correct view, Alagappa, the co-trustee, has not been represented in the suit. Misconduct on the part of a trustee does not ipso facto result in his removal, granting that Alagappa was guilty of misconduct in alienating or attempting to alienate his trusteeship. In any event the office is a hereditary one and Alagappa having died shortly after the suit, leaving three adult sons, his right devolved upon them.

Co-trustees, as has been held, form as it were one collective trustee whose office is joint and indivisible and whose powers and duties must be exercised jointly: 24 M L J 75,[35] already cited at p. 76; 42 M L J 133.[29] All co-owners must join in a suit to recover property unless the law otherwise provides. If some co-owners refuse to join, it is the practice in India to allow them to be included in the array of defendants: 3 Mad 234.[36] Co-trustees are subject to the above rule: 42 M L J 133[29] already cited, 11 Cal 338[27] and 9 M L J 312.[28] Similarly in the case of co-executors a suit cannot be held properly constituted unless all of them are on the record. An action having been brought by one executor only, the co-executor was impleaded as defendant on objection being taken. It was held that the suit was time-barred under Sec. 22, Limitation Act, as the co-executor was brought on the record after the period allowed by the statute: *see* the judgment of Sir John Wallis in 40 M L J 532.[32]

Mr. Patanjali Sastri at the close of his argument applied that he should now be permitted to bring on the record the sons of Alagappa. The suit was filed nearly 17 years ago and the objection as to non-joinder was taken at the earliest stage. It would not be proper exercise of discretion to allow the defect to be cured at this distance of time. The observations of the Judicial Committee in 8 I A 135[26] apply with great force to the facts here. After holding that "the non-joinder of Bikuntanath is not an objection of form only," their Lordships go on to state:

> The appellants have not on any occasion sought the assistance of the Court as they might have done . . . . . to make him a party to the suit. It is not the province of either the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, for motives of their own, deliberately abstained from making him a party to the suit.

The history of the previous suit filed by the plaintiff in 1916 seems to be repeating itself. On that occasion he put forward the false claim that the properties belonged to the family and not to the trust. Mr. Jackson, the District Judge, referring to the late addition of the choultry as plaintiff remarked thus:

> Of course the Court had no right to allow an entirely fresh plaintiff to be brought into the suit in this precipitate manner, but apart from the question of procedure the chatram which adopted plaintiff 1's plaint in toto had no locus standi. It was in terms suing in 1920 a trespasser who had come in in 1906.

Holding that by the time the chatram was brought on the record the action had become time-barred, the learned District Judge dismissed the suit. In the present plaint also defendants 2 and 3 are, as already stated, treated as trespassers. Granting that the suit was in time when it was filed, it has now been pending for over 17 years, and it does not appear just to deprive the defendants of the plea of limitation that is available to them. On this ground, if on no other, the request made at this late stage must be refused.

Lastly, it was contended that where a de facto trustee brings a suit he is entitled to a decree. First it must be observed that this case has been put forward for the first time at the hearing of the appeal. Secondly the argument rests on a very slender foundation. The few Madras cases which seem to support this view, (such as 51 M L J 598[15] and A I R 1926 Mad 1066[14]), purport to follow certain decisions which, with great respect, have been completely misunderstood. 37 All 86[12] is one of such decisions. There a suit was brought under S. 92, Civil P. C., and it was dismissed on the

36. Haria Pisharody v. Narayan Somajipad, (1881) 3 Mad 234.

ground that no breach of trust was alleged or proved. Referring to the defendant who succeeded Karamat Ali, the learned Judges observed :

Assuming that Karamat Ali was legally entitled to be the mutawalli (which office he undoubtedly de facto enjoyed) he was entitled to appoint his successor.

It is difficult to see how this countenances the view that a suit lies at the instance of a de facto trustee. In 63 I C 171[16] it was held that a person challenging the de facto mutawalli's possession must adduce evidence to show that the latter has no title. It decides no more than that a de facto trustee may be presumed to be also the de jure trustee, a presumption liable, of course, to be rebutted. In A I R 1924 All 59[17] no question of law whatever has been decided, as a glance at that case will show. In 38 Mad 260[37] it has been held that a de facto trustee or a trustee de son tort is entitled, like a de jure trustee, to be reimbursed the moneys properly expended by him. How this decision supports the view taken in the two Madras cases cited above, it is difficult to see. Nor does 64 I C 737[21] avail the plaintiff. The judgment makes it clear that the de facto manager was recognized as such by the parties concerned. Some reliance has been placed upon 26 Mad 514.[38] But that case deals with what is known as possessory title. As against a wrongdoer, prior possession of the plaintiff in an action of ejectment is sufficient title; that is all that has been decided. The two Madras cases to which I have referred are thus, in my opinion, clearly wrong. The contention therefore, that a de facto manager is entitled to a decree, assuming that it can now be raised, must be overruled. In the result the lower Court's decree is reversed and the suit is dismissed with costs throughout.

C.R.K./D.S. *Appeals accepted.*

37. Kaliba Mavulvija v. Saran Bivi Saila Ammal, (1916) 3 A I R Mad 57=28 I C 290=38 Mad 260=28 M L J 347.
38. Narayana Row v. Dharmachar, (1903) 26 Mad 514.

A. I. R. 1938 Madras 994

WADSWORTH J.

Adoor Arunachalam Chetty—Appellant.

v.

Konjiti Seshiah Chetty and another — Respondents.

Second Appeal No. 913 of 1936, Decided on 26th August 1938, against decree of Dist. Court, Nellore, in A. S. No. 77 of 1934.

Hindu Widows' Remarriage Act (1856), S. 2 — Guardian of widow executing release deed reciting that in consideration of execution of promissory note in his favour by widow's husband's coparceners of fixed amount in lieu of maintenance payable to widow she releases her right to maintenance — Suit by guardian against coparceners for balance due on promissory note — Remarriage of widow— Coparceners held could not repudiate claim for balance due on promissory note.

A maternal uncle of a child widow was acting as her guardian after the death of her husband. In that capacity he executed a release deed which recited that in consideration of the execution of a promissory note for Rs. 2500 by the coparceners in favour of the guardian, a fixed amount in lieu of maintenance payable to the widow during all her lifetime, she surrendered her rights in the estate of her husband's coparceners and renounced all claims which she might have as a result of any change of circumstances, etc., and released her right to maintenance. The widow ratified the release deed as soon as she attained her majority, and the guardian brought a suit for the balance due on the promissory note. The widow subsequently remarried :

Held that once the promissory note and the discharge document had been executed, the widow no longer had any interest in her husband's estate. She had taken in substitution therefor a claim against her uncle to the proceeds of the promissory note debt due by the coparceners to her guardian. This debt due by the coparceners to the guardian could not be treated as an interest in the property of the deceased husband which the widow could claim. Hence neither on the strict letter of the Act nor in equity, had the coparceners the right to repudiate this debt.

[P 995 C 2 ; P 996 C 1]

C. Vasudevan and Bhagawat — *for Appellant.*

M. S. Ramachandra Rao — *for Respondents.*

Judgment.—The plaintiff sued on a promissory note which was executed in circumstances about which there is no dispute. The plaintiff is the maternal uncle of a child widow and was acting as her guardian after the death of her husband. In that capacity, he opened negotiations with the coparceners of the deceased husband of the widow and there was an arbitration and a series of documents came into existence on the same date. The plaintiff as guardian of the widow executed a release deed, Ex. 2. It recites that in consideration of the execution of a promissory note for Rs. 2500 in favour of the plaintiff, a fixed amount in lieu of maintenance payable to the widow during all her lifetime, she surrenders her rights in the estate of her husband's coparceners and renounces all claims which she might have as a result of any change of circumstances, etc., and releases her right to maintenance. On the same date, there

is Ex. 1 which is a deed of indemnity executed by the plaintiff. It recites the receipt of Rs. 2500 in the shape of a promissory note, undertakes to get the widow to ratify the release deed as soon as she attains her majority and to hold the defendants blameless in the event of any claim by her. On the same date we have also Ex. A, the suit promissory note, executed by the defendants in favour of the plaintiff, which recites: "We agreed to pay you the sum of Rs. 2500 being the maintenance amount for the widow." On this promissory note, there is an endorsement of payment of Rs. 1250. The suit for the balance due on the promissory note was presented on 24th July 1933. On 9th September 1933, after the filing of the suit, the widow executed Ex. B, in which she ratifies the action of her guardian in releasing her maintenance right as the plaintiff had undertaken in Ex. 1 that she should ratify his action. On 14th September 1933 the widow remarried.

It is not now contended that the suit by the promisee under Ex. A is incompetent because of the absence from the array of parties of the widow who is the beneficiary under the arrangement whereby the promissory note came into existence. Such a contention would clearly be untenable. It is however contended that the District Judge was right in holding that by virtue of the provisions of Sec. 2, Hindu Widows' Remarriage Act, the widow having by her marriage forfeited her right to maintenance from her husband's estate, the balance due under the promissory note executed in lieu of maintenance to the plaintiff cannot be claimed. The relevant words of S. 2, Hindu Widows' Remarriage Act, are as follows:

> All rights and interests which any widow may have in her deceased husband's property by way of maintenance . . . . . shall upon her remarriage cease and determine as if she had then died.

It is contended that the claim for the unpaid amount due under this promissory note is in fact a right to claim maintenance out of the property of the deceased husband. It seems to me that this contention is unreasonable on the facts of the case. On the date of Ex. A, there was, in my opinion, a complete settlement of the widow's claim to maintenance for all time and a composition whereby in lieu of an uncertain liability for a recurring payment towards maintenance, the defendants executed a promissory note for a lump sum. The nature of this transaction can be seen from the nature of the release deed executed on behalf of the widow Ex. 2, which expressly puts an end to any interest which the widow might have in the property of her deceased husband in consideration of a payment which is treated as having already been made by the execution of the promissory note; that is to say, there is a completed contract whereby the coparceners of the deceased husband, taking into consideration the uncertainty of the future claims which the widow might make, compounded for those claims by a fixed sum which was treated as having been paid by the substitution for the actual payment of a promissory note executed by the defendants to the uncle of the widow. When once this promissory note and this discharge document have been executed, the widow no longer has any interest in her husband's estate. She has taken in substitution therefor a claim against her uncle to the proceeds of the promissory note debt due by the defendants to the plaintiff, the uncle. I fail to see how this debt due by the defendant to the plaintiff can be treated as an interest in the property of the deceased husband which the widow can claim. The widow could not sue on this promissory note nor could she claim anything from her husband's coparceners; her right would be to sue the present plaintiff. Looking at the words of the Act, it is clear the position of the widow on remarriage is that she has no more rights in her husband's property than she would have if she had died on the date when she remarried. Could it for a moment be contended that if this lady had died instead of remarrying, her death would have provided a defence to the suit on the promissory note by the plaintiff? Quite clearly, it could not. When this promissory note debt was incurred, it was incurred in lieu of the cash payment which was the consideration for the release deed executed on behalf of the widow. That cash payment was in fact a composition for a recurring claim which might conceivably endure for 70 years or more, or might on the other hand be terminated in a short space of time by various circumstances, one of which might be the untimely death of the widow. It may be that the defendant did not actually visualize the possibility of the widow's remarriage, but it may be taken that they agreed to the payment of a cash sum in lieu of an uncertain claim which might be affected by various contingencies,

e. g. a change in the circumstances of the family or a lapse into unchastity of the claimant. It is not, to my mind, open to them to say, "there is one contingency which we overlooked in agreeing to this payment and that is the contingency of the widow's remarriage." Neither on the strict letter of the Act nor in equity, have the defendants, to my mind, the right to repudiate this debt. I therefore allow the appeal and restore the decree of the learned District Munsif with costs in the first Appellate Court and in this Court.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1938 Madras 996

PANDRANG ROW J.

In re G. Ananthachari — Accused Appellant.

Criminal Appeals Nos. 271 and 314 and Revn. Case No. 222 of 1937, Decided on 28th April 1938, against the Judgment of Third Presidency Magistrate, Egmore, D/- 18th May 1937.

(a) Penal Code (1860), Ss. 109, 405 — *A*, employee in Corporation of Madras, issuing cheques for payment at Corporation treasury— Cheques presented for encashment at Corporation treasury and money obtained even when person drawing cheque had no funds to meet them and many of the cheques so encashed were dishonoured subsequently—Money so obtained used by *A* for his private business—*A* and his fellow employee *C* charged with offence of abetment of criminal breach of trust—No evidence to show that *C* had done anything which facilitated cashing of cheques—*C* held not guilty of offence of abetment of criminal breach of trust—*A* held guilty, as abetting by him was one by instigation; his case was covered by S. 109.

A practice in the treasury of the Corporation of Madras of cashing cheques was alleged to have been availed of by *A* for the purpose of using Corporation money for his own profit by having the use of Corporation money from time to time. The *modus operandi* followed was as follows: *A* used to issue cheques himself, though sometimes they were issued by his friends, and the cheques were presented for encashment at the Corporation treasury either by himself or by his servant and thereby moneys were obtained from the Corporation treasury even when the person who drew the cheques had no funds to meet those cheques and many of the cheques so cashed were dishonoured subsequently. The money so obtained from the Corporation treasury was alleged to have been used by *A* for his private business. Along with *A*, his fellow employee in the Corporation *C* who was the collection manager was charged with abetment of criminal breach of trust. There was nothing to show that *C* had anything to do with the payment of the cheques and it could not be said that *C* had done anything which facilitated the cashing of the cheques nor was there anything to show that he had instigated anyone to make the payment :

Held that *C* could not be held to be guilty of the offence of abetment of criminal breach of trust. *A* was however guilty of the offence of abetment of criminal breach of trust. The abetting by him was by instigation and the case was covered by S. 109, I. P. C. [P 998 C 1]

(b) Penal Code (1860), S. 109—Omission by public servant to bring to notice of higher authorities offence committed by fellow servant does not amount to abetment of offence.

The mere omission on the part a public servant to bring to the notice of the higher authorities the offences committed by his fellow servant does not amount to an abetment of those offences, although it may form the foundation for a disciplinary action against him in a departmental way. [P 997 C 2]

(c) Penal Code (1860), S. 109—Abetment by instigation — Instigation need not be in any particular form.

In the case of an abetment by instigation, it is not necessary that the instigation should be in a particular form or that it should be only in words and may not be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed, if the person committing the act had the same knowledge and intention as the abettor. It is impossible for any human tribunal to decide exactly how much the instigation actually weighed in the mind of the person abetted when he committed the act or offence. [P 998 C 1, 2]

Nugent Grant for V. T. Rangaswami Aiyangar, K. Narasimha Iyengar, K. S. Jayarama Iyer and C. S. Rajappa — *for Appellant.*

V. Rajagopalachariar — *for Respondents.*

Crown Prosecutor — *for the Crown.*

Judgment.—These cases arise out of a defalcation discovered some time in the middle of 1936 in the treasury of the Corporation of Madras, after an audit by a firm of chartered accountants. There appears to have been a practice in the Corporation treasury, the only purpose of which was to receive collections and to remit them to the Imperial Bank of India, to cash cheques, originally only pay cheques of the Corporation officials, later on cheques signed by Corporation officials and finally any cheques which the Assistant Revenue Officer thought fit to pass. The case for the prosecution is that this practice which is described by one of the Magistrates as a "pernicious and obviously illegal practice" was availed of by the appellant in Criminal Appeal No. 271 of 1937, Ananthachari, for the purpose of using Corporation money for his own

profit by having the use of Corporation money from time to time. The *modus operandi* followed is described in para. 5 of the judgment of Mr. Tremenhere and it is unnecessary to repeat what he has said. Further, that paragraph contains a correct statement of the facts elicited in the evidence. In brief, Ananthachari used to issue cheques himself, though sometimes they were issued by his friends, and the cheques were presented for encashment at the Corporation treasury either by himself or by his servant, and thereby moneys were obtained from the Corporation treasury even when the persons who drew the cheques had no funds to meet those cheques and many of the cheques so cashed were dishonoured subsequently. The case for the prosecution is that this money which was obtained from the Corporation treasury was taken for the purpose of Ananthachari's private business. The scale on which these operations were carried on was so large that Ananthachari was able to cash cheques for one lakh eleven thousand odd rupees, and over Rs. 4500 of Corporation money still remains to be made good out of the money so taken out.

The prosecution in its eagerness to rope in as many as possible threw a wide net in order to catch almost everyone connected with the defalcation, even though in a remote way. Besides Ananthachari, the collection manager, Chinnaswami Iyer, appellant in Criminal Appeal No. 314 of 1937, Thiruvenganathan Chetty, the Head Cashier, and the Assistant Revenue Officer, S. C. John, were all prosecuted besides the Head Accountant, Srinivasa Iyer. The cases against the last three mentioned individuals resulted in discharge, and only Ananthachari and Chinnaswami Iyer have been convicted, the former by the Third Presidency Magistrate and the latter by the Chief Presidency Magistrate, the cases having been tried by different Magistrates because the case against Ananthachari was transferred from the Chief Presidency Magistrate's file at the request of Ananthachari. The Crown Prosecutor has filed a revision petition in respect of the order of discharge relating to the Head Cashier; but this petition has not been seriously pressed before me, and the whole argument in these cases has proceeded on the basis that the Head Cashier personally acted honestly, and that in any case he did not know that the cheques which he cashed were going to be dishonoured or that the cheques were presented for payment with the intention of making wrongful gain for those who cashed the cheques. The revision petition has not been argued and I have no doubt that the order of discharge is right; it is enough therefore to dismiss that petition.

I shall first deal with the case against Chinnaswami Iyer. I may deal with it very briefly because I am of opinion that on the findings of fact recorded by the Chief Presidency Magistrate in his judgment the conviction cannot be supported. The learned Magistrate was of opinion that he had to decide the following three points, namely :

(1) Whether Chinnaswami Iyer was aware that Ananthachari was systematically issuing private cheques without having the necessary funds in the bank; (2) whether Chinnaswami Iyer omitted to bring to the notice of the higher authorities the fact that Ananthachari's cheques were being dishonoured with the deliberate intention of suppressing an inquiry into the matter, and (3) whether he was aware that Ananthachari was utilizing the funds of the Corporation illicitly for his own private purpose.

On these points the findings were all in the affirmative. But these findings do not suffice to support a conviction for abetment of criminal breach of trust. On the charges of conspiracy and falsification of accounts, this accused has been acquitted by the learned Magistrate. The only charge in respect of which he was convicted is the charge of abetting criminal breach of trust by a public servant. The mere omission to bring certain facts within the knowledge of the accused to the notice of the higher authorities does not itself constitute abetment as defined in the Indian Penal Code, unless the omission is one which can be said to be an illegal omission, i. e. involves a breach of a duty imposed by law, and not merely a breach of a departmental rule of conduct or discipline. It cannot be said that the mere omission to bring to the notice of the higher authorities offences committed by other persons amounts to an abetment of those offences; to take a concrete case, if a clerk does not report to the superior authorities what is known to him about his fellow clerks' taking bribes such omission does not amount to abetment of bribery. It may form the foundation for disciplinary action against him in a departmental way, but it cannot in law amount to abetment of the offence committed by his fellow clerk. It is admitted that Chinnaswami Iyer had nothing to do with the

payment of the cheques in question and it was the payment of the cheques, that is to say, the payment out of the Corporation treasury, that is alleged to constitute criminal breach of trust in the present case. The cheques never went to him before they were paid and he had nothing to do with cheques of this kind before they were paid. It is therefore impossible to say that he did anything which facilitated the cashing of the cheques, and there is nothing to show that he instigated anyone to make the payment. On this ground alone, it is obvious that the conviction of Chinnaswami Iyer cannot be sustained. It is therefore unnecessary to go further into the matter and consider whether the findings of the learned Magistrate are supported by the evidence or not. On the assumption that the findings are supported by the evidence the conviction cannot stand. It is therefore set aside and the sentence also; and the appellant Chinnaswami Iyer is acquitted. The fine, if paid, will be refunded to him.

Then remains the case of the appellant, Ananthachari. Mr. Grant who appeared for him did not make any serious attempt to question the correctness of the findings of the learned Magistrate. His argument was that the offence disclosed by the evidence might be one of cheating but cannot amount to any abetment of criminal breach of trust. The evidence clearly shows that cheques were being presented either by Ananthachari himself or caused by him to be presented for payment. There can be no doubt that he must have got the cheques cashed for his own wrongful gain and known at the time that such payment by the Head Cashier out of the Corporation money would be criminal breach of trust by a public servant. The learned Magistrate is of the opinion that the abetting by Ananthachari was by instigation, and after careful consideration I am of opinion that the learned Magistrate's view is right. The presentation of a cheque at the counter necessarily involves a request for payment of cash and this request to the Head Cashier to pay money on worthless cheques out of public funds must have been known to Ananthachari to be criminal breach of trust by public servant; and there can be no doubt that such payment would have amounted to that offence if the Head Cashier had the same knowledge and intention as Ananthachari had. This is therefore a case which is covered by Sec. 109, Penal Code. The law does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct; for instance, a mere gesture indicating "beat" or a mere offering of money by an arrested person to the constable who arrests him may be regarded as instigation, in the one case to beat and in the other to take a bribe. Whether there was instigation or not is a question to be decided on the facts of each case. The only point of difficulty in the case is that even though there was instigation to make payment out of Corporation money the actual reason which led the Head Cashier to make the payment might have been, as argued by Mr. Grant, not the instigation by Ananthachari, but the initials of the Assistant Revenue Officer on the cheques. It is however not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation, and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. It is impossible for any human tribunal to decide exactly how much the instigation actually weighed in the mind of the person abetted when he committed the act or offence. I am therefore of opinion that this argument does not really help the appellant Ananthachari. There is no doubt that his conduct amounted to instigation to do an act, namely to make payment out of the Corporation treasury for the wrongful profit of himself and that such payments were actually made by the Head Cashier honestly or without a dishonest intention. The ingredients of the offence are in my opinion established in this case, and there would be no justification for interference with the conviction. The sentence does not appear to be too severe. His appeal is dismissed. He must surrender to his bail and serve the remainder of the sentence.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1938 Madras 998

HORWILL J.

In re W. K. Devaraja Mudaliar

Petitioner.

Criminal Revn. Case No. 132 and Petn. No. 129 of 1938, Decided on 4th May 1938.

Motor Vehicles Act (8 of 1914), S. 16 — Madras Rules, R. 15-A—Onus of proof of overloading is on prosecution — Knowledge to accused, how can be imputed.

The wording of R. 15-A and the general plan of the Act show that the burden is on the prosecution to show that an accused knew that the lorry was overloaded. Such knowledge could be proved by adducing evidence that, for example, the lorry had just left the owner's premises or that all the goods on the lorry had come from there. [P 999 C 1]

K. V. Easwaran — *for Petitioner.*

K. V. Ramaseshan for the Crown Prosecutor — *for the Crown.*

Order.—The petitioner is the owner of a lorry that was overloaded; and he was convicted under S. 15.A,* Motor Vehicles Act, of suffering the lorry to be overloaded. The wording of S. 15.A and the general plan of the Act show that the burden was on the prosecution to show that the accused knew that the lorry was overloaded. Such knowledge could be proved by adducing evidence that, for example, the lorry had just left the owner's premises or that all the goods on the lorry had come from there. All we know in the present case however is that the lorry was overloaded. It is stated at the Bar that the lorry was actually on its way from Conjeevaram to Madras. If so, it is unlikely that the accused knew that the lorry was overloaded. The prosecution did not therefore prove its case. The petition is accordingly allowed, the conviction set aside and the fine ordered to be refunded.

C.R.K./B.D. *Petition allowed.*

* The reference is to S. 16, Motor Vehicles Act, and R. 15-A and breach of condition 2 of G Permit and not S. 15-A. *(Ed.).*

A. I. R. 1938 Madras 999

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

P. L. N. K. M. Nagappa Chettiar — Appellant.

v.

O. R. M. O. M. S. P. Firm and another —Respondents.

Appeal No. 36 of 1936, Decided on 9th May 1938, from Judgment and decree of Lakshmana Rao J., D/- 27th March 1936.

(a) Hindu Law — Charitable endowment — Constitution.

Under Hindu law all that is required to constitute a religious or charitable endowment is the intention to endow and the creation of a fund in fulfilment of the intention. [P 1001 C 2]

(b) Banker and Customer — Trust funds — Application of trust funds with banker towards customer's debts, in breach of trust and for benefit of banker—Knowledge or suspicion on banker's part — Banker would render himself liable.

A banker is not entitled to apply what he knows to be trust funds in discharge or reduction of a debt of a customer. If a banker does so he can be compelled to make restitution of the moneys so applied. If he has the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if he is going to derive a benefit from the transfer and intend and design that he should derive a benefit from it, the banker would not be entitled to honour the cheque drawn upon the trust amount without some further inquiry into the matter. If further inquiry revealed a breach of trust the banker would be doing wrong if he honoured the cheque, and would render himself liable: *(1897) 2 Ch 243, Rel. on.* [P 1001 C 2]

(c) Trusts — Suit by trustee to recover trust funds applied in breach of trust—Art. 120, Lim. Act applies — Trustee ignorant of breach—Right to sue accrues when trustee becomes aware of it.

A suit by a trustee against the bankers with whom the trust funds are deposited, for recovering the amount of trust fund applied towards a customer's debt in breach of trust is governed by Art. 120, Lim. Act, and where the trustee is kept in ignorance of the breach of trust, the right to sue does not accrue until the trustee becomes aware of the fact: *33 Mad 31 and A I R 1914 Mad 708, Not foll.; Case law referred;* [P 1003 C 2]

(d) Civil P. C. (1908), S. 92—Suit by trustee against banker for trust money—S. 92 does not apply.

A suit by a trustee against a banker to recover trust moneys which he has misapplied does not come within the provisions of Sec. 92 and may be instituted without the sanction of the Advocate-General: *A I R 1938 Mad 92, Rel. on.* [P 1004 C 1]

M. Patanjali Sastri for K. P. Mahadeva Iyer — *for Appellant.*

K. V. Krishnaswamy Iyer and M. Murugappa Chettiar — *for Respondents.*

Judgment. — The parties to this appeal are Nattukottai Chettiars. The appellant was the plaintiff in the suit. He is a trustee and he sued in that capacity on the Original Side of this Court to recover from respondent 1, a banker, trust moneys which he alleged respondent 1 had wrongly applied in reduction of a debt owed by respondent 2. Respondent 1 is one Lakshmanan Chettiar who carries on business in Madras under the style of the O. R. M. O. M. S. P. Firm. Respondent 2 is the uncle of the appellant and a co-trustee. The father of the appellant was one Meenakshisundaram Chettiar, who did business in Madras with respondent 2, his brother. Meenakshisundaram died in 1914. After his death the joint family consisted of the appellant, his minor

brother Lakshmanan and respondent 2. In 1916 the appellant and his brother separated from respondent 2 and a deed of partition was executed. It was decided by the appellant and respondent 2 that they should set aside out of the family funds two sums of Rs. 10,000 as endowments of specified religious charities. One sum of Rs. 10,000 was to be devoted chiefly to the maintenance of a water supply at the Tirukalikundram temple, a famous Hindu temple in the Chingleput District, and the other sum of Rs. 10,000 was to be an endowment of another Hindu temple, known as the Kalayar Koil in the Ramnad District. It is common ground that out of the Tirukalikundram fund the temple piper was also to be paid. The appellant and respondent 2 were to contribute to these funds in the proportions of 5/8 and 3/8 respectively. These provisions except the provision with regard to the payment of the piper were included in the deed of partition, which also provided that the appellant and respondent 2 were to act as the trustees of the funds. The trust funds were created and it is admitted that respondent 2, being the uncle of the appellant and much older, was given the management of them. It is also admitted that respondent 2 was given the right of investing the trust funds in his own business, if he so decided.

On 1st December 1916, the appellant drew, as his contributions to the two trusts, two hundis, payable to bearer, one for Rs. 6250 and the other for Rs. 5000. Previously a sum of Rs. 2000 had been set aside for charity and this sum was taken into account in calculating the amounts which the appellant had to provide. The appellant handed the two hundis to respondent 2 for investment on behalf of the trusts. At all material times both the appellant and respondent 2 had banking private accounts with respondent 1. When the trusts were created the proprietor of the O. R. M. O. M. S. P. Firm was Subramaniam Chettiar, the father of respondent 1. He had assisted at the partition of the properties between the appellant and his brother and respondent 1 and had signed the partition deed as a witness. Respondent 2 handed the two hundis drawn by the appellant to Subramaniam Chettiar, who realized them by debiting the appellant's personal accounts, which was in credit, with the amounts. He then opened accounts in his books in the names of the two trusts, allocating to the Tirukalikundram Temple Trust the hundi for Rs. 6250 and to the Kalayar Koil Temple Trust the hundi for Rs. 5000. The allocations were in accordance with the instructions given to him. The arrangement made by respondent 2 with respondent 1 was that these moneys were to remain with respondent 1 as thavanai loans with interest calculated annually. I should mention that the hundis themselves disclosed that they represented trust funds and an endorsement was made on each hundi by the then agent of the O. R. M. O. M. S. P. Firm acknowledging that the moneys had been received by the firm. Subramaniam Chettiar died in 1918 and the business was then taken over by respondent 1, who had knowledge of it before he succeeded to it. It is not disputed that he knew that the moneys in these accounts represented trust moneys. His own books showed this.

For many years respondent 2 had a large business in Madras and another business in Penang, but he became financially involved and on 4th January 1926 he was adjudicated an insolvent by this Court on a petition filed on 10th October 1925. On 10th February 1920, respondent 2 had overdrawn his account with respondent 1 to the extent of Rs. 15,700. The total amount standing to the credit of the two trust funds on this date was Rupees 15,732.15.9. With the consent of respondent 2, respondent 1 transferred Rs. 15,700 of the Rs. 15,732.15.9 standing to the credit of the trust accounts to the private account of respondent 2 and paid to him the balance of Rs. 32.15.9 in cash. The result of this arrangement was that respondent 2's liability to respondent 1 was discharged. The appellant was unaware of this arrangement and until 1929 he was kept in ignorance of the transaction. In 1924 he had been told by respondent 1's agent that the trust moneys had been withdrawn from respondent 1 and had been taken over by respondent 2, but nothing was said to arouse his suspicions. When respondent 2 was adjudicated an insolvent, the appellant filed an application in the insolvency proceedings asking that it be declared that the trust moneys constituted a first charge on the assets of the insolvent's estate in the hands of the Official Assignee. This application was filed on 20th February 1929.

When respondent 2 arranged with respondent 1 that his overdraft should be paid off by the transfer of the trust funds,

respondent 2 opened accounts in his own books in the names of the two trusts making a credit entry in each corresponding to the amount of the trust fund and debiting respondent 1 with the amount. Respondent 2 set aside no moneys of his own for the purposes of these trusts, but merely made book entries. He did not even debit himself with the amounts. I will return to this part of the case later. The application of the appellant for a declaration that the trusts were entitled to the first charge on respondent 2's assets in the hands of the Official Assignee was heard by Waller J. on 15th October 1928. The learned Judge dismissed the application on the ground that book adjustments could not be treated as passing trust moneys into the hands of the Official Assignee. An appeal followed, but was dismissed. Stated broadly, the decision of the Appellate Court was that after 10th February 1920 the trust funds consisted of debts owing by respondent 2 to the trusts, he having had the right to invest the trust moneys in his own business. It is not necessary to consider whether this decision is open to objection, because in the present case the Court is concerned with the question of the liability of respondent 1 as a banker.

The present suit was filed on 29th April 1933 for a decree for Rs. 49,919-0-2, being the amount of the two trust funds as they stood on 10th February 1920 with interest at the thavanai rate for a period of 12 months. When he instituted the suit the appellant merely claimed a decree against respondent 1, but as respondent 1 pleaded that respondent 2 was a necessary party, respondent 2 was added as a defendant on 24th January 1934. Respondent 2 however did not appear and the contest remained between the appellant and respondent 1. Respondent 1 denied that the trusts had been duly constituted and pleaded that in any event there had been no breach of trust. He also contended that the suit could not be maintained in view of the provisions of S. 92, Civil P. C., and of the Madras Hindu Religious Endowments Act, and raised pleas of estoppel and limitation. All these contentions were decided against respondent 1, except the contention that there had been no breach of trust. The learned Judge found that defendant 2 had full authority to do what he did on 10th February 1920 and therefore respondent 1 was not liable as a banker who had knowingly applied trust moneys to his own debt. Accordingly he dismissed the suit with costs. The appellant contends that as respondent 1 took the trust moneys and utilized them in discharging the debt due to him by respondent 2 he is liable to refund them with interest. He also contends that even if the arrangement between respondents 1 and 2 could in law be regarded as a payment out, to respondent 2, of the trust moneys he had no authority to pay them out without the consent of the appellant, the co-trustee of respondent 2. Respondent 1 has persisted in the pleas raised by him before the learned trial Judge, except the plea that the Madras Hindu Religious Endowments Act is a bar to the suit. It is idle for respondent 1 to contend that the trusts were not validly constituted. They were constituted under the terms of the partition deed and moneys were set apart and deposited with respondent 1 as thavanai loans. Under Hindu law all that is required to constitute a religious or charitable endowment is the intention to endow and the creation of a fund in fulfilment of the intention. Here there was the intention and the creation.

Before proceeding to discuss the question of the validity of the arrangement of 10th February 1920, I will state what I conceive to be the law. A banker is not entitled to apply what he knows to be trust funds in discharge or reduction of a debt of a customer. If a banker does so he can be compelled to make restitution of the moneys so applied. There are many authorities dealing with this question, but it is not necessary to consider them in detail. The most important cases were considered by Byrne J. in (1897) 2 Ch 243,[1] where he held that reasonable suspicion puts a banker on inquiry when a benefit to himself is concerned. At p. 254 of the report of the judgment there is this passage :

> If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust amount without some further inquiry into the matter.

If further inquiry revealed a breach of trust the banker would be doing wrong if he honoured the cheque, and would render himself liable. In this case, it is admitted that respondent 1 had full knowledge that

1. Coleman v. Bucks and Oxon Union Bank, (1897) 2 Ch 243=66 L J Ch 564=76 L T 684 =45 W R 616.

the Rs. 15,700 which he transferred to respondent 2's account in discharge of his debt on 10th February 1920 constituted trust moneys, but stress has been laid on the fact that respondent 2 had the right to invest the trust moneys in his own business and it is said that inasmuch as respondent 2 immediately opened corresponding accounts in his own books, this amounted to an investment in his business. If the transaction did not amount to an investment of the trust funds in this way, respondent 1 is liable.

I will here pause to consider a finding of the learned trial Judge that when this transaction was carried through, respondent 2 was in affluent circumstances, much having been made of this point. That he was dealing in large sums of money cannot be doubted, and the evidence does not disclose that at the time he was actually insolvent, but it does not follow that he was in affluent circumstances or that his position was a sound one. The learned advocate for respondent 1 confessed that he was unable to say what the financial position of respondent 2 was at the time. The fact that his banker deliberately applied trust funds in payment of the overdraft which then existed does however in itself indicate that he had no confidence in the financial stability of his customer. But there are other indications that all was not well with respondent 2's position and that respondent 1 knew this. At this time respondent 1 was living at Devokottah and his banking business in Madras was being carried on by his agent. On 7th February 1920 the agent wrote a letter to his principal which would appear to have had reference to respondent 2's indebtedness to respondent 1. This letter has not been produced nor has the press copy book kept by the Madras agent, although all other letters and press copy books have been produced. It would appear that in this letter of 7th February 1920 adverse reference was made to defendant 2's financial position. In addition to the non-production of the letter and the press copy, there is the fact that on 17th February 1920 respondent 1 wrote to his Agent in Madras saying:

> You must not have credit and debit dealings in the current account for large amounts with P. L. N. K. S. P. generally.

P. L. N. K. S. P. is respondent 2. It has been argued that in spite of these facts it must be accepted that respondent 2 was in affluent circumstances at the time, because later he was allowed to overdraw his account to a much larger extent and that his books show that in that year he paid a large amount to Government by way of income-tax. The fact that respondent 1 allowed respondent 2 to overdraw later does not necessarily indicate that he had confidence in his financial stability. At the most it shows that after 10th February 1920 he regained confidence, but a banker may let a customer whose credit is shaken have advances in respect of particular transactions if he is certain that the business will result in the money coming back to him. With regard to the payment of income-tax an examination of the books indicates that respondent 2 was not able to pay at once what was due to Government. The payments made in 1920 comprised ten instalments. In these circumstances we are unable to agree with the learned Judge that it has been established that respondent 2 was in affluent circumstances when respondent 1 utilized the amounts standing in the trust accounts to discharge respondent 2's overdraft. The evidence points the other way.

Now, what was the effect of the transaction? It resulted in the disappearance of both the trust funds, and respondent 2 never replaced these moneys. In answer to a direct question put by the Court to the learned advocate for respondent 1 in the course of his argument, he frankly acknowledged that respondent 1 knew when he transferred the trust moneys to the private account of respondent 2 that respondent 2 intended merely to constitute himself a debtor to the two trusts by making entries in his own books. In other words, respondent 1 knew that the trust moneys were not to be replaced by cash and that respondent 2 was merely intending to acknowledge liability to the trusts, and this at a time when respondent 2 was unable to pay off his overdraft out of his own moneys. The contention that this was legitimate because respondent 2 had the right to invest the trust moneys in his own business, is, it seems to me, fallacious. There could be no investment of the trust moneys in respondent 2's business unless they were replaced. They were not replaced and therefore there was no investment. Respondent 1 was not entitled to do what he did without being satisfied that the entries in respondent 2's books were going to be supported by cash. He took no steps to

satisfy himself that this would be done. On the other hand he applied the trust moneys for his own benefit knowing full well that respondent 2 was merely intending to constitute himself a debtor to the trusts. Moreover respondent 1 was guilty of concealment of the transaction from the appellant, who was also his own customer and to his knowledge the co-trustee of respondent 2. It is admitted that the appellant did not know of the disappearance of the trust fund until he filed the application for a declaration of a charge in the insolvency proceedings. Until 1924 he thought the moneys were still invested with respondent 1 and it was only when the application to which I have referred came before the Insolvency Judge that he realized that the funds had disappeared altogether.

In these circumstances it must be held that respondent 1 had knowledge that the moneys were being applied in breach of trust, and as respondent 1 derived benefit from the transfer and intended and designed that he should derive a benefit from the transfer the case falls within the rule stated by Byrne J. in (1897) 2 Ch 243.[1] Even if he had not got the knowledge he knew sufficient to be put on enquiry, which would also bring him within the rule. Holding this view the second contention advanced on behalf of the appellant, namely that respondent 1 could not deal with the trust funds without the consent of the appellant, does not require to be decided, but in passing I may observe that it is difficult so see how respondent 1 could be held liable on that ground. Respondent 2 was admittedly the managing trustee and he had invested the trust funds with respondent 1. It only remains to consider the contentions of respondent 1 that the suit fails by reason of the doctrine of estoppel, the law of limitation and the provisions of S. 92, Civil P. C. The contention with regard to estoppel is based on the doctrine of election and it is this. It is said that, inasmuch as the appellant filed an application for a declaration of charge in the Insolvency Court and there failed, he cannot now turn round and seek to make respondent 1 liable. There is here a misconception of the position and the law. When that application was filed, the appellant was under the impression that respondent 1 had paid out the trust moneys to respondent 2 and that they had been invested in respondent 2's business. This was not the case, and the appellant having realized as the result of the proceedings in the Insolvency Court, that the trust funds had been applied by respondent 1 for his own purpose he filed the present suit. The doctrine of election can have no application here. The cause of action was different and the suit was filed in order to establish the liability of respondent 1. It is true that respondent 2 was added as a party as the result of the attitude of respondent 1, but again the cause of action against respondent 2 in this suit is a different one. It is now sought to make him liable for a breach of trust. There was no question of breach of trust in the previous proceedings.

In view of the Full Bench decision of this Court in (1938) 1 M L J 334,[2] it is accepted that the Article of the Limitation Act which applies is Art. 120. That Article states that limitation shall start to run when the right to sue accrues, and as the cause of action arose when the trust funds were transferred to respondent 1 on 10th February 1920, the right to sue accrued on that date. It has been held by this Court and other High Courts in India that, where a trustee is kept in ignorance of a breach of trust, the right to sue does not accrue until the trustee becomes aware of the fact: 58 M L J 349,[3] 1 M L W 134,[4] 2 M L W 813,[5] 7 M L W 280,[6] 28 M L W 224,[7] 12 Lah 262[8] and 14 Pat 824.[9] There are two decisions of this Court which tend the other way (33 Mad 31[10] and 38 Mad 1064[11]), but the weight of authority is in favour of the view that knowledge is a

2. Subbiah Thevar v. Samiappa Mudaliar, (1938) 25 A I R Mad 353=174 I C 459=I L R (1938) Mad 586=(1938) 1 M L J 334 (F B).
3. Basavayya v. Bapana Rao, (1930) 17 A I R Mad 173=120 I C 880=58 M L J 349.
4. Thirumala Rao v. Durgi Shettithi, (1914) 1 A I R Mad 429=22 I C 883=1 M L W 134.
5. Muruga Chetty v. Rajaswamy, (1916) 3 A I R Mad 130=30 I C 669=29 M L J 574=2 M L W 813.
6. Venkateswara Iyer v. Somasundara Chettiar, (1918) 5 A I R Mad 76=44 I C 551=7 M L W 280.
7. Viswanadham v. Narayana Dass, (1928) 15 A I R Mad 837=112 I C 22=28 M L W 224.
8. Lal Singh v. Jai Chand, (1931) 18 A I R Lah 70=130 I C 778=12 Lah 262=31 P L R 1014.
9. Mathura Singh v. Rama Rudra Prasad Singh, (1936) 23 A I R Pat 231=162 I C 235=14 Pat 824=16 P L T 484.
10. Ottapurakkal v. C. P. Uppathumma, (1910) 33 Mad 31=5 I C 698.
11. Venkatachala Reddiar v. Collector of Trichinopoly, (1914) 1 A I R Mad 708=24 I C 369=38 Mad 1064=26 M L J 537.

factor. The appellant had no knowledge of this breach of trust until 1929 and this is not disputed. There can be no doubt that the true position was concealed from him until 1929 and as the suit was filed in 1933 it was filed in time.

The argument which is based on the provisions of S. 92, Civil P. C., is that, as the appellant asked respondent 1 to account for the trust moneys in his hands, it was a suit for the taking of accounts of a trust and therefore falls within the purview of S. 92. It is clear that this suit was not a suit for an account in that sense. It was a suit against a banker to recover trust moneys which he has misapplied. In 46 M L W 426[12] a Bench of this Court of which I was a member held that a suit by trustees against co.trustees for accounts does not come within the provisions of S. 92 and may be instituted without the sanction of the Advocate.General. This contention must also be overruled. My learned brother concurs in this judgment and the appeal will therefore be allowed with costs in both the Courts. There will be a decree against respondent 1 for the sum of Rs. 15,700 with interest from 10th February 1920 to the date of this judgment at the thavanai rates and annual rests which was agreed upon when the moneys were deposited by respondent 2 with respondent 1 and interest at 6 per cent. will be payable on the decretal amount from the date of judgment. The advocate's costs will be on the higher scale of one and one.third of the regulation fee both here and below.

C.R.K./N.S. *Appeal allowed.*

12. Shanmugham Chetty v. Govinda Chetty, (1938) 25 A I R Mad 92=176 I C 26=I L R (1938) Mad 39=46 M L W 426.

A. I. R. 1938 Madras 1004

BURN J.

Bonagiri Sreeramulu — Appellant.

v.

Karumuri Venkatanarasimham and others — Respondents.

Appeal No. 48 of 1937, Decided on 17th August 1938, against appellate order of Sub.Judge, Narasapur, D/- 7th November 1936.

Election—Doctrine of — Election is not confined to instruments—No person can approbate and reprobate.

The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage: *A I R 1927 Mad 1009 and A I R 1930 Mad 268, Rel. on ; A I R 1936 Mad 49, Doubted ; A I R 1924 Mad 716 and A I R 1922 P C 269, Disting.* [P 1005 C 2]

Ch. Raghava Rao — *for Appellant.*

M. Appa Rao — *for Respondents.*

Judgment.—This is an appeal from the order of the Subordinate Judge of Narasapur in Appeal No. 27 of 1936. The appellant was judgment-debtor 2 in O. S. No. 247 of 1924 on the file of the District Munsif of Narasapur. In that suit respondent 1 in this appeal got a decree for money against a father and three sons. Before judgment, on 16th October 1924, the joint family property belonging to the defendants in the suit had been attached. After the attachment a partition suit was filed by the sons against their father and the matter is also further complicated by the fact that after the attachment an insolvency petition was brought against the father and in that petition the father was adjudicated. The Official Receiver sold the father's one-fourth share in the joint family property and proposed to sell the shares of the three sons. Respondent 1, the decree.holder in O. S. No. 247 of 1924, objected to the sale of the three.fourths share belonging to the sons, but his objection preferred to the Official Receiver was dismissed for default. The sale was held by the Official Receiver and respondent 1 took part in the bidding. Respondent 1 subsequently filed O. P. No. 19 of 1928 to have the sale of the sons' three.fourths share set aside but he allowed this petition to be dismissed for default. The Official Receiver then distributed the proceeds of the sale to the creditors in insolvency of whom respondent 1 was one. Subsequently the purchaser at the sale held by the Official Receiver sued the sons for possession in O. S. No. 36 of 1931 (Sub.Court, Narasapur) but his suit was dismissed on the ground that the sale of the son's shares by the Official Receiver was void. The vendee preferred an appeal but the appeal was not pressed because he and the three sons entered into a compromise by which the vendee paid the sons Rs. 800 and the sons executed in his favour a deed of release or relinquishment undertaking not to dispute his right in future. This deed was executed on 22nd September 1933. In 1934 respondent 1 presented the execution petition

which has given rise to this appeal. He sought to bring to sale the three-fourths share in the joint family property belonging to the three sons. In 1935 the District Munsif of Narasapur ordered execution to proceed. The second judgment-debtor (present appellant) appealed to the Subordinate Judge of Narasapur and in A. S. No. 31 of 1935 the order for execution was set aside and the execution petition remanded to the Court of the District Munsif for fresh disposal. The District Munsif was ordered to consider the question of the validity of the sale of the three-fourths share belonging to the sons. Thereupon another District Munsif considered the question afresh and although he held that the sale of the three-fourths share by the Official Receiver was certainly illegal and invalid, he dismissed the application for execution on the ground that the decree-holder was not entitled to proceed in execution against the same property which had been sold by the Official Receiver since the decree-holder had taken his share of the dividend out of the sale proceeds. On appeal the present learned Subordinate Judge of Narasapur reversed the decision of the District Munsif and held that the decree-holder is entitled to proceed against the three-fourths share. The learned Subordinate Judge therefore sent back the execution petition for further proceedings in execution. The second judgment-debtor has preferred this appeal.

The appellant's position is simple; he contends that the decree-holder approved of the sale held by the Official Receiver after it was held and that he cannot now be allowed to say that the Official Receiver's sale was void. The position of respondent 1 decree-holder is equally simple. He says that the sale held by the Official Receiver was undoubtedly void so far as the three-fourths share belonging to the sons is concerned and that nobody can prevent him from alleging the invalidity of that sale and nobody can prevent him from proceeding against the property which is still the property of the 2nd, 3rd and 4th judgment-debtors in his suit. The law in my opinion is sufficiently clear that a party who seeks the assistance of the Court is not entitled to approbate and reprobate or blow hot and cold, as it is sometimes put. The principle is clearly stated in (1921) 2 K B 608.[1] Scrutton L. J. puts it in this way: "A plaintiff is not permitted to approbate and reprobate." The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election, namely that no party can accept and reject the same instrument. The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage, that is to approbate and reprobate the transaction. The principle has been followed in this Court: *vide* the cases in 26 M L W 527[2] and 58 M L J 137.[3] Those are cases of orders passed by Courts involving the payment of costs to the successful party by the unsuccessful party. It was held that if the successful party received the costs ordered to be paid by the unsuccessful party, he could not afterwards come to Court and say that the order itself was passed without jurisdiction. In 69 M L J 673[4] Cornish J. drew a distinction which with all respect I am unable to appreciate. Cornish J. held that an order setting aside an ex parte decree after the expiry of the period of limitation was without jurisdiction and that even if the receipt of Rs. 10 in the shape of costs by the plaintiff's vakil could be regarded as an adoption of the order, such an adoption of an order made without jurisdiction could not have the effect of making that order one which the Court was competent to pass. With all respect I think the learned Judge did not appreciate the point of the decision in 58 M L J 137.[3] It is of course obvious that acquiescence in an order passed by a Court will not render the order valid if it is an order passed without jurisdiction but the principle followed in 58 M L J 137[3] is that a person who has chosen to adopt an order cannot subsequently be allowed to object to it. As Ramesam J. puts it, if the facts indicate that the person has adopted the order, he cannot object to it afterwards. The question is really one of fact whether there has been approbation or not. If there

1. Vershures Creameries v. Hull and Netherlands Steamship Co., (1921) 2 K B 608=91 L J K B 89=125 L T 165.

2. Ramasami Chettiar v. Chidambaram Chettiar, (1927) 14 A I R Mad 1009=105 I C 620=26 M L W 527.

3. Venkatarayadu v. Ramakrishnayya, (1930) 17 A I R Mad 268=123 I C 337=58 M L J 137.

4. Narayanasami Iyer v. Subramania Pillai, (1936) 23 A I R Mad 49=159 I C 1028=69 M L J 673.

has been approbation, reprobation is not permitted.

On the facts in this case it seems to me clear that the decision of the learned District Munsif was right and that of the learned Subordinate Judge wrong. It is clear that respondent 1 (the decree-holder) at first objected to the sale but then allowed it to proceed, and took part in it by bidding. After the sale was held, he first protested against it and then withdrew his protest and subsequently took from the Official Receiver his share of the proceeds of the sale. In his execution petition he gave credit to the judgment-debtors for the amount which he had taken from the Official Receiver as his share of the sale proceeds. These acts of the decree-holder indicate that he approved of the sale and having done so he is not permitted afterwards to say that the sale was void. Mr. Appa Rao who has appeared for the decree-holder contends that he is entitled to ignore the sale held by the Official Receiver and to treat it as null and void. This would be correct if it were not for the fact that he had at an early stage approbated the sale. Having done so, he is not entitled now to ignore it. Moreover, as I have already stated, he does not ignore the sale at all but treats it even now as being a valid sale since in the execution petition he gives credit to the judgment-debtors for the amount which he took from the Official Receiver.

Mr. Appa Rao for respondent 1 contends that the appellant who is the second judgment-debtor has no right to raise such objections as he has raised. His argument on this part of the case is practically that if questions of approbation and reprobation are to be considered the second judgment-debtor is far worse than himself. This however is not relevant to the present case. Mr. Appa Rao has drawn my attention to the cases in 47 M L J 85[5] and 44 M L J 735,[6] but I do not think they have any application to the doctrine of election or approbation and reprobation.

Another point taken for respondent 1 is that the execution petition was remanded to the District Munsif by the learned Subordinate Judge of Narasapur in his judgment in A. S. No. 31 of 1935 only for one specific purpose, viz. to consider the validity or otherwise of the sale by the Official Receiver of the three-fourths share belonging to the sons. He contends that that being so, the learned District Munsif was not justified in dismissing the execution petition on the ground that the decree-holder had elected to abide by the sale. It is not however possible to say that the learned District Munsif after remand order did anything that was beyond his jurisdiction and in any case the question would have come to this Court in its present form, no matter what the decision of the District Munsif had been.

In the result this appeal succeeds and is allowed and the order of the District Munsif restored and the execution petition dismissed. Respondent 1 will pay the costs of the appellant throughout. Leave refused.

C.R.K./B.D. *Appeal allowed.*

5. Ammakannu Ayi v. Murugayya Odayar, (1924) 11 A I R Mad 716=83 I C 324=47 Mad 850=47 M L J 85.
6. Jai Barham v. Kedarnath Marwari, (1922) 9 A I R P C 269=69 I C 278=2 Pat 10=49 I A 351=44 M L J 735 (P C).

A. I. R. 1938 Madras 1006

WADSWORTH J.

Allaka Sanyasi Naidu and others — Appellants.

v.

Rajah of Vizianagaram and others — Respondents.

Second Appeal No. 620 of 1933, Decided on 22nd August 1938, against decree of Sub-Judge, Vizagapatam, D/- 29th July 1932.

(a) Land Tenure—Inam grants—Three classes enumerated.

Inam grants have been classified under three groups : (1) a grant of land on favourable rent burdened with service, (2) a grant made in consideration of past and future service ; (3) a grant of an office remunerated by an interest in land in lieu of wages : *28 Bom 305, Ref.* [P 1007 C 1]

(b) Land Tenure—Inam grants—Post-settlement grants—Presumption in favour of resumability.

The idea behind the presumption that the post-settlement grants are resumable is that a personal servant of a zamindar is necessarily one whose service the zamindar has the right to terminate and that a zamindar would not ordinarily give away land revenue in lieu of wages in perpetuity to such a servant without reference to his need of the services for which the wages are paid. That is to say the presumption is one based on the ordinary conduct of the average landholder and is, by its very nature, rebuttable by very slight evidence to the contrary. This presumption has a logical basis and unless there is something in the evidence to indicate the contrary, the natural inference to be drawn is that the grant was in all probability always regarded as resumable : *7 Mad*

268 ; 14 Mad 365 ; 26 Mad 403 ; (1911) 2 M W N 406 ; (1910) M W N 436 and A I R 1914 Mad 669, Rel. on ; A I R 1930 Mad 755 (FB) and A I R 1936 Mad 831, Ref. [P 1008 C 1]

P. Somasundaram — *for Appellants.*

S. Venkatesa Aiyangar — *for Respondents.*

Judgment.—This appeal is preferred by the defendants in a suit brought by the Rajah of Vizianagaram for the resumption of a darimila or post-settlement service inam. It appears to be established that the lands in question are held under an inam grant made at some time after 1836. The grant was hereditary and it related to what is known as 'Pattamdar's Service' which is a service involving the giving of assistance to the revenue subordinates of the zamindar. The document of grant is not available and the documentary evidence from which the nature of the grant might be inferred is meagre. There are four old documents of some importance in the evidence. Firstly, there is Ex. 2 which is a patta of the year 1855, relating to the lands. This merely says that the land has been given away with a view "that you may protect the ryots and that you may enjoy the same as Akaram, etc." This indicates nothing more than that there was a service tenure. Ex. K of the year 1862 is the next document of importance and it is on this document that the learned Subordinate Judge mainly relies in holding that the grant was a personal service grant resumable at the pleasure of the zamindar. Ex. K is an extract from the Inam Register signed by a Deputy Collector. It has the usual columns, describes the office to which the inam is attached as Gramanayakaram, what apparently is the same as Pettamdar—and in the column showing how the inam was acquired, the remark is that the zamindar was pleased to grant the inam for the purpose of granting takkavi loans to the ryots, for payment of the kist, for the cultivation of waste lands and for setting right such other affairs, "settling that the inam should be enjoyed only during his pleasure." The only other documents that throw any light on the matter are Exs. V and J which are renewal grants of the years 1868 and 1869. These documents, except for the words showing that the grant was hereditary and was connected with revenue service, give little light on the questions to be decided.

What is the position on this state of the evidence? The case law on the question of presumptions has been placed before me. Inam grants have been classified under three groups (1) a grant of land on favourable rent burdened with service, (2) a grant made in consideration of past and future service, (3) a grant of an office remunerated by an interest in land in lieu of wages. It is pointed out in 28 Bom 305[1] that grants forming classes (1) and (2) are normally out and out grants not resumable by the grantor in the absence of a condition to that effect and in any case the zamindar who seeks to dispossess those who have been in possession for several generations has, in the first instance, to establish those facts which form a basis for a prima facie inference that the grant is one which may be presumed. There is a long line of Madras decisions which lay down that in the case of post-settlement personal service inams, we start with the presumption that the grantor has a right to resume and that it is incumbent upon the holder of the grant to rebut this presumption when once it has been established that the grant is of this nature. Decisions of this kind are : 7 Mad 268,[2] 14 Mad 365,[3] 26 Mad 403,[4] (1911) 2 M W N 406,[5] 1910 M W N 436[6] and 1914 M W N 179.[7] The question of the extent to which the authority of this line of decisions has been shaken by the Full Bench ruling in 59 M L J 183,[8] does not appear to have been completely settled. In a recent case, A I R 1936 Mad 831,[9] Madhavan Nair and Stodart JJ. seem to have left the matter open. The Full Bench dealt with the case of a pre-settlement inam and held that when there is no clear evidence as to the nature of the grant, the question as to the class in which a service grant falls, whether it is a grant burdened with service, a grant in consideration of past and future service or the grant of an

1. Lakhamgavda v. Keshav Annaji, (1904) 28 Bom 305=6 Bom L R 364.
2. Sanniyasi v. Salur Zamindar, (1884) 7 Mad 268.
3. Mahadevi v. Vikrama, (1891) 14 Mad 365.
4. Sobhanadri Appa Rao v. Venkatanarasimha Appa Rao, (1903) 26 Mad 403.
5. Vadisapu Appandora v. Veerabhadraraju, (1911) 2 M W N 406=12 I C 487.
6. Visweswara v. Gorla Budaradu, (1910) M W N 436=7 I C 401.
7. K. Ananga Bheema v. S. Prahlada Bissoyi, (1914) 1 A I R Mad 669 = 21 I C 833 = 1914 M W N 179.
8. Alakh Narayana v. Appalaswami, (1930) 17 A I R Mad 755=127 I C 231 = 59 M L J 183 (F B).
9. Sobhanadri Apparao v. Ramadu, (1936) 23 A I R Mad 831=168 I C 498.

office remunerated by a favourable tenure of land, is a matter on which there is no presumption one way or the other. This decision does not expressly refer to the line of cases dealing with the presumption as to post-settlement personal service grants. The idea behind this presumption is, I think, that a personal servant of a zamindar is necessarily one whose service the zamindar has the right to terminate and that a zamindar would not ordinarily give away land revenue in lieu of wages in perpetuity to such a servant without reference to his need of the services for which the wages are paid. That is to say the presumption is one based on the ordinary conduct of the average landholder and is, by its very nature, rebuttable by very slight evidence to the contrary. It seems to me that this presumption has a logical basis and that unless there is something in the evidence to indicate the contrary, the natural inference to be drawn from the facts such as those of this case is that the grant was in all probability always regarded as resumable. The zamindar remunerates one of his servants for his work by permitting him to hold land on favourable tenure and recognizing the right of the son to step into his father's shoes and enjoy the emoluments of his office. In ordinary prudence the zamindar would retain the right, if he no longer required the service or if the rendering of service was stopped by the default of the servant, to stop paying the wages.

I am therefore of opinion in the present case that the zamindar can in the absence of evidence to the contrary rely upon the presumption of resumability. But quite apart from the presumption there is in the documentary evidence one slight indication in favour of the resumability of the inam and it is on this mainly that the learned Subordinate Judge relies. I refer to the words in Ex. K, "settling that the inam should be enjoyed only during his pleasure." It has been pointed out in 59 M L J 183,[s] and in other cases that such words as "at the pleasure of His Highness," when found in documents addressed to a zamindar, may be mere expressions of subservience and have little, if any, significance as indicating the terms on which a grant is held. It must however be pointed out that Ex. K is not a document addressed to a zamindar but an entry in a register prepared by a Government official. Quite probably the remarks in the column relating to the history of the inam were extracted from some other source which may have been a document addressed to the zamindar or prepared by a zamindari official. But there is no evidence on that point and all that we can say is that there is an entry in a Government register of ancient date which indicates that the inam was held during the pleasure of the zamindar. In the absence of other evidence and quite apart from any presumption, I am of opinion that this small piece of evidence would be sufficient to decide this case in favour of the zamindar and to justify the decision of the learned Subordinate Judge. In the result therefore the appeal is dismissed with costs. Leave granted.

C.R.K./B.D. *Appeal dismissed.*

END

...SHMIR UNIVERSITY
Iqbal Library
Acc. No 17.7218
Dated ..20.:11.:80.....